

Bargaining Justice: Negotiating Law in an Indian Bazaar

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INTRODUCTION

The bazaars in the city of Banaras provide an especially good test case for considering the topic at hand: Corporate Capitalism and the City of God.

First, the city of Banaras, located in the North Indian state of Uttar Pradesh on the banks of the Ganges River, is truly the City of God—or at least the city of one god in particular. Banaras—also known as Varanasi and Kashi—is thought by many to be the earthly abode of Lord Shiva as well as the axis mundi that connects the human and divine worlds. Banaras, it is said, sits on the three prongs of Lord Shiva’s trident, thus allowing for a unique intermingling in the city of the mundane and divine. Banaras is, quite simply, Lord Shiva’s city, and it has been recognized as such for millennia.¹

Second, Banaras has likewise been a center for commerce for millennia, with business and religion, and the inevitable business of religion, making it an important destination for merchants and pilgrims.² Banaras first achieved renown as a center for fine fabrics and a hub for

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1. See generally Diana Eck, *Banaras: City of Light* (1982); Jonathan Parry, *Death in Banaras* 11–32 (1994).

2. See generally Hans Bakker, *Construction and Reconstruction of Sacred Space in Vārāṇasī*, 43 *NUMEN* 32 (1996).

trade.³ In the eighteenth century it became “the subcontinent’s inland commercial capital,”⁴ with its bankers functioning as the proverbial Wall Street of its day. Even today the city is an important commercial hub, producing and disseminating a wide variety of goods and services for much of North India.

My interest is in the way that Banaras offers a challenge to normative views of “corporate capitalism,” both in terms of how it is practiced in the city and the rules that govern it. Elsewhere I have discussed the former, focusing on ways that the bazaars of Banaras function as a “series of ongoing and socially embedded networks that are the mechanisms for the exchange of specific commodities,”⁵ while also recognizing the ways these bazaars are moralized and moralizing entities with concomitant institutions, value systems, and products.⁶ In this article, I discuss the latter, focusing on the legal system that is mobilized to guide commercial exchange and daily life in the bazaars of Banaras, this legal system’s relationship to the city’s courts and police, and the relationship between these two justice systems and the kinds of justice they deliver.

So why does this matter? The bazaars of Banaras, as well as those throughout much of India, have long functioned as complex ecosystems, with individuals coming together in networks based on a shared trust rather than on a shared ethnicity, class, caste, or religion. These heterogeneous networks have stood as both a bulwark against communal violence and a testament to the power and possibility of participatory self-governance.⁷ Better understanding the legal system that governs the bazaar and its networks, and the ways that trust can be cultivated, violence avoided, and civility and compromise incentivized, might just help us better understand how to make India, and perhaps elsewhere, more inclusive and egalitarian.⁸

In what follows, I offer an overview of India’s courts and police as a way of assessing the limitations of India’s criminal justice system and

3. P. NAYAK, T.K. ROUT & SHAKEEL SHAIKH RAJANIKANT, MINISTRY OF COM. & INDUS., GOV’T OF INDIA, DREAM WEAVING: STUDY & DOCUMENTATION OF BANARAS SAREES AND BROCADES 1–3 (2007), <http://textilescommittee.nic.in/sites/default/files/banaras.pdf> [<https://perma.cc/KP6PZCMF>].

4. CHRISTOPHER ALAN BAYLY, RULERS, TOWNSMEN AND BAZAARS: NORTH INDIAN SOCIETY IN THE AGE OF BRITISH EXPANSION 1770–1870, at 126 (1998).

5. ARANG KESHAVARZIAN, BAZAAR AND STATE IN IRAN: THE POLITICS OF THE TEHRAN MARKETPLACE 70 (2007).

6. Andy Rotman, *Brandism vs. Bazaarism: Mediating Divinity in Banaras*, in *RETHINKING MARKETS IN MODERN INDIA: EMBEDDED EXCHANGE AND CONTESTED JURISDICTION* 234, 241 (Ajay Gandhi, Barbara Harriss-White, Douglas E. Haynes & Sebastian Schwecke eds., 2020).

7. *Id.* at 257–61.

8. See generally NATASHA BEHL, *GENDERED CITIZENSHIP: UNDERSTANDING GENDERED VIOLENCE IN DEMOCRATIC INDIA* (2019).

offering context for the flourishing of India's bazaar law system, especially in Banaras. My observations and insights come from academic writing on these topics as well as from more than two decades of ethnographic research in Banaras. Since 2001, I have interviewed hundreds of merchants and consumers, religious leaders and devotees, pilgrims, politicians, and police officers, often repeatedly, in an effort to understand the complex and constitutive relationship in the bazaar between morals and markets and how these interactive and evolving systems affect the social life of the city. Over the years, many of my informants have become friends and teachers, and their insights inform much of what follows.

I. SLOW COURTS, POLICE GAMESMANSHIP, AND *JUGAAD* JUSTICE

Almost everyone in Banaras tries to avoid relying on the courts to adjudicate a commercial dispute, or almost any dispute for that matter. The Indian court system is impressively congested with more than 30 million cases currently pending in district and subordinate courts, more than 4 million cases in the high courts, and roughly 65,000 in the Supreme Court.⁹ In 2010, one High Court Justice estimated that at the current rate this backlog would take 320 years to clear, and in the intervening years the backlog has only increased.¹⁰ According to the World Bank's "Doing Business" indicators for "Enforcing Contracts," it is estimated that in India to resolve a hypothetical commercial dispute through a local first-instance court would take 1,445 days, making it the fifth slowest of the 190 countries measured.¹¹

Considering the enormous delays in the court system, individuals often rely on the courts less to dispense justice than to torment one's adversaries, bogging them down in prolonged legal wrangling.¹² The anthropologist Bernard Cohn's assessment from the 1960s, based on his study of a village that borders Banaras, is still apt:

The use of the courts for settlement of local disputes seems in most villages to be almost a minor one. In Senapur, courts were and are

9. Kaushik Deka, *On India's Judiciary: Boggled by a Backlog*, INDIA TODAY (Feb. 8, 2021), <https://www.indiatoday.in/magazine/nation/story/20210208-bogged-by-a-backlog-1763840-2021-01-30> [<https://perma.cc/W2M5-934L>].

