Due Process & the Theater of Racial Degradation: The Evolving Notion of Pretrial Punishment in the Criminal Courts

Nicole Gonzalez Van Cleve

Most theorists assume that the criminal courts are neutral arbiters of justice, protected by the Constitution, the rule of law, and court records. This essay challenges those assumptions and examines the courts as a place of punitive excess and the normalization of racial abuse and punishment. The essay explains the historic origins of these trends and examines how the categories of "hardened" and "marginal" defendants began to assume racialized meanings with the emergence of mass incarceration. This transformed the criminal courts into a type of public theater for racial degradation. These public performances or "racial degradation ceremonies" occur within the discretionary practices and cultural norms of mostly White courtroom professionals as they efficiently manage the disposition of cases in the everyday practice of law. I link these historical findings to a recent study of the largest unified criminal court system in the United States – Cook County, Chicago – and discuss court watching programs as an intervention for accountability and oversight of our courts and its legal professionals.

Illinois Supreme Court Justice Anne Burke takes "field trips" from Illinois's highest court to its circuit courts to do "court watching." She dresses in plain clothes to blend into the public and sits undetected in the public gallery. There, she observes the everyday practice of law, a dramatic difference from the type of work that she does for Illinois's highest court. In 2016, Justice Burke went to Cook County, Chicago's Leighton Criminal Courthouse – the largest unified court system in the nation – to watch an average bond court call.[1] The usual parade of defendants came through for bond hearings with most cases lasting under four minutes.[2]

Four minutes is an improvement from ten years ago when bond court was not an in-person hearing but televised from the depths of the Cook County Jail. Like an Orwellian nightmare, defendants would stare into a camera and their image

https://doi.org/10.1162/DAED_a_01894

would be projected into a courtroom where desperate relatives gasped and cried at the sight of their loved ones on that small, pathetic screen. The defendant could only see the judge and their attorney on a tiny screen in the jail as they talked about their fate and the monetary cost of their freedom. One public defender was present in court and another was next to the defendant to push him out of view once the bond was determined, usually in less than two minutes.[3] Bond court reform moved these hearings in front of a judge in a courtroom so that defendants and court personnel could speak face-to-face.

One would expect that ten years later, when Justice Burke walked into bond court, such reform would have improved the appearance of justice, perhaps even improved its quality and dignity for those involved.[4] Justice Burke watched as the steady stream of defendants came through the court. They wore the standard-issued jail jumper or D.O.C.s, as the defendants called them. Then, among this consistent stream of homogeneously presented defendants, Cook County Sheriff's officers paraded in a female defendant suffering from mental illness. Police had arrested this defendant in her underwear and, while in the transport between police arrest to the local precinct and then to the Cook County Jail and courthouse, it was determined that a garbage bag was sufficient for her modesty and dignity. There, in open court, the defendant faced the judge and a full gallery dressed in a garbage bag.[5]

It is impossible to know how many police, public defenders, prosecutors, sheriff's officers, social workers, and staff saw her in the garbage bag, but what is clear is that not one person came to her aid or protested. In fact, it was so normalized that these professionals knew that the judge would also find it acceptable because, as Justice Burke described, the bond hearing continued without any recognition that they had dressed this defendant as "trash." Had Justice Burke not been in the court that day, this case would not have attracted any attention. In fact, what may be most alarming is the extent to which this degradation was normalized in their court culture, one that was supposedly reformed years prior.

Most theorists assume that the criminal courts are neutral arbiters of justice, protected by the Constitution, the rule of law, and court records. This essay challenges those assumptions and examines the courts as a place of punitive excess and the normalization of racial abuse and punishment. I argue that the criminal courts have transformed into a type of public theater for racial degradation. This public performance occurs through the discretionary practices and cultural norms of mostly White courtroom professionals as they efficiently manage the disposition of cases in the everyday practice of law.

In 1956, Harold Garfinkel published a classic sociological article on the "Conditions of Successful Degradation Ceremonies." There, he elaborated the sociology of moral indignation, in which the "ritual destruction of a person be-

ing denounced . . . is intended literally."[6] The degradation ceremony transforms the social actor (like the defendant wearing a garbage bag) and diminishes her social status until she is separated from the social body. Performance is central to this ceremony and allows for public distinctions between "us" (the mostly White professionals) and "them" (the mostly poor people of color held accountable by the system). Overall, degradation in everyday legal practices amounts to pretrial punishment prior to adjudication, and to state-sanctioned abuse and humiliation of people of color under the guise of due process.

