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FIGHTING THE COURAGEOUS FIGHT
A Review of Stephen B. Bright and James Kwak's *The Fear of Too Much Justice*

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At American capital punishment's peak in 1986, juries, mostly in southern states, imposed 325 capital sentences.[1] Executions reached their apex (or nadir, depending on your perspective) in 1999, when 98 people were put to death.[2] Since the year 2000, New York, Connecticut, Maryland, New Mexico, Delaware, Colorado, Illinois, New Hampshire, New Jersey, Washington, and, remarkably, Virginia, which alone executed 113 people between 1987 and 2017, have abolished the death penalty.[3] In 2022, 21 people were sentenced to death, and 18 people were executed.[4]

This decline, which took place in fits and starts over forty years, is attributable to a cadre of nimble, creative, and most of all courageous lawyers and organizers who fought capital punishment in courthouses and state houses from coast to coast. Their work was concentrated in the former Confederacy, where legally imposed executions followed trials meant to legitimize state-sanctioned murder.[5] These executions largely, but not completely, replaced the work of vigilante lynch mobs.[6]

*Clinical professor of law, Yale Law School. I count myself among the exceptionally lucky generations of lawyers and students whom Stephen Bright has taught, mentored, and inspired. I owe him an enormous debt of gratitude for supporting my career as a capital habeas lawyer and as a law professor. Many thanks also to Arianna Khan, Yale Law School '25, for capable assistance with this book review.

1 *Death Sentences in the United States Since 1973*, Death Penalty Info. Ctr. (2022), https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year.

2 *Executions by State and Region Since 1976*, Death Penalty Info. Ctr. (2024), https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976.

3 *State by State*, Death Penalty Info. Ctr. (2023), https://deathpenaltyinfo.org/states-landing.

4 *Death Sentences*, *supra* note 1; *Executions*, *supra* note 2.

5 Stephen B. Bright & James Kwak, The Fear of Too Much Justice: Race, Poverty, and the Persistence of Inequality in the Criminal Courts 218 (2023).

6 *Id.*

https://doi.org/10.1162/ajle_a_00072

No lawyer is more responsible for fighting, and winning, battles against the death penalty than Stephen B. Bright. He exposed pervasive injustice in every type of criminal case and argued, and won, four cases before the Supreme Court of the United States.[7] However, his new book, with characteristic self-effacement, is not, other than in the foreword by Bryan Stevenson, about his astonishing career. Instead, the book, *The Fear of Too Much Justice: Race, Poverty, and the Persistence of Inequality in the Criminal Courts*, coauthored with his former student, James Kwak, an accomplished author, law professor, and musician, is a catalog of the stubborn indifference, corruption, and incompetence that continue to rot criminal legal proceedings in every jurisdiction in these United States.

Bright and Kwak shine a glaring light on the specific, persistent disparities that make a mockery of American justice. A dozen years after Michelle Alexander's *The New Jim Crow* awakened many to criminal laws as tools of racist social control, *A Fear of Too Much Justice* provides readers with the nitty-gritty of daily indignities and macro-level absurdities that continue to oppress the poor, especially the Black poor, in courthouses across the nation. It is a timely and necessary contribution to the literature that insists that people of conscience pay attention and decry the judicial means of social subjugation carried out in our names.

The book opens with a reminder that wrongful conviction happens not only to the factually innocent:

> The conviction of innocent people, although the most striking failure of the criminal legal system, is only the tip of the iceberg. The courts are failing in another essential obligation: to provide fair and equal treatment to all people. The fates of people accused of crimes often depends less on what they did than on the whims of prosecutors; their choice to exercise their right to a trial instead of taking a plea deal; the assignment of incompetent or overworked attorneys to defend them; their race and the victims' race; the political motives of elected judges and prosecutors; and the exclusion of members of their race from juries.[8]

The book's nine chapters cover these topics and others, including the myth of the adversarial system—it is fictional due to inadequate counsel for the poor; the unparalleled power of prosecutors; the influence of electoral politics on judges' decisions and the need for defense lawyers to be independent from judicial appointment; racism in jury selection and verdicts; punishment of the poor through imposition of fines and fees that trap them

7 McWilliams v. Dunn, 582 U.S. 183 (2017); Foster v. Chatman, 578 U.S. 488 (2016); Snyder v. Louisiana, 552 U.S. 472 (2008); Amadeo v. Zant, 486 U.S. 214 (1988); *see also*, *e.g.*, Robert L. Tsai, Demand the Impossible: One Lawyer's Pursuit of Equal Justice for All (2024).