10. Amrit Amirapu, *Justice Delayed is Growth Denied: The Effect of Slow Courts on Relationship-Specific Industries in India* 3 (Univ. of Kent Sch. of Econ., Working Paper No. 1706, 2017).

11. *See Enforcing Contracts*, DOING BUSINESS (May 2020), www.doingbusiness.org/en/data/exploretopics/enforcing-contracts [<https://perma.cc/FCB4-77QS>].

12. *See generally* Jolie M. F. Wood, *Contentious Politics and Civil Society in Varanasi*, in REFRAMING DEMOCRACY AND AGENCY: INTERROGATING POLITICAL SOCIETY 93 (Ajay Gudavarthy ed., 2012).

used as an arena in the competition for social status, and for political and economic dominance in the village. Cases are brought to court to harass one's opponents, as a punishment, as a form of land speculation and profit making, to satisfy insulted pride, and to maintain local political dominance over one's followers. The litigants do not expect a settlement that will end the dispute to eventuate from recourse to the state courts.¹³

Robert Moog conducted research on the court system in Banaras in the 1980s and 1990s and concurs with Cohn, citing numerous others who do as well. According to Moog:

The situation I observed in Varanasi appeared to be no different. Attorneys, judges, and litigants often cited defense of *izzat* (honor), harassment, and speculation as reasons for filing with the courts.

Harassment and speculation often translate into extending the case as long as necessary to crush the opposite party or have him/her submit. Delays are an inherent part of the strategy.¹⁴

For many people, the utility of the Indian courts is predicated on the fact that they are slow and can be made even slower. Slowness facilitates the perception that the proceedings are burdensome. This burdensomeness can be wielded to punish one's adversaries, inflicting on them the penalty of having to go to court and suffer various forms of tediousness and uncertainty, as well as possible legal censure. This is slowness by design, or at least slowness by consent.

Police are likewise to be avoided in Banaras but for quite different reasons. While the courts are akin to playing fields—sites for a plodding and grinding competition, with honor as the sport¹⁵—the police are more enigmatic. Encounters with police are like playing a game with ever-shifting alliances and rules, and one in which everyone's agency and authority is provisional at best. It is a game filled with danger and uncertainty for everyone involved. While one might choose to go to court hoping to win against a rival, almost everyone "will take pains to avoid the police, expressing fears that they will at best receive no help from

13. Bernard Cohn, *Anthropological Notes on Disputes and Law in India*, 67 AM. ANTHRO. 82, 105 (1965).

14. Robert S. Moog, *Conflict and Compromise: The Politics of Lok Adalats in Varanasi District*, 25 L. & SOC'Y REV. 545, 551 (1991) (footnote omitted); Robert Moog, *Delays in the Indian Courts: Why the Judges Don't Take Control*, 16 JUST. SYS. J. 19, 27 (1992) ("In Varanasi and Deoria, it was not uncommon for both advocates and judges to comment that in every case at least one of the parties is interested in delaying the matter, thus providing advocates with a selfless rationale for extending cases.").

15. See generally Pierre Bourdieu, *The Sense of Honour*, in ALGERIA 1960, at 95 (1979).

feckless or indifferent police officers, and at worst experience coercive harassment.”¹⁶ Police constables, who constitute roughly 85% of the police force in each state,¹⁷ have been described as a “despised minority,”¹⁸ which is how the police are generally viewed in Banaras. I have heard them compared to blood-sucking parasites, thriving at the expense of others, exploiting them for personal gain and giving nothing in return. And I have heard much worse.

Beatrice Jauregui, who has written extensively on the police in North India, argues that police are systematically disempowered and delegitimized by both design and practice. As such, they have only a “provisional authority,” which is “fundamentally interdependent with the demands of various others who may express provisional authority themselves.”¹⁹ Everyone’s agency and authority are in flux, such that justice isn’t served but rather continually negotiated.

In 2009, Human Rights Watch released a report about the Indian police called *Broken System*, which chronicles some of the implications of the systemic and systematic disempowerment of the police, especially in and around Banaras. For example, police constables are minimally trained, chronically underpaid, and posted far away from their homes, which is intended to prevent them from mobilizing their resources for illicit purposes but also deprives them of local support.²⁰ Many of them live in cramped, dilapidated barracks with fewer beds than occupants. At one Banaras police station, four constables shared a single bed in a small room.²¹ And constables are required to be available for duty twenty-four hours a day, seven days a week, with many working more than twelve hours a day with no days off.²² The report features numerous interviews with police officers from Banaras who make assessments like this one:

We are being exploited. I have to work for 24 hours but I get the wage of a *chaprasi* [messenger]. I don’t get any leave. My meals are unhealthy and below caloric value. There is no fixed time for meals, sometimes we just get [meals] at nine, sometimes at 12. It’s just like I’m a prisoner. We are suffocating here. I feel like it’s still the British Empire. There [are] no medical facilities, no toilet. The funds

16. Beatrice Jauregui, *Beatings, Beacons, and Big Men: Police Disempowerment and Delegitimation in India*, 38 L. & SOC. INQUIRY 643, 645 (2013).

17. HUMAN RIGHTS WATCH, *BROKEN SYSTEM: DYSFUNCTION, ABUSE, AND IMPUNITY IN THE INDIAN POLICE* 7 (2009), <https://www.hrw.org/report/2009/08/04/broken-system/dysfunction-abuse-and-impunity-indian-police> [<https://perma.cc/B86M-ADKZ>].

18. UPENDRA BAXI, *THE CRISIS OF THE INDIAN LEGAL SYSTEM* 86 (1982).

19. BEATRICE JAUREGUI, *PROVISIONAL AUTHORITY: POLICE, ORDER AND SECURITY IN INDIA* 14 (2016) [hereinafter *PROVISIONAL AUTHORITY*].

20. See generally HUMAN RIGHTS WATCH, *supra* note 17, at 34

21. *Id.* at 34.