In 1977, legal scholar Malcolm Feeley described pretrial punishment as the arduous nature of our court system that commences upon arrest.[7] Certainly, there are still high costs to arrest and pretrial detainment and due process.[8] However, in addition to these types of pretrial punishments, there is also punishment through cultural practices that are enacted by discretionary actors – judges, prosecutors, and defense attorneys – as they process cases and people through the system. The character and quality of these practices enact a type of ritual punishment beyond what we once understood and theorized as pretrial costs. In effect, court practices are a legal forum to degrade and parade defendants in an expressive manner that reaffirms the division between "us" (professionals) and "them" (defendants). In the era of mass incarceration, this divide is inherently a racial one: the professionals holding court are primarily White and the defendants held accountable in these courts are primarily poor people of color.

Sociologist David Garland notes that the field of criminal justice often falls victim to a "presentist" view of criminology.[9] Policy analysts and academic criminologists regularly fail to interrogate the cultural and historical links that influence or sustain present-day practices.[10] As such, I begin with an examination of the 1960s criminal court reform era as a seminal turning point for the start of mass incarceration.[11] In particular, I focus on *The Challenge of a Crime in a Free Society*, a report from the President's Commission on Law Enforcement and Administration of Justice.[12] I analyze the historic links between this reform era and show how cultural tropes about "worthy" and "unworthy" defendants became intertwined with racial meanings and stigmas. These racial stigmas are mobilized in the criminal courts to help efficiently sort and process cases, but they also transcend criminal justice institutions and jurisdictions.

I use the term "criminal justice adjacencies," which highlights the shared culture between loosely coupled criminal justice institutions like police, courts, and local jails. They share structural codependencies in case management despite their unique organizational objectives. Criminal justice adjacencies also share culture logics and structural resources that exert influence on each other.[13] As this framework suggests, the cultural shifts in due process have a lasting impact on other parts of the criminal justice system. In effect, cultural stigmas and the practices they create are contagious and shared across institutions and jurisdictions,

as we saw in the first case study in which a stream of discretionary actors – from police to lawyers to sheriffs – rationalized the presentation of the defendant in a degraded state. I address the consequences of these cultural changes that lead to punitive court practices, the skirting of due process procedures, and the types of public racial degradation ceremonies that Garfinkel elaborated in his sociology of indignation.

In this essay, I review the core findings in my decade-long research on the criminal court system in Chicago. This is the first study in forty years to take a system-wide approach to understanding pretrial punishment in terms of court processes, which are a product of culture, discretion, and racial stigma. The research includes twelve months of observations in both the Office of the Illinois State's Attorney and the Office of the Public Defender. I used a multimethod approach to incorporate multiple vantage points on the same field site over an extended period of time. In addition to ethnography, I interviewed 104 attorneys (prosecutors, public and private defenders, and judges). I also conducted a large-scale qualitative effort with the assistance of 130 researchers. Overall, I collected more than one thousand hours of observation across all twenty-five courtrooms in the main courthouse in Chicago. The research assistants were from varying racial backgrounds and dressed in plain clothes (rather than professional attire) to blend in with the general public while they observed the courts. These "court watchers" collected observational data in a semistructured manner using the National Center for State Courts and the Bureau of Justice Assistance's "Trial Court Performance Standards" regarding "access to justice."[14]

Rather than focus on the high costs of pretrial punishment and the escalating costs of exercising rights as Feeley does, my research investigates how discretion, racial stigma, and the coding of defendants in terms of their supposed moral failings creates a tinderbox for racial punishment in our courts.[15]

Contradictory organizational demands influence criminal courts in America; courts are expected to manage efficiently the case volume of the entire criminal justice system while ensuring that justice is done.[16] The criminal courts are not merely an "operating system" of state power; they are expected to protect the rights of individuals such that the "innocent and the unfortunate are not oppressed."[17] Hence, the courts serve an important educational and symbolic role in the criminal justice system and society, at large.

However, generations of legal scholars have documented a large divide between the normative "law on the books" and the criminal courts "in practice." One of the most famous academic works was Malcolm Feeley's award-winning book *The Process Is the Punishment*, which documented the arduous nature of the lower courts and the high cost of pretrial punishment in New Haven, Connecticut. Feeley notes that at a time when myriad new procedural guarantees were ex-

tended to defendants, many were still without attorneys and no one in his sample (n = 1,600) chose to have a jury trial.[18]

However, despite this work's lasting impact, Feeley acknowledges the overlooked historical context of his findings. In the 1920s, American legal scholar Roscoe Pound studied the criminal court system, and his description of urban criminal courts was still accurate fifty years later when Feeley conducted his study. In Pound's words, the courts were defined by "confusion, the want of decorum, the undignified offhand disposition of cases at high speed, [and] the frequent suggestion of something working behind the scenes, [that] . . . characterize the petty criminal court in almost all of our cities."[19]

When Feeley revisited New Haven in 1992 for his book's second edition, he observed that the Court of Common Pleas was restructured as a unified trial court to improve the administration of justice. However, he noted that the culture, attitudes, and processes that he first observed after the "due process revolution" remained the same.[20]