8 Bright & Kwak, *supra* note 5, at 4.

in unremittable debts, often to profiteering probation outfits; the particular suffering of defendants with mental illness and disability, including those sentenced to death; excessively long sentences and the overreach of extra-carceral supervision (probation and parole); and the folly that long prison sentences reduce crime.[9] Bright and Kwak settled on these issues because, other than policing (a topic they left to other experts), they view them as the most significant contributors to lopsided justice that consistently disadvantages those lacking the means to balance the scales.[10]

The Fear of Too Much Justice anchors statistics and structural context with stories of the people who bear their brunt. Bright and Kwak unflinchingly detail the consequences of allowing masquerades of justice to march on. More than 2,800 people who were exonerated served longer than 25,000 years in prison for crimes they did not commit.[11] Overburdened lawyers for the indigent "meet and plead" their clients in a few moments to keep the system rolling, heedless of human toll.[12] Courtrooms run in the twenty-first century as they did in the 1950s:[13] defendants are ambushed at trial by informant testimony and prosecutors' failure to disclose exculpatory evidence.[14] A defense lawyer uttered nine words at the penalty phase of his client's capital trial, four of which were "judicial pleasantries" and the remaining five of which were an objection the court overruled.[15] To no one's surprise, his client was sentenced to death.[16]

These are travesties that permeated the death penalty's reign. In the wake of its denouement, Bright and Kwak make the case that the United States continues to lock up too many people, for too many years, at incalculable cost, for precious little reason or return. They remind readers that from 2000 to 2020, the number of people serving life sentences increased from 127,677 to more than 160,000.[17] An additional 42,000 people were serving "virtual life sentences" that permitted parole after fifty years.[18]

The Fear of Too Much Justice breathes new life into familiar, common-sense antidotes. Bright and Kwak advocate for independent, well-resourced public defender offices;[19] appointed, rather than elected, judges and prosecutors who do not depend on the whims of voters for their offices;[20] functional second-chance mechanisms for reconsidering long

9 *Id.* (Table of Contents).

10 Zoom interview with Stephen B. Bright, author, *The Fear of Too Much Justice* (Oct. 27, 2023).

11 Bright & Kwak, *supra* note 5, at 4; *id.* at 3–4 ("The criminal courts have repeatedly failed in their most fundamental responsibility—separating the guilty from the innocent—in the cases with the highest stakes.").

12 *Id.* at 7.

13 *Id.* at 9.

14 *Id.* at 27, 34–39.

15 *Id.* at 54.

16 *Id.*

17 *Id.* at 232.

18 *Id.*

19 *Id.* at 93–94.

20 *Id.* at 131.

prison terms and eliminating mandatory "three-strikes" sentences;[21] humane alternatives to incarceration and abolition of capital punishment for people living with mental illness or disability;[22] jury-selection reform;[23] funding police departments with revenues other than fines and fees imposed on indigent defendants;[24] elimination of cash bail, which keeps people locked up on account of their poverty;[25] stopping probation and parole revocations for technical or minor violations that are revolving doors of incarceration;[26] and offering victims restorative justice.[27]

The recommendations concerning second-chance laws and curbing probation and parole revocations hold particular promise for bringing people home from incarceration and preventing them from returning to prison. Second-chance mechanisms such as parole, sentencing modification, and clemency and commutation are essential to unwinding years of overly harsh sentences. We cannot reduce our prison population without them.[28] Nevertheless, some states have parole boards composed of part-time volunteers who seldom meet.[29] Others have no parole boards.[30] Every jurisdiction should have full-time bodies of experts appointed to review applications for early release for all crimes, with no exclusions based on conviction or length of sentence. Those boards should grant parole or commutation in appropriate cases where applicants have demonstrated strong records of rehabilitation.

Likewise, Bright and Kwak wisely recommend that parole and probation agencies slow down revocations that land people back in prison when they struggle to get back on their feet after incarceration.[31] Such revocations are a snare, especially those for technical violations such as missing supervision appointments, failing to secure employment within a certain period, or alcohol use, as opposed to commission of new crimes. With about 3.7 million people under non-carceral supervision, the pitfalls that send hundreds of thousands of them back to prison annually deserve more attention as drivers of mass

21 *Id.* at 259–60, 237–38.

22 *Id.* at 50, 213.

23 *Id.* at 158–61.

24 *Id.* at 169–70.

25 *Id.* at 50.

26 *Id.* at 246–47.

27 *Id.* at 262.

28 Nazgol Ghandnoosh, *Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations*, Sent'g Project (Feb. 8, 2023), https://www.sentencingproject.org/policy-brief/ending-50-years-of-mass-incarceration-urgent-reform-needed-to-protect-future-generations/.

29 *See* Mario A. Paparozzi & Joel M. Caplan, *A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism*, 89 Prison J. 363, 411–16 (2009).

30 *See* Mark A. Cunniff & Mary K. Shilton, Bureau Just. Stat./Nat'l Ass'n Crim. Just. Planners, Variations on Felony Probation: Persons Under Supervision in 32 Urban & Suburban Counties 2–3 (Mar. 1991), https://www.ojp.gov/pdffiles1/Digitization/131580NCJRS.pdf.