22. *Id.* at 29.

allocated by the government to constables are taken away by the superiors. You don't understand the trauma of being here . . . I took three days' medical leave and had 25 days' salary deducted.²³

According to the report, the Director-General of Police in Uttar Pradesh boasted to them, "If you brought a US policeman here[,] he'd commit suicide within one day. [Here], you are literally thrown against the wall. We don't have a shift of 8 to 10 hours, it is the system we have: we work 24 hours a day."²⁴

One of the constables that Jauregui interviewed, recognizing the ways that the police are simultaneously disenfranchised and pressured, offered this pithy assessment: "This job is exploitation in the name of discipline."²⁵ As such, Jauregui argues, it isn't an exaggeration to classify the burdens placed on these officer as "human rights abuses *against* police."²⁶

Indian police are in a precarious financial position. Police officers are underpaid, with a constable's pay hovering at the poverty line,²⁷ and police departments are under-resourced, without enough money for basic operating expenses.²⁸ As a result, the police invariably rely on various forms of bribery, like payoffs and protection payments, to supplement their individual incomes, with "a significant portion" of this money going into their department's kitty for mundane expenses, like office supplies and petrol.²⁹ But police generally have to pay hefty bribes to get their positions in the first place—the proverbial "pay to play" that is so normalized one might think of these as "fees" rather than "bribes." So, many police are saddled with jobs that pay them subsistence wages and also require them to contribute to basic operating expenses at work, and are saddled too with debts to sponsors or moneylenders that are accruing interest. All this incentivizes them to seek out bribes so that they can survive, and maybe even thrive, as well as repay the debt from the bribes that they themselves have paid.³⁰

This world of bribery is part of a larger social system that both justifies and perpetuates the position of the police as both fearsome and

23. *Id.* at 35.

24. *Id.* at 7.

25. PROVISIONAL AUTHORITY, *supra* note 19, at 111.

26. *Id.* at 109.

27. *Id.* at 166.

28. COMMON CAUSE & LOKNITI, STATUS OF POLICING IN INDIA REPORT 2019: POLICE ADEQUACY AND WORKING CONDITIONS 62–78 (2019), https://www.lokniti.org/media/upload_files/SPIR%202019.pdf [<https://perma.cc/KQC8-55GR>].

29. PROVISIONAL AUTHORITY, *supra* note 19, at 45.

30. *Id.* at 49; Deepak Gidwani, *Pay and Get Your Choice Posting in Uttar Police*, DAILY NEWS & ANALYSIS INDIA (June 11, 2015), <https://www.dnaindia.com/india/report-pay-and-get-your-choice-posting-in-uttar-padesh-police-2094347> [<https://perma.cc/7WM4-92AH>].

feckless. The system is constituted such that police must rely on bribes for their personal and professional well-being, and yet soliciting bribes undermines the authority of the police as trustworthy arbiters and custodians of the law. Instead, the police are often seen as opportunists with a vested interest in both exploiting the law for personal gain and making sure that citizens continue to break the law so the police can collect bribes from them for those infractions. Police are often viewed as fostering an unjust system in which citizens must break the law to survive, for a fully law-abiding public wouldn't provide the police with the bribes that they so desperately need.³¹

But the police are, as Jauregui argues, both disempowered and delegitimized, which means that the authority they wield is neither sovereign nor immutable; it is, instead, provisional and variable, deeply dependent on condition and circumstance and fluctuating accordingly. Furthermore, this authority is opaque. As a senior police officer explained to Jauregui, "your authority comes from your resources,"³² and yet no one is ever quite sure of one's own resources or the resources of others. There is a kind of "resource opacity," meaning that one has hunches about the power of an individual's resources but is never sure until they are put to the test. The police, as such, are constantly trying to accrue more resources and various forms of capital while simultaneously testing and modulating their authority with the public, commanding officers, and politicians. Authority, in other words, is constantly being negotiated.

Just as the authority of the police is provisional, variable, and opaque, so too is the law they enforce. The police, as Jauregui observes, "routinely and inevitably transgress and even transmogrify an imaginary line delimiting moral and legal right that is itself a moving target."³³ What counts as legal and illegal is conditioned by authority and circumstance, both of which are in flux. The law, in practice, shape-shifts, mutating according to forces seen and unseen. In the words of one of the constables interviewed by Jauregui, "A little bit of dishonesty benefits everyone . . . the victims, the judges, the police . . . sometimes even the criminals. Therefore, it is not wrong."³⁴

While such logic can be used to rationalize flagrantly extralegal measures, like torture, it more often is used for what Jauregui refers to as a *jugaad* approach to justice.³⁵ The term *jugaad* refers to a frugally innovative method of problem-solving, a kind of thrifty virtuosity that

31. PROVISIONAL AUTHORITY, *supra* note 19, at 153–57.

32. *Id.* at 137, 158.

33. *Id.* at 104.

34. *Id.* at 51, 91.

35. *Id.* at 49–56.

exemplifies the savvy ways that the under-resourced do the needful to get a job done. In a world of shifting moral economies, *jugaad* allows for one to straddle the “imaginary line delimiting moral and legal right,” turning corruption into a kind of virtuosity.³⁶ The term is especially common in Banaras, where one is frequently forced to make do with makeshift measures because of a lack of resources, and where *jugaad* is something like a local art form.

This configuration of police authority and the law, and the *jugaad* approach to justice that it engenders, creates a situation in which police are routinely posturing and bluffing. Police encounters with the public are often like a card game, with everyone engaged in some honest recognition of their own holdings and those of others, while also trying exploit others’ weaknesses. The police, however, often eschew the proverbial poker face, with its blank impassivity disguising any tell, and instead don a mask of power and privilege, with the license, swagger, and unpredictability that it affords. Although the police, in fact, have limited authority and legitimacy, they frequently posture as though they are untouchable—not the lowliest of the low, of course, but the mightiest of the mighty, and in doing so, break laws, norms, and sometimes bones. Many police believe that violence is a necessary application of *jugaad* justice, one that is forced upon them by an enfeebled criminal justice system, and that violence, or at least the threat of it, is an expedient way not only of fulfilling their mandate but also of strengthening their claims to legitimacy—with might, quite literally, making right.³⁷ Jauregui observes that “police violence in [the North Indian state of] Uttar Pradesh is ubiquitous and woven into the fabric of everyday sociality,”³⁸ and few in Banaras would dispute the claim.