Each generation of scholars and policy-makers is astounded that the court system has little resemblance to the dignity of the law and has a cultural resistance to systemic change. Some have theorized that the organizational structure of criminal courts may be to blame for the cultural similarities between courts across different jurisdictions.[21] While criminal courts may vary from jurisdiction to jurisdiction, there are many organizational features that create parallels between all courts. Courtrooms are workgroups comprising judges, prosecutors, and defense attorneys who are familiar with each other's specialized roles, but who have their own unique vantage points on processing cases and doing justice.[22] As such, places like Cook County, Chicago, are "ordinary in their dysfunction": facing the same challenges and case burdens that mass incarceration has created for frontline practitioners throughout the nation.[23] Finally, as Feeley noted in 1992, our criminal courts have shown little change since Pound's studies in the 1920s; however, what has changed is the rise in mass incarceration.[24]

Historian Elizabeth Hinton's work *From the War on Poverty to the War on Crime* examines the origins of mass incarceration and shows how it was a bipartisan effort that extended from the administration of John F. Kennedy to Ronald Reagan and beyond. Collectively, Congress, the executive branch, and the courts built the state's capacity for the racist criminalization of people of color. This shift was a reaction to racist assumptions about African American "inferiority" and cultural "pathology." For instance, Kennedy's Juvenile Delinquency and Youth Offenses Control Act of 1961 conceptualized Black youth as needing repair rather than opportunity or justice, while Lyndon B. Johnson transformed this clampdown on Black youth into an all-out "war on crime." From this time, we have seen a rise in the militarization of police, law and order rhetoric and policy, increased surveillance of Black communities, and the use of labels like "delinquent" and "potentially delinquent."[25]

However, there is a paradox to this account: at a time when mass incarceration was gaining punitive momentum, the criminal courts were entering a supposed reform revolution. A core objective of Lyndon Johnson's commission was eliminating unfairness in the criminal justice system. While the police, courts, and correctional agencies had a mandate to enforce the law, it had an equally important responsibility to "provide fair and dignified treatment for all."[26] Beyond fair treatment of every individual, the perceptions of those affected by the justice system mattered for its legitimacy and the willingness of people to trust the system and its values. In their view, it was a centerpiece of the criminal justice system, the institution to which the "rest of the system has developed and to which the rest of the system is in large measure responsible."[27] In essence, the commission reaffirmed the U.S. Supreme Court's ruling that "justice must satisfy the appearance of justice."[28]

Despite these normative expectations, Roscoe Pound, Malcolm Feeley, and the commission detailed an overburdened court system that was lacking in both dignity and decorum. The commission described being shocked by the conditions of the lower courts: the noisy cramped spaces, the often undignified and perfunctory compliance with due process procedures, and poorly trained court personnel. Court employees were overwhelmed by the caseload, their inability to address the social problems of their defendants, and that their high case volume impeded their ability to examine cases carefully.

Given the gross disparity between the number of cases in the lower courts and the court personnel and facilities able to handle these cases, there was a total preoccupation with moving cases (and people) toward disposition by any means necessary. Speed was a substitute for care. Compromise and negotiation almost entirely substituted for adjudication. Most important, individual defendants received inadequate attention to the detriment of their rights, the accurate evaluation of their social or criminal risk, and their postconviction future. The commission described this confluence of problems as "futility and failure" in the court system.[29]

As Dean Edward Barrett noted in the commission report,

> Whenever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. . . . Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on the docket, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous. . . . Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.[30]

In a sense, the commission acknowledged that the gap between the "law on the books" and the "law in practice" is not just enormous, it is obvious. It is in

the everyday injustices hidden in plain sight in the structural arrangements of the courts and the norms and practices that define court culture.

Perhaps exacerbating the issue of case volume was the commission's concern that the density of populations in large urban jurisdictions along with myriad social problems made it difficult to discern the potentially dangerous defendants from those who posed no violent threat to society.[31] At that time, they noted that an improved criminal code was a means to that end but clarified that, ultimately, it was court professionals who had a significant responsibility in exercising discretion to distinguish between "hardened" or habitually dangerous offenders from "marginal" offenders who may be guilty but were neither habitual nor dangerous. They clarified that such nuance was difficult to capture in the criminal code, but the latitude or discretion given to police and prosecutors (in arresting and charging) and judges (in sentencing) was essential to the proper functioning of effective law enforcement.[32] Because the system punished these "marginal" offenders (who made up almost half of all arrests), criminal justice professionals created the case volume that burdened them and the system.[33] In a sense, the criminal justice system was overburden by those offenders violating "moral norms" rather than those engaging in dangerous behavior. This was problematic even prior to mass incarceration.