31 Bright & Kwak, *supra* note 5, at 245–47.

incarceration.[32] Bright and Kwak point out that subjecting people to punitive supervision "hamper[s] their efforts to build better lives for themselves and their families and place[s] them constantly at risk of incarceration."[33] Ensuring that people facing supervision revocations have lawyers and adopting policies encouraging parole and probation officers to use their discretion in rehabilitative rather than punitive directions would go a long way toward implementing fairness, mercy, and smarter use of justice resources.[34] Bright and Kwak's spotlighting these underappreciated antidotes to mass incarceration is a highlight of their book.

Fortunately, Bright's path, which the book leaves untold, offers additional inspiration for action and hope. A son of Jim Crow–era Kentucky, Bright grew up in a home with parents who shunned skin-color discrimination. In his adolescence, he heard media reports of executions that turned his stomach and piqued his curiosity. He went to college interested in journalism, an interest evident today in his narrative gifts and appreciation for the power of a compelling story. Bright came to realize that lawyers can "get in the fight" and resolved to join their ranks. He went to law school, dropped out to work on George McGovern's presidential campaign, and returned to law school confident that as an attorney, he would never lack meaningful work. During law school and after graduation, Bright did antipoverty work in Appalachian civil legal services until he joined Washington D.C.'s illustrious Public Defender Service. It was not long after capital punishment resumed, after its brief Supreme Court–imposed hiatus and reinstatement, that activists desperate to find lawyers for unrepresented condemned prisoners in the South reached out to Bright and a few of his colleagues and asked them to intervene in Hail Mary appeals to halt executions.[35] Bright was hooked. He moved to Georgia to what was then the Southern Prisoners' Defense Committee, later the Southern Center for Human Rights, which Bright led for forty years. Bright's and his cohort's litigation transformed the law and exposed an undeniable record of corruption and misconduct among prosecutors, judges, and defense lawyers in case after case. They forced into the public eye the racial discrimination at the center of American capital punishment and mass incarceration. Among Bright's most meaningful accomplishments are the policy reforms, such as the establishment of Georgia's public defender system, that he and his colleagues at the Southern Center for

32 Danielle Kaeble, Bureau Just. Stat., Probation and Parole in the United States, 2021 (Feb. 2023), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf; Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, Prison Pol'y Initiative (May 2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023.html.

33 Bright & Kwak, *supra* note 5, at 246.

34 Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Geo. L.J. 291, 322, 345 (2016); Vincent Schiraldi, Mass Supervision: Probation, Parole, and the Illusion of Safety and Freedom 220, 228–38 (2023).

35 Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976).

Human Rights fought valiantly for over decades. Because of that public defender system, which now provides qualified, resourced lawyers to the poor, in March 2024, Georgia had not executed anyone since 2020, and prosecutors and juries seldom pursue or impose death sentences.[36]

Bright and Kwak's book's title gestures toward its most powerful theme. "A fear of too much justice" is a riff on United States Supreme Court Justice William Brennan's dissent in *McCleskey v. Kemp*. In that opinion, Brennan notoriously faulted his colleagues in the majority for declining to recognize that statistically proven race-of-victim discrimination, by which the petitioner established that in Georgia a person who killed a white victim was four times as likely to be sentenced to death than a person who killed a Black victim, warranted legal relief.[37] Brennan charged that his fellow Justices could not face the implications of pervasive racial discrimination in sentencing.[38] To decide that criminal laws' discriminatory application required reversal of capital punishment would risk upending an entire justice system built on racist pillars, hence, the "fear of too much justice."[39] Better to look away. Today, federal, state, and local policymakers; judges; prosecutors; defense lawyers; and voters are to blame for fearing too much justice. Bright and Kwak insist that we remain awake to the causes and vigilant about the consequences of injustice's relentless churn: "It is never wrong to remedy discrimination; the fact that it may open the door to other claims of discrimination can only advance the cause of justice."[40] Most crucially, Bright and Kwak challenge us to brave the fights that will dismantle the apparatus of criminal legal oppression, which they walk us through in the book. In Stephen Bright and his cohort of advocates, we have shining examples of how to do just that.

36 *Executions*, *supra* note 2; *Death Sentences*, *supra* note 1; *LDF Condemns Georgia's Resumption of Death Penalty Executions*, NAACP Legal Def. & Educ. Fund, Inc. (Mar. 22, 2024), https://www.naacpldf.org/press-release/ldf-condemns-georgias-resumption-of-death-penalty-executions/.

37 McCleskey v. Kemp, 481 U.S. 279, 321–22 (1987) (Brennan, J., dissenting).

38 *Id.* at 339.

39 *Id.*

40 Bright & Kwak, *supra* note 5, at 15.