And yet the police must be careful in how much they bend or break the law, for there are serious consequences if they overplay their hand. If

36. Numerous books invoking *jugaad* as a method for innovation, entrepreneurship, or management have been published in India during the past decade, and while they emphasize *jugaad* as a template for frugal innovation, they deemphasize the moral ambiguity that such practices often entail. E.g., NAVI RADJOU, JADEEP PRABHU & SIMONE AHUJA, *JUGAAD INNOVATION: THINK FRUGAL, BE FLEXIBLE, GENERATE BREAKTHROUGH GROWTH* (2012); DEAN NELSON, *JUGAAD YATRA: EXPLORING THE INDIAN ART OF PROBLEM SOLVING* (2018). In the case of the police, for example, a *jugaad* approach to justice isn’t simply “doing more with less.” It involves finding provisional fixes to morally vexing problems, like the “Dirty Harry Problem,” named for Inspector “Dirty Harry” Callahan in the film *Dirty Harry*, who faces a series of inescapable moral dilemmas about whether “bad” means can be justly or justifiably used to achieve “good” ends. See Carl Klockars, *The Dirty Harry Problem*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 33–47 (1991); see also *DIRTY HARRY* (The Malpas Company 1971).

37. See generally Jyoti Belur, *Why Do the Police Use Deadly Force?: Explaining Police Encounters in Mumbai*, 50 BRIT. J. OF CRIM. 320 (2010); Justice Tankebe, *In Search of Moral Recognition? Policing and Eudaemonic Legitimacy in Ghana*, 38 L. & SOC. INQUIRY 576 (2013).

38. PROVISIONAL AUTHORITY, *supra* note 19, at 90.

a police officer beats up, arrests, or solicits bribes from the wrong member of the public, the officer is liable to be beaten up in retribution or even killed,³⁹ as the Indian police suffer “an outrageously large number of fatalities.”⁴⁰ Yet for many the more pressing concern is pleasing one’s superiors, for if one arrests too many or too few, or isn’t sufficiently deferential or obsequious to the right people, one is liable to be reprimanded, suspended, or transferred. Transfers—which allow political agents to build their own coalitions and destroy those of others—are perhaps the biggest worry, for every police officer is always subject to them, and they happen “at a dizzying rate.”⁴¹ One officer that Jauregui interviewed recounts being transferred to a new office five times in five days and did not even manage “to arrive at several of his new offices before receiving another transfer order directing him somewhere else hundreds of miles [away] across the state.”⁴²

Pleasing one’s superiors, however, can be a challenge, for it often involves very selectively enforcing and not enforcing the law. According to one officer working outside of Banaras, “Most of the time we are not registering petty theft. If I registered more cases, I’d be suspended or transferred . . . I must show there’s no theft.”⁴³ Another officer explains that state government leaders have a vested interest in disempowering the police,

Because were we to function properly, and enforce the law, this would lead to many of their [political leaders’] convictions in court and would take away their power. So they want to weaken the police, or at least to keep us weak enough so that they cannot be touched by the law.⁴⁴

Keeping the law at bay is, in fact, a serious concern for many politicians. In the Lok Sabha Elections in 2019, 47% of the winners from Uttar Pradesh faced serious criminal charges, including murder, attempted murder, and crimes against women.⁴⁵

One way that politicians disempower the police is by deploying an enormous number of them for their own VIP security, using them “*as props* in performing their power to the world,” while also reducing them

39. Jauregui, *supra* note 16, at 644.

40. PROVISIONAL AUTHORITY, *supra* note 19, at 107.

41. *Id.* at 124.

42. *Id.*

43. HUMAN RIGHTS WATCH, *supra* note 17, at 46.

44. Jauregui, *supra* note 16, at 661.

45. ASS’N FOR DEMOCRATIC REFORMS, LOK SABHA ELECTIONS, 2019 UTTAR PRADESH ANALYSIS OF CRIMINAL BACKGROUND, FINANCIAL, EDUCATION, GENDER AND OTHER DETAILS OF WINNERS 3 (2019) <https://adrindia.org/content/lok-sabha-elections-2019-uttar-pradesh-analysis-criminal-background-financial-education> [<https://perma.cc/FE2L-FGXQ>].

in the eyes of the public “to yes-men, robotic soldiers serving kingly and queenly leaders, who are the ‘true’ sources of authority.”⁴⁶ In a quest for one-upmanship, politicians routinely jockey to gain ever larger VIP details, as the number and type of police personnel in one’s entourage is understood as an index of one’s power.⁴⁷ In 2019, with more than 20% of police department positions lying vacant nationwide, 66,043 police officers—nearly 3.5% of the total police force—were nevertheless assigned to protect 19,467 VIPs.⁴⁸ Delhi led the way, with an average of sixteen personnel protecting each VIP.⁴⁹

So how does an underpaid, understaffed, and under-resourced police, who the public distrusts, fears, and mocks for its makeshift approach to justice and its extortionary tactics, actually function? Jauregui offers a telling example.⁵⁰ A man was arrested for “being caught in the act of illegally severing metal rods and wiring from a fence around a plot of land several kilometers from the police station, to steal and presumably sell as scrap.”⁵¹ But the police lacked the resources to gather the evidence, which included “large pieces of wood and steel and wire, and then lug them all the way down to the judicial magistrate’s office in town for the arraignment.”⁵² The station officer was away with the station’s only jeep—not uncommon considering the state’s 68% shortage of patrolling vehicles⁵³—and no one had a conveyance big enough to do the job or the money or authorization to get someone else to do it.