In addition to creating cases that criminalized people, the commission noted that enforcing these crimes of "immorality" was "degrading for the police and raises troublesome legal issues for the courts."[34] They also observed that in many cities, the enforcement of these laws led to corruption in policing and in the courts, which resulted in a general "decline in respect for the law" and concern for the system's overall legitimacy.[35]

Despite the important role of discretionary actors, the commission had significant misgivings about court professionals and their ethics, ideologies, and practices. As the report states, "courts can only be as effective and just as the judges and prosecutors, counsel, and jurors who man them."[36] The commission noted that court professionals were often an obstacle to that end. Professionals and defendants had "little understanding" of each other. The law and court procedures seemed "threatening" and confusing to those held accountable to the law. Likewise, many defendants were "not understood by, and seem threatening to, the court and its officers."[37] The commission questioned whether prosecutors and judges from middle-class backgrounds and attitudes had the capacity to empathize with poor defendants who lacked education. As the report states:

> A prosecutor or judge with a middle-class background and attitude, confronted with a poor, uneducated defendant, may often have no way of judging how the defendant fits into his own society or culture. He can easily mistake a certain manner of dress or of speech, alien or repugnant to him, but ordinary enough in the defendant's world,

> as an index of moral worthlessness. He can mistake ignorance or fear of the law as indifference to it.[38]

This may be the most astounding observation that foreshadows the future to come: the great racial divide between court professionals and defendants and victims.

Two major macrostructural changes have impacted our courts since the publication of the commission report. First is the rise of mass incarceration. It is doubtful that the commission – lamenting the problem of case volume in the 1960s – anticipated the seven-fold growth in incarceration that would come over the next forty years. They could not have foreseen the strikingly disproportionate impact on Blacks and Latinos,[39] which has transformed our social and political landscape, including the racial composition of our courts. Hence, the racial disparity that defines mass incarceration impacts our criminal courts whereby the racial divides between court professionals and defendants and their families are more pronounced. One only has to walk into a large, urban courthouse to see the segregated divide between the minority consumers of justice from the White purveyors of justice.[40]

Second, there has been a retraction of the welfare state. This has resulted in an increased reliance on the criminal justice system for social service provision. Social services previously obtained through traditional welfare agencies are now obtained through contact with the criminal justice system.[41]

These two larger, structural changes – the racialized nature of mass incarceration and the use of the criminal justice system for social service provision – have amplified the pressures on the criminal justice system. There is an increase in case volume in addition to changes in how court professionals make sense of this caseload of people. The designations identified by the commission – "marginal" and "hardened" – are still prominent in how professionals categorize defendants.

In Chicago, professionals called these defendants either "mopes" or "monsters," and in jails, sheriffs called these inmates "lazy criminals" or "real criminals."[42] What is consistent is the need to label and mark offenders as either "social burdens" to be managed or "criminal threats" to be punished. Those marked as "marginal" or "mopes" are all but required to have their case disposed of with minimal time, effort, and litigation resource. Hence, the labeling serves the function of resource allocation in the courts where time is scarce and due process can be costly.

However, in an era of mass incarceration, when courthouse roles are racially segregated, additional racialized narratives become associated with these categories of "marginal" or "hardened" offenders. These narratives harken to readily available, racist ideology about the supposed cultural failings of Blacks and Lati-

nos. For instance, in Chicago, a probation officer in my study (who worked with the prosecuting team) described "mopes" as having a "childlike" mentality and then proceeded to imitate a "mope" by using a bastardization of Black English Vernacular within earshot of the defendant and the public gallery:

> See this guy . . . He's like, "oh man dat ain't right . . . dis shit ain't right. Why da judge be like dat, man?" If all I had to do was just show up every day and report to probation, pay $25 fines, and do some community service, just to stay out of lock-up . . . I would. Is there a choice? Putting some of these guys on probation is like throwing trash in the ocean . . . it just comes back to you. This guy's a piece of shit . . . he'll be back.

Rather than discuss the defendant's criminal offense, this probation officer describes the defendant as a social burden. His real crime is being guilty of the moral failing of being a "mope," a defendant that is akin to "trash" in the ocean.

While the commission originally noted professionals having a lack of understanding for the people whose lives were impacted by the justice system, they did not specifically study how stereotypes and racial stigmas associated with the categories of defendants gained organizational utility within the court organizations.

In Chicago, once defendants are labeled as "mopes," their moral failings make them "unworthy" of due process. To professionals, due process is not a right extended to all defendants, but a privilege reserved for "true" criminals. This belief system, which, at its core, is rooted in racialized assumptions about the moral failings of people of color, becomes particularly useful for court professionals. If defendants are marked as unworthy "mopes," then court professionals can strip down due process procedures to the minimal compliance required by law in order to achieve disposed cases or "disposes." Note that this vernacular for a closed case is another term that sounds like "throwing trash in the ocean."