Trying to abide by the “twenty-four-hour rule,” which requires that a subject in police custody be produced before a judicial magistrate within one day of arrest, the investigating officer and his cohort decided to take a *jugaad* approach to justice. They charged the suspect with pickpocketing.⁵⁴ For evidence of his crime, they procured double-edge razor blades—the tool of choice for many local pickpockets—which were readily available, inexpensive, and far easier to transport than metal rods and wiring.⁵⁵ The false charge was easy for the officers to justify for it allowed them to present the arrest report, the evidence, and the accused on time, and “the punishment meted out will be the same, whatever evidence

46. Jauregui, *supra* note 16, at 659.

47. *Id.* at 658–60.

48. *Id.*

49. Deepthiman Tiwary, *Bengal, Punjab, Bihar Have Maximum VIPs with Police Security: BPR&D*, INDIAN EXPRESS (Dec. 31, 2020), <https://indianexpress.com/article/india/bengal-punjab-bihar-have-maximum-vips-with-police-security-bprd-7126957/> [<https://perma.cc/CZ75-KF3A>].

50. PROVISIONAL AUTHORITY, *supra* note 19, at 60–62.

51. *Id.* at 60.

52. *Id.* at 60–61.

53. COMMON CAUSE & LOKNITI, *supra* note 28, at 130–31.

54. PROVISIONAL AUTHORITY, *supra* note 19, at 60.

55. *Id.* at 61.

is used, since pickpocketing and the crime actually committed both count under the IPC [Indian Penal Code] as theft.”⁵⁶ The accused, without protest, signed the doctored arrest report, and the arresting officer explained that he was not worried about the accused proclaiming that he was falsely charged because “every criminal claims innocence and denies wrongdoing.”⁵⁷

Justice here is a collective, if not coercive, improvisation. The police are cognizant of the so-called “rules,” which they selectively follow or circumvent, riffing off one another like skilled musicians in a free-jazz ensemble, to create a likeness of justice, if not justice itself. Law here is not enforced, it is bargained for.

So, what does a system like this mean for the residents of Banaras? In short: Avoid the police so you can also avoid the court system, unless you want to torment a rival. Nationwide, about 50% of the population believe the police are lazy, but the situation is more acute in Uttar Pradesh. According to a report from 2019, nearly 60% of the state’s population is either somewhat or highly fearful of the police and 75% have paid a bribe in the past year, with more than 33% of those bribes going to the police.⁵⁸ And among Indian states, Uttar Pradesh is second to last both in terms of trusting the police and being satisfied with their performance and dead last in their sympathy for police working conditions.⁵⁹ I have frequently been told that Banaras is overrun by two kinds of crooks, khaki and khadi—police and politicians, signaled here by their clothing. As one merchant who has lived his entire life in the bazaar told me, “No one trusts the police. This is fact.” I have never found a reason to doubt him. In Banaras, it could be said, the police “fall into the class of the a priori distrusted.”⁶⁰

II. A SYSTEM BUILT BROKEN

Human Rights Watch called its report about the Indian police *Broken System*, but it’s less that the system has become broken than that it was built broken—it was designed to be disempowered, and “an ongoing *social process* of delegitimation of police authority” has kept it that way.⁶¹ This configuration of the police is not unique to India; it is also a hallmark of certain postcolonial societies that lived through a “police state” and never want to repeat the experience. Ghana, for example, when it was a British

56. *Id.* at 62.

57. *Id.*

58. See generally LOCALCIRCLES, INDIA CORRUPTION SURVEY 2019: REPORT (2019), <https://www.localcircles.com/a/press/page/india-corruption-survey-2019#uttar-pradesh> [<https://perma.cc/9JXA-MRF3>].

59. COMMON CAUSE & LOKNITI, *supra* note 28, at 56.

60. PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY 43 (1999).

61. Jauregui, *supra* note 16, at 646.

colony like India, experienced a form of policing that “had little to do with serving the community and everything to do with upholding the authority of the colonial state.”⁶² The Ghanaian police, much like the colonial state it tried to legitimate, was understood as “an ‘alien’ institution imposed on an unwilling but helpless populace,”⁶³ and Ghanaian independence, which came in 1957, has done little to change that understanding. As criminologist Justice Tankebe notes,

If it was thought that with political independence the police would undergo a fundamental restructuring—organisationally and ideologically—such aspirations were dashed as the police were used as by successive governments to suppress liberties and political freedoms . . . [In 2005,] 78.6% of Ghanaians considered the police to be the most corrupt public institution⁶⁴ . . . [and] some sections of Ghanaian society consider police abuse as . . . a fact of life, inevitable, irresistible.⁶⁵

In trying to make sense of why “a fundamental restructuring” never occurred, Justice Tankebe builds on Peter Ekeh’s work on the politics of postcolonial Africa, which identifies two coexisting publics: the primordial public, which is “moral and operates on the same moral imperatives as the private realm,” and the civic public, which “is amoral and lacks the generalized moral imperatives operative in the private realm and in the primordial public.”⁶⁶ According to Tankebe,

The realm of the former is governed by indigenous shared norms and customs, but the realm of the civic public—inhabited by the post-colonial state and its institutions, including the police—suffers from weak moral commitment. The reason for this detachment lies in the legitimacy deficits of the colonial state and the failure of many Africans to decouple the state from its predecessor. . . . Ekeh further argues that corruption “arises directly from . . . the legitimation of the need to seize largesse from the civic public in order to benefit the primordial public.” The moral economy of corruption within this civic public thus makes it a *respectable crime*. Respectable crimes in this sense are crimes which “while being legally culpable and widely approved, are none the less considered by their perpetrators as being

62. DAVID KILLINGRAY & DAVID M. ANDERSON, POLICING THE EMPIRE: GOVERNMENT, AUTHORITY AND CONTROL, 1830–1940 123 (D. M. Anderson & D. Killingray eds., 1991).

63. Justice Tankebe, *Colonialism, Legitimation, and Policing in Ghana*, 36 INT’L J.L., CRIME & JUST. 75 (2008).

64. *Id.* at 76, 79.

65. Justice Tankebe, *Public Cooperation With The Police In Ghana: Does Procedural Fairness Matter?*, 47 CRIMINOLOGY 1265, 1280 (2009) (internal quotations omitted).

66. Peter Ekeh, *Colonialism and the Two Publics in Africa: A Theoretical Statement*, 17 COMPAR. STUD. SOC’Y & HIST. 92 (1975).

legitimate, and often as not being [offences] at all. . . .” Thus not only do such crimes occupy “a grey zone of legality and morality”; further, “the real borderline between what is [considered an offence] and what is not fluctuates, and depends on the context and on the position of the actors involved.”⁶⁷

For Tankebe, the civic public and its institutions, such as the police, suffer from “legitimacy deficits,” which lead to various forms of corruption and their justification, and a fluctuating borderline between the legal and illegal, moral and immoral. These legitimacy deficits originated in part as an inheritance from the colonial period and have become exacerbated by perceived injustices of the postcolonial state. But they are also fueled by the imperatives and sentiments that arise from a primordial public, whereby individuals understand themselves to have moral obligations to benefit and sustain an extended network of which they see themselves as members, and they are emboldened to commit “respectable crimes” to do so.

The police in Ghana, it might be said, take something of a *jugaad* approach to justice, crisscrossing a fluctuating, if not imaginary, line between right and wrong. But what is especially interesting is that civilian resistance to police authority comes in large part from abiding in a pre-colonial public, with an alternate moral economy and an alternate ideology of legitimation, which offers individuals, especially those who join together in voluntary associations, “intangible, immaterial benefits in the form of identity or psychological security.”⁶⁸ This primordial public offers a kind of citizenship with rules that govern and foster a shared moral sensibility, in contradistinction to the amoral civic public, and “[t]he unwritten law of the dialectics is that it is legitimate to rob the civic public in order to strengthen the primordial public.”⁶⁹

A primordial public, or something akin to it, thrives in the bazaars of Banaras; individuals there share a sense of moral obligation to an extended trust network, which is cultivated by voluntary associations and strengthened by a collective recognition that the police and courts are morally bankrupt. Regardless of the history of this public and the way it might relate to pre-colonial publics or how it might have been reconfigured

67. Justice Tankebe, *Public Confidence in the Police: Testing the Effects of Public Experiences of Police Corruption in Ghana*, BRITISH J. CRIMINOLOGY 301 (2010) (internal citations omitted); Cf. Justice Tankebe, *Public Cooperation with the Police in Ghana: Does Procedural Fairness Matter?*, 47 CRIMINOLOGY 1281 (2009).

68. Ekeh, *supra* note 66, at 107.

69. *Id.* at 108.

by colonial governmentality,⁷⁰ there is now a dominant public in the bazaars of Banaras that is bound together by a moral code and is in clear opposition to civic authority. This public has its own laws and punishments, which are widely accepted and recognized as just, making it unnecessary, if not perverse, to seek justice from the police and courts, which are thought to be unjust.

Such a public is not new, and there is a good reason that it has thrived in Banaras. Banaras has been a center for religion and commerce since the early centuries of the Common Era, and both have helped inoculate it against incursions from the state. As the terrestrial home of Lord Shiva, Banaras tolerates and even encourages the many forms of antinomian behavior that Shiva embraced. Shaivite ascetics, following Shiva's precedent, flaunt rules of purity and propriety, Brahmanical law, and state law, such as openly smoking marijuana, which is sacred to Shiva but nonetheless illegal,⁷¹ or wandering around naked, with ashes rubbed onto their bodies as their only clothes. Many of these ascetics, past and present, have likewise enjoyed "the privilege of self-government under their 'abbots' and regional controllers along with relative immunity from imposts and interference by the rulers' police officials."⁷² Lay followers of Shiva, as well as the many other gods that are revered in the city, are less fragrant in their disregard for conventions, but they seem to be emboldened by the city's many thousands of temples, large and small,⁷³ which taken together create the impression that the old city is one vast temple-scape and divine law the only mandate. As such, it is something of a truism that the city's residents take great pleasure in breaking rules, with any sign proclaiming that an activity is "strictly forbidden" (*sakht mana hai*), be it spitting, urinating, or overloading a vehicle, taken as an invitation to do the exact opposite.

Banaras's commercial power has likewise insulated it from state interference. During the rise of the East India Company and then the rise (and fall) of the British Empire, Banaras was the subcontinent's inland bank, a repository and lending facility for merchants and rulers throughout India.⁷⁴ During this period, the Naupatti banking fraternity, which consisted of nine families in Banaras, stood at the pinnacle of power and authority, functioning as financial overlords and unimpeachable arbiters,

70. See generally U. Kalpagam, *Colonial Governmentality and the Public Sphere in India*, 14 J. HIST. SOCIO. 418 (2001); see generally Christian Novetzke, *Religion and the Public Sphere in Premodern India*, 72 ÉTUDES ASIATIQUES 147 (2018).

71. See generally Narcotic Drugs and Psychotropic Substances Act, 1985.

72. BAYLY, *supra* note 4, at 223.

73. See Christian Haskett, *On Varanasi's Tiny Temples*, 18 S. ASIA MULTIDISCIPLINARY ACAD. J. 6, 15 (2018).

74. BAYLY, *supra* note 4, at 126–29.

with more influence and clout than many local kings.⁷⁵ The Naupatti eventually became, in the words of one historian, “a self-perpetuating oligarchy of status,”⁷⁶ immune to challenges from insiders and outsiders, and a bulwark for the city against state intervention. The Naupatti were a heterogeneous collective made up of brahmans, vaishyas, Jains, and the like, as well as old and new money. They helped merchants in Banaras overcome caste and sectarian boundaries so that they too could function as a collective, making the city a refuge for merchants of all kinds and a financial superpower and increasing its immunity from incursions of the state.⁷⁷ Additionally, at that time, “corporations of townsmen, merchants and religious specialists developed a new coherence and autonomy which . . . amounted to a virtual civic self-government.”⁷⁸ This type of self-rule fostered in the city’s inhabitants a deep distrust and dislike of government officials and policies and any outside incursions into local affairs. To this day, the mercantile community in Banaras continues to be wealthy, heterogeneous, bound by local forms of solidarity, and for the most part independent of state oversight, with a kind of “virtual civic self-government” as the predominant law of the land.