Because of these ideologies, due process procedures become a type of ceremony without substance, or a "ceremonial charade," in which covert evasions of due process allow professionals to expend the least amount of effort on cases. Files are barely opened. Discovery material is sloppily reproduced and almost in violation of Brady obligations of evidence disclosure. Legal admonishments are nearly incomprehensible as judges race to read rights into the record rather than explain them to defendants. The great irony and perhaps hypocrisy about this efficiency is that the race to convict "mopes" through the ceremonial charade rewards the more violent defendants categorized as "monsters": those violent defendants are represented by attorneys from specialized task forces, warrant investigations, and use the lion's share of time on the court docket.[43]

Labeling offenders as "unworthy" social burdens appears race-neutral on the surface. Professionals rationalized their disdain for defendants as a disdain for the immorality of their crimes. Once race is coded out of the picture, a host of abuses are allowable against defendants and even their families. Because courts are divid-

ed along racial lines, this is tantamount to Whites abusing Blacks and Latinos with impunity in our American criminal courts.

Racial abuse in the criminal courts is a patterned exchange between White professionals and defendants of color, but it is decidedly one-sided in its power and violence. Garfinkel's construct of "degradation ceremonies"[44] is useful in describing encounters of racial abuse or degradation as they occur in the courtroom workgroup. Criminal courts and the professionals who maintain them are tasked with making moral distinctions between defendants. Some may be "monsters" and charged with violent crimes and the vast majority are "mopes" charged with crimes associated with social ills; regardless, the courts are the perfect theater for moral indignation, which is central to Garfinkel's degradation ceremony. It is a place where moral distinction and racial distinctions collide, where the moral failure of the defendant (the decision to steal, deal drugs, or even possess drugs) is both a racial offense and a criminal offense.

However, the racial disparity of mass incarceration transforms the court into a theater of racial degradation: a dramaturgical model of law in which prejudice and power are reenacted in everyday life for other White attorneys to gaze upon. In the sociology of moral indignation, the "ritual destruction of a person being denounced . . . is intended literally,"[45] and the ceremonial aspect withers the social status of the actor (the defendant) until she is separated from the workgroup itself. This allows for the public enactment of the "us" versus "them" distinctions that are crucial to organizational efficiency in the courts. As Garfinkel describes, the ceremony involves a denunciation in which social actors "publicly deliver the curse: 'I call upon all men to bear witness that he is not as he appears but is otherwise and in essence of a lower species.'"[46] One can imagine the case study of the woman wearing a garbage bag in court. In the context of a degradation ceremony, the defendant is not sick or suffering from mental illness. She is not a victim of police abuse. She is not to be sympathized with nor indulged with respect and decency. In fact, in this most egregious case, the defendant is literally costumed as garbage or presented as the "essence of a lower species."

These ceremonies are communicative in that the status degradation is meant to be performed. There are denouncers, perpetrators, and witnesses with the goal of reconstituting "the 'other' as a social object."[47] The denouncer must get the witnesses to appreciate the perpetrator, as well as the blameworthy event and blameworthy being. In the case of the criminal courts, those witnesses are often fellow courtroom colleagues and White professionals. Finally, the denouncer must publicly claim and manage their status as a bona fide representative of the group in front of the witnesses. From this position, she must name the perpetrator an outsider. This social ceremony is like a separate evidentiary hearing for the social standing of poor people of color. With the participation of armed sheriffs, these ceremonies can be violent.

In my research, a defendant's request for basic due process was enough to commence a racial degradation ceremony. For instance, one defendant who was charged with a nonviolent felony maintained his innocence and would not accept a plea bargain to easily "dispose" his case. Instead, he asked for a jury trial. By law, the attorneys had to honor this request. However, they could enact a degradation ceremony to perform this defendant's "unworthiness" for a trial. As a "joke," sheriff's officers wrapped an extension cord around the defendant's chair to simulate his execution. This occurred after the torture at Abu Ghraib was revealed and seemed inspired by those events. Note the undertone of actual violence. The sheriffs dramatized an execution for other White witnesses in the courtroom.

In another instance, a defendant who was HIV positive and had contracted tuberculosis (TB) while in jail was brought into court, and his public defender requested that he be released in order to save him from dying in jail. This request for leniency initiated a racial degradation ceremony. When his HIV and TB statuses were discussed in court, the sheriffs guarding him stepped back from the defendant in unison. The defendant was mocked as a contaminating object. One sheriff pantomimed, "HELP ME!" to the prosecutor as she laughed. The judge smiled and acknowledged the joke as the public defender continued to speak. All of these exchanges occurred as the defendant was watching, which signified that his presence was inconsequential to those initiating the ceremony. Thus, the defendant's social status was withered to the point of invisibility. Like a separate social hearing on his moral (rather than legal) standing, the request to humanize the defendant was met with an immediate response to cast him as "not as what he seems." He is not to be sympathized with nor is he vulnerable. He is a contaminant. He is cast as the "essence of a lower species." This ceremony occurs undetected by the courtroom record.