III. BAZAAR JUSTICE, *JUGAAD* JUSTICE

The bazaar, like the police, takes a *jugaad* approach to justice. Once again, what counts as legal and illegal are conditioned by authority and circumstance, both of which are in flux. The ethical rules of the bazaar are not codified in an official code; they are more tacit than explicit—difficult even for residents to articulate in propositional form, although they regulate many aspects of their behavior.⁷⁹ Moreover, these rules are not applied equally to everyone in all circumstances; there is no “one law for all,” either by design or practice.⁸⁰ Rules may vary according to one’s gender, stage of life, social class, and religious position, just as they do in normative Hindu configurations of dharma.⁸¹ In the bazaar, law is like a rivulet of water, adapting to circumstances and obstacles. Being fluid, however, is not the same as being arbitrary.

75. *Id.* at 215–17.

76. *Id.* at 216.

77. *See id.*

78. *Id.* at 211.

79. *See generally* Philip Gerrans, *Tacit Knowledge, Rule Following and Pierre Bourdieu’s Philosophy of Social Science*, 5 ANTHROPOLOGICAL THEORY 53 (2005).

80. *See generally* Werner Menski, *Indian Secular Pluralism and its Relevance for Europe in Legal Practice and Cultural Diversity*, in LEGAL PRACTICE AND CULTURAL DIVERSITY 31 (Ralph Grillo, Roger Ballard, Alessandro Ferrari, Andre J. Hoekema, Marcel Maussen & Prakash Shah eds., 2009).

81. *See generally* Ludo Rocher, *Hindu Conceptions of Law*, 29 HASTINGS L.J. 1283, 1284–89 (1978).

The bazaar law system is much like India's religious family law system, which follows a model of shared adjudication within a complex legal pluralism. According to Gopika Solanki, the state shares its adjudicative authority for family law with a wide range of actors and organizations—state and non-state, formal and informal, as well as lay, civic, and religious—which, in turn, engage in dialogue and negotiation within and between themselves to construct the law in an ongoing and iterative process.⁸² This form of legal heterogeneity, with its “institutionalization of bargaining and accommodation as state craft,”⁸³ fosters a fluid and evolving notion of the law and likewise promotes diversity by allowing for a proliferation of ideas about religion, religious identity, marriage, and divorce. India's religious family law is created by “a negotiated, uneven, and ongoing process; slow but holding forth a promise of structural change from below”⁸⁴—which is how Solanki describes the workings of gender equality within this legal system but which could also be used to describe the legal system itself. Justice is a work in progress, leading (one hopes) to a more egalitarian future.

In the bazaar law system, justice is likewise a product of dialogue, negotiation, bargaining, and accommodation, and this legal haggling shares many similarities with the haggling over the price of commodities, which is a ubiquitous feature of the bazaar economy. Many commodities in the bazaar, like fruits, vegetables, and the price of transport, do not have a fixed price. Instead, there is a price range—a normal haggling range—and within it the buyer and seller negotiate, asking and bidding back and forth, until a price is agreed upon.⁸⁵ Fixing a price simultaneously fixes a relationship, however temporary. This form of direct negotiation functions as a training ground for dispute resolution, schooling individuals in the mechanics of resolving conflicts, making agreements, and building trust.

Haggling, in other words, is not fundamentally antagonistic.⁸⁶ Instead, it is constitutive of community building and essential for the creation of the heterogeneous trust networks that make up the bazaar's social safety net.⁸⁷ Because haggling that leads to successful compromise, as opposed to irreconcilable intransigence, is integral to the proper

82. See generally GOPIKA SOLANKI, *ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM AND GENDER EQUALITY IN INDIA* (Cambridge University Press, 2011).

83. *Id.* at xxiii.

84. *Id.* at 332.

85. Victor C. Uchendu, *Some Principles of Haggling in Peasant Markets*, 16 *ECON. DEV. & CULTURAL CHANGE* 37, 37 (1967).

86. Clifford Geertz, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68 *AM. ECON. REV.* 28, 29 (1978).

87. Rotman, *supra* note 6, at 257–61.

functioning of the bazaar's economy and legal system, it is incentivized in a variety of ways. A potential buyer generally does not start haggling with a seller unless they plan to make a purchase; to begin to haggle is normally understood as a commitment to negotiate in good faith with the intention of arriving at a consensus. One may be a hard bargainer, but one is still expected to compromise, and there is social cost for not coming to an agreement. Raymond Firth's observations about haggling among Malay fisherman are apt:

[M]en who always drive the hardest bargain and will make no concessions are unpopular. If sellers, some dealers do not go to their boats; if buyers, some sellers do not welcome them. The reasons for this are based partly on a rather vague feeling of companionship between buyers and sellers—they are all members of the same community and some of them are friends and kinsfolk and they all have to get a living somehow; and partly on a more real economic interdependence.⁸⁸

Likewise, in Banaras, individuals who are unwilling to make concessions while ostensibly haggling are ostracized. There is a sense of a “just price,” “bidding properly,” and “a rather vague feeling of companionship” that encourages people to come to an agreement, “though a little deception is quite permissible if one can manage it.”⁸⁹ While Firth's hagglers are “all members of the same community”—members, perhaps, of an ethnically homogeneous middleman group, bound together by mutual trust that allows for “an alternative to contract law and to the vertically integrated firm”⁹⁰—the denizens of the bazaar are far more heterogeneous. They generally come together informally and voluntarily in “associational engagements,” creating “a form of cohesion and solidarity among otherwise unaffiliated shopkeepers and residents” and building trust where there was none.⁹¹ Haggling with shopkeepers, in other words, is crucial for creating the “wider solidarities”⁹² that help constitute the bazaar's social order and the de facto governing body that maintains it.