What is most disconcerting about these racial degradation ceremonies is that there are people of color also watching in the public galleries of the courtroom. Some are defendants waiting for cases. Some are victims waiting for closure. Others are family members supporting their loved ones. Regardless, the spectacle of abuse created by these ceremonial encounters disciplined and punished other outsiders into silence, subordination, and fear. It was common to see elderly women, for instance, walking gingerly toward professionals with their hands raised in the surrender or "don't shoot" position to ask a simple question. The power of the degradation ceremony and its measure of punitive excess is its capacity to exert fear, discipline, and intimidation beyond the subjects of the ceremony and onto all people of color in the courthouse.

Are the cultural tropes and ceremonies enacted in the courts generalizable to other jurisdictions and criminal justice adjacencies?[48] The increased reliance on the criminal justice system as a social service provider for

the poor has created new cultural logics and shifted how the court practitioners view the criminal justice system and understand their role within it. "The number of appearances in court, legal motions, trials, jail beds, food, showers, safe haven from the streets, and in-custody medical services is interpreted as part of the many criminal justice 'benefits' that arrested individuals seek to access and abuse."[49] As a result, court professionals act as institutional gatekeepers who are tasked with thwarting access to due process rather than granting it. This institutional role requires decision-makers to reimagine defendants that make up their caseload as welfare abusers rather than as true criminal threats.

Consistent with the racialized "mope trope" of a defendant as a social burden, court professionals mobilize "welfare stigma" or stereotypes about poor people's overreliance on and abuse of public aid to allocate criminal justice resources, including due process in our criminal courts. These stereotypes are intersectional and center around the belief that poor people – especially poor people of color – will tend toward abusing public aid.[50] Welfare stigma allows court professionals to create stricter eligibility criteria for due process in criminal courts and even occupancy in jails. In my study with sociologist Armando Lara-Millán, a prosecutor elaborated on this view of defendants by using a welfare trope: "I'm just sick and tired of them living off my back.… As long as there is a McDonald's 'Help Wanted' sign in the window, there's a job for them."[51]

What is most striking about these cultural dynamics in the court is that they transcend jurisdiction and even criminal justice institution. Our study shows how welfare stigma is used in both courts and jails with interorganizational effects on efficiency and case management. Welfare stigma in the courts helps rationalize pushing people through the adjudicative process with as little time and effort as possible. These stigmas are also used to rationalize pulling people out of jail to reduce the inmate population. But do these cultural categories manifest in distinct racial degradation ceremonies in jail and other criminal justice locations?

In jails, the rationale to deny medical treatment to inmates and even engage in gross violations of human rights are often normalized by these tropes. Inmates are "faking" their ailments. They are complaining about their pain or about not getting their medicines like it is a "hospital." In the worst cases, the degradation crosses the line into overt assault and abuse. In my recent research for my book *The Waiting Room*, a sheriff detailed a technique called the "lawn mower," in which inmates were shackled and stripped naked by sheriffs in the Cook County Jail. They would shower them by hosing them down in their cells and yank the chain laced between the inmate's arms and legs to make them fall to the ground on their faces. The racial degradation ceremony transformed any jailhouse "handout" to an opportunity for the violation of human rights and dignity. Furthermore, with no oversight, these encounters seem to begin in the courthouse and end in the jail through violence. Like the woman in the garbage bag, professionals across multi-

ple criminal justice locations and institutions share the cultural understandings that underpin these ceremonies and can enact them within their contexts.

If, as the commission states, courts are indeed a reflection of our society's "most deeply held and most cherished views about the relationship of the individual and society,"[52] then these findings are particularly troubling. We must interrogate which values our courts reflect in practice because that is the true experience of justice for defendants and victims. We must admit that the categorical distinctions between types of offenders – whether "marginal" or "hardened" – have become riddled with racial stigmas that allow our criminal courts to operate efficiently. These narratives simplify the enormous case docket into dichotomous categories that make for expedient justice. As I write in *Crook County*, these categories have long histories rooted in American racism:

> Professionals simplify the court docket into two racialized categories; defendants are either monsters or mopes. As Kipling conceived, the white man's burden is managing a racialized underclass that is "half-devil and half-child." If mopes are the archetype of the "half-child," then this rarer offender represents the "half-devil" or as prosecutors call them, "monsters."[53]

This style of justice comes at a high cost. It legitimizes racist tropes about defendants, it degrades the status of victims (many of whom are people of color), and it degrades the legitimacy of the system as a moral authority representing the rule of law. At the heart of our policy concerns and reforms is addressing the system's legitimacy in the eyes of the communities it serves.

Jonathan Casper's 1972 book *The Defendant's Perspective* captured the "consumer" perspective of justice: appraising the criminal justice system from the vantage point of the system's consumers. He noted that the defendants viewed the system as having the same lack of integrity as a hustle that went down on the streets. Defendants saw police, attorneys, and judges playing the same immoral games as a common criminal.

In the present day, Chicagoans call their justice system "Crook County" (rather than Cook County) to mock the legitimacy of the police and the courts. Perhaps appraising the system by the consumers it serves is how we develop the standards by which we measure the success of our courts. We must ask: are our courts satisfying the appearance of justice or are they instead normalizing the mistreatment of people of color? Do our courts appear fair, accessible, and just as the National Center for State Courts spells out in their "Trial Court Performance Standards"? How do these practices appear to defendants and victims? The answer is clear: we can and must do better.

One defense attorney in Chicago lamented the difficulty of achieving systemic change. Even in the shadow of one of the largest federal investigation scandals in the nation's history, Operation Greylord, the repeat players in Chicago's court

community were still resistant to change. Prosecutors used the word "nigger" in their offices and in court (which transformed into the word "mope"), played games while convicting defendants, and showed disregard for their duty to see that justice shall be done. As this defense attorney explained, even with federal scrutiny, there was no internal motivation to change practices in the courts:

> You didn't have an internal motivation to change; you had external motivations to change in the form of indictments. That's not really a cultural change … that's "oh my god, I got caught." … So, that didn't really affect that much culturally. That was like the difference between general and specific deterrence. There is certainly some specific deterrence: guys [attorneys and judges] were going to the joint. But, generally speaking, the culture persisted in a less obvious way. The culture continued to be an "us and them" culture with defendants. The defendants are outside of us.[54]

Astoundingly, this attorney talks about achieving cultural change by using the language of criminal deterrence for court professionals. With such resistance, how can we reform our courts and these cultural practices that have sustained themselves over generations of practitioners and the scholars that study them? One answer comes from a surprising finding from my research. When conducting the anonymous court watching portion of my data collection, some court watchers (despite dressing in casual attire to blend in with the public) were found out by professionals. In one case, a judge instructed the sheriff to make the court watchers identify themselves, put their hands up, and relinquish their pencils in order to stop them from writing notes. In another instance, a judge became particularly offended by a court watcher who was also a summer associate at a law firm. The judge yelled, "Do they pay you so much at your firm that you have time to watch me do my job?"

I noticed that the presence of court watchers was greeted with particular hostility because they represented oversight and accountability, and *that* incensed professionals. It occurred to me that anonymous court watching was more than just a research technique to gather data. It had the potential to be a deterrence-based program or intervention to inject accountability and oversight into a court system that tends to exclude outsiders from meddling in their work. Perhaps Justice Anne Burke's presence in court is even more evidence for the need for such oversight.

The court watching that I designed for research purposes is a method of collecting data on the practice of law and evaluating whether professionals adhere to the National Center for State Courts' "Trial Court Performance Standards." These standards prioritize "access to justice" and allow for oversight of how "justice is satisfying the appearance of justice."[55] Beyond holding all professionals accountable, a court watching program has the potential to evaluate judges and those evaluations can be used to educate voters. Would judges engage in racial degradation ceremonies if they knew the broader public was watching? Would prosecutors

mock defendants in Black English Vernacular if they knew their behavior would be reported? How would these court professionals act if they knew that the public, higher courts, and the media cared about how justice was being served? My prediction is that they would act with the level of professionalism and dignity that is required of their ethical commitments as lawyers and their roles as judges, prosecutors, and defense attorneys in our justice system.

ABOUT THE AUTHOR

Nicole Gonzalez Van Cleve is Associate Professor of Sociology at Brown University and a Fellow (2021–2022) at The Radcliffe Institute for Advanced Study at Harvard University. She is the author of *Crook County: Racism and Injustice in America's Largest Criminal Court* (2017) and *The Waiting Room* (2018). Beyond her academic writing in journals such as *Law and Social Inquiry* and *Criminology*, her written commentary has appeared in *The New York Times* and *The Atlantic* and on CNN and NBC News.

ENDNOTES

[1] "Court call" is the daily business of the court, which includes bond determination, status hearings, the exchange of discovery material, and setting dates for trials.

[2] See Andy Grimm, "New Bond Court Rules Take Effect, but Not Much of an Effect," *Chicago Sun-Times*, September 18, 2017, https://chicago.suntimes.com/news/new-bond-court-rules-take-effect-but-not-much-of-an-effect/.

[3] See "Criminal Injustice in Cook County," *Conscious Choice Magazine*, May 2007.

[4] *Offutt v. United States*, 348 U.S. 11, 14 (1954).

[5] "Lester: Illinois Supreme Court Justice Goes Undercover in Bond Court," *Daily Herald*, August 22, 2016, https://www.dailyherald.com/article/20160822/news/160829822/.

[6] Harold Garfinkel, "Conditions of Successful Degradation Ceremonies," *American Journal of Sociology* 61 (5) (1956): 420–421.

[7] Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979).

[8] Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (New York: Russell Sage Foundation, 2016); and Mikaela Rabinowitz, "Holding Cells: Understanding the Collateral Consequences of Pretrial Detentions" (Ph.D. diss., Northwestern University, 2010).

[9] David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002), 14.

[10] Nicole Gonzalez Van Cleve and Lauren Mayes, "Criminal Justice through 'Color-Blind' Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice," *Law & Social Inquiry* 40 (2) (2015): 406–432.

[11] Elizabeth Hinton, *From the War on Poverty to the War on Crime* (Cambridge, Mass.: Harvard University Press, 2016).

[12] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[13] In large jurisdictions, pressure from one institution on issues like jail overcrowding exerts consequences on efficient case management in the courts. Likewise, the number of pretrial detainees and convicted inmates exerts pressure on jail capacity.

[14] Armando Lara-Millán and Nicole Gonzalez Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System," *Criminology* 55 (1) (2017): 59–84.

[15] My comprehensive findings were published in Nicole Gonzalez Van Cleve, *Crook County: Racism and Injustice in America's Largest Criminal Court* (Stanford, Calif.: Stanford University Press, 2016); as well as in a comparative study of courts and jails in Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

[16] James Eisenstein and Herbert Jacob, *Felony Justice* (Boston: Little, Brown and Company, 1977).

[17] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 125.

[18] Jennifer Earl, "The Process Is the Punishment: Thirty Years Later," *Law and Social Inquiry* 33 (3) (2008): 737–778.

[19] Roscoe Pound, *Criminal Justice in America* (Piscataway, N.J.: Transaction Publishers, 1997), quoted in Feeley, *The Process Is the Punishment*, 6.

[20] "Due process revolution" refers to the eruption of court decisions that extended or defined procedural guarantees for defendants. (For more, see Van Cleve, *Crook County*.) This inspired an empirical and sociolegal revolution of sorts as scholars attempted to measure whether these rulings affected the experience of justice in practice. See, for example, Brenda Sims Blackwell and Clark D. Cunningham, "Taking the Punishment Out of the Process: From Substantive Criminal Justice through Procedural Justice to Restorative Justice," *Law & Contemporary Problems* 67 (4) (2004): 59; Feeley, *The Process Is the Punishment*; David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in Public Defender Office," *Social Problems* 12 (3) (1965): 255–276; Abraham S. Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," *Law & Society Review* 1 (2) (1967): 15–40; Jonathan D. Casper, *American Criminal Justice: A Defendant's Perspective* (Englewood Cliffs, N.J.: Prentice-Hall, 1972); and Eisenstein and Jacob, *Felony Justice*.

[21] Van Cleve, *Crook County*; and Eisenstein and Jacob, *Felony Justice*.

[22] Eisenstein and Jacob, *Felony Justice*.

[23] Van Cleve, *Crook County*, 22.

[24] Ibid.

[25] Hinton, *From the War on Poverty to the War on Crime*.

[26] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, viii.

[27] Ibid., 125.

[28] *Offutt v. United States*, 348 U.S. 11, 14 (1954).

[29] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 128.

[30] Ibid.

[31] At that time, about thirty states and the federal government examined the criminal code for a revision. The product of this work resulted in the "Model Penal Code" as a sound guide to criminal code reform in order to distinguish between greater and lesser offenses in a more accurate way.

[32] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 127.

[33] Half of all arrests were crimes from these "marginal" offenders and comprised charges like disorderly conduct, vagrancy, gambling, and drunkenness.

[34] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 126.

[35] Ibid.

[36] Ibid., 127.

[37] Ibid.

[38] Ibid.

[39] Garland, *Culture of Control*; and Bruce Western and Christopher Wildeman, "The Black Family and Mass Incarceration," *The ANNALS of the American Academy of Political and Social Sciences* 621 (2009): 221–242.

[40] Van Cleve, *Crook County*.

[41] Megan Comfort, "Punishment beyond the Legal Offender," *Annual Review of Law and Social Science* 3 (1) (2007): 271–296; Kaaryn Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York: New York University Press, 2011); and Alexandra Natapoff, "Gideon's Servants and the Criminalization of Poverty," *Ohio State Journal of Criminal Law* 44 (2015): 445–464.

[42] Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System." Please note that the jail studied in this article is on the West Coast, and not in Chicago. The jurisdiction cannot be identified due to the human subject agreement with the correctional institution.

[43] Ibid.; and Van Cleve, *Crook County*.

[44] Garfinkel, "Conditions of Successful Degradation Ceremonies."

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

[49] Ibid., 61.

[50] Michael B. Katz, *The Undeserving Poor: American's Enduring Confrontation with Poverty* (New York: Oxford University Press, 2013); and Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

[51] Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

[52] Ibid., 125.

[53] Van Cleve, *Crook County*, 69.

[54] Ibid., 79.

[55] For information on creating a court watching program in your jurisdiction, see "Delving Deeper: A Discussion Video," Stanford University Press, http://www.sup.org/crookcountyresources/. There, you will find training videos, PowerPoint presentations, research instruments, and information on how court watching can be used for research and deterrence of unethical behavior in our courts.