The bazaar also incentivizes haggling by bestowing prestige on those who do it skillfully. One might find a bargain in a shopping mall, I have often been told in Banaras, but one creates a bargain in the bazaar, and this

88. RAYMOND FIRTH, *MALAY FISHERMAN: THEIR PEASANT ECONOMY* 201 (1946).

89. *Id.*

90. JANET T. LANDA, *A THEORY OF ETHNICALLY HOMOGENEOUS MIDDLEMAN GROUP: AN INSTITUTIONAL ALTERNATIVE TO CONTRACT LAW* 361 (1981).

91. Rotman, *supra* note 6, at 258.

92. Christopher Alan Bayly, *Merchant Communities: Identities and Solidarities*, in *THE OXFORD INDIA ANTHOLOGY OF BUSINESS HISTORY* 99, 117 (2011).

happens through dexterous haggling. By creating bargains, one shows oneself to be thrifty, and as with shoppers in North London, thrift is regarded as a form of moral deferment, “instrumental in creating the general sense that there is some more important goal than immediate gratification, that there is some transcendent force or future purpose that justifies the present deferment.”⁹³ While in some cases “thrift is clearly a simple expression of poverty,”⁹⁴ a form of frugality as necessity, thriftiness in Banaras is generally endowed with dignity, even sanctity. Conversely, overpaying as the result of not bargaining with sufficient savvy is seen as a kind of moral flaw, a wastefulness bordering on sinfulness.

Furthermore, haggling generally feels good, in part because the act of haggling is coded as virtuous but also because shopkeepers are skilled at making customers feel that they have bargained well, or even that the bargain has been bestowed upon them because of their good reputation. Issues of reputation are especially important as haggling often “attracts bystanders,” creating a kind of public performance with ritualized “threats, counter-threats, meaningful shrugs of the shoulders, grimaces, and disclaimers of interest” that make the eventual agreement all the more powerful.⁹⁵ Additionally, after the parties agree on a price and cease haggling, a shopkeeper will sometimes offer a customer a small gift, understood as a token of appreciation, as if to encourage the recipient to come back and return the kindness by purchasing something once again. In short, customers are strongly encouraged to haggle, in the abstract because it helps build trust networks that are essential to the functioning of the bazaar as a commercial, legal, and social institution, and more concretely because it allows one to save economic capital while simultaneously accruing social and symbolic capital.

Punishment in the bazaar law system can be financial, corporeal, or social, or some combination of the three. Those who are understood to have broken the law—although what constitutes “the law” in the bazaar may very well be contested—are often expected to pay a fine. However, the law is sufficiently fluid that “a fine” might be construed as “a fee” or even “a bribe,” with “fine” registering moral disapproval, “fee” implying no moral judgment, and “bribe” a marker of moral coercion.⁹⁶ Lawbreakers may also be punished physically, paying for their transgressions with the pain inflicted upon them. This form of punishment is especially common when the result of perceived lawbreaking is

93. DANIEL MILLER, A THEORY OF SHOPPING 104 (1998).

94. *Id.* at 136.

95. Uchendu, *supra* note 85, at 38–39.

96. Michael Sandel, *Market Reasoning as Moral Reasoning: Why Economists Should Re-engage with Political Philosophy*, 27 J. ECON. PERSPS. 121, 128–29 (2013).

grievous, such as a traffic fatality, and when the lawbreaker is an outsider to the community.

Lawbreakers are also punished with forms of social alienation, much like the Malay fisherman in Firth's account who, as a result of making no concessions, are neither patronized nor welcomed. In Banaras, one's social standing is a key indicator of one's creditworthiness, so to be alienated is to suffer a loss of credit. Considering the importance of credit for even basic functioning in the bazaar, to lack credit is to face a kind of social death, or worse. C. A. Bayly, writing about Banaras in the eighteen and nineteenth centuries, notes that "there were cases in . . . Benares . . . where great merchants who had participated in the business of state"—and broke the unwritten law prohibiting it—"lost their credit and died of starvation."⁹⁷ Even now, a merchant who breaks the laws of the bazaar is considered untrustworthy, and as with the Nattukottai Chettiar merchant community in South India, it is likely that "news of his untrustworthiness would spread rapidly. . . . [No one] would do business with him. A major part of his working capital and an important and reliable source of liquid credit would be denied him. He would soon be out of business."⁹⁸ In Banaras, as I note elsewhere:

Stories abound of lawbreakers ostracized not only from the higher realms of commerce but from the more quotidian realms of sociality, unable to rent a room or buy a home, get their children into the right schools or married. Breaking the norms, be they legal or moral, rendered them functionally excommunicated, with exile the only logical course of action.⁹⁹

Yet perhaps the bazaar law system in Banaras is not so, well, bizarre. Robert Ellickson, in his famous study of how rural ranchers negotiate property rights in Shasta County, California, observes that "neighbors in fact are strongly inclined to cooperate, but they achieve cooperative outcomes not by bargaining from legally established entitlements . . . but rather by developing and enforcing adaptive norms of neighborliness that trump formal legal entitlements."¹⁰⁰ In other words, "members of a close-knit group develop and maintain norms whose contents serve to maximize the aggregate welfare that members obtain in their workaday affairs with

97. BAYLY, *supra* note 4, at 461.

98. DAVID RUDNER, *CASTE AND CAPITALISM IN COLONIAL INDIA: THE NATTUKOTTAI CHETTIARS* 128 (1994). For an excellent study of the ways that debt, credit, reputation, and trust are mobilized in the bazaars of Banaras, see SEBASTIAN SCHWECHE, *DEBT, TRUST, AND REPUTATION: EXTRA-LEGAL FINANCE IN NORTHERN INDIA* (2022).

99. Rotman, *supra* note 6, at 245–46.

100. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 4 (1991).

one another.”¹⁰¹ In the bazaar, too, we find something akin to “adaptive norms of neighborliness” created by “neighbors” who are brought together because of their physical proximity with one another, not because they are ethnically homogeneous or otherwise affiliated.¹⁰² As “a close-knit group,” they recognize the utility of cooperation, or perhaps the social costs of an ongoing competition, so they want to maximize the welfare of the collective to which they belong. They do this by maintaining certain “adaptive norms,” which prioritize a kind of “aggregate welfare” rather than individual justice, which evolve in a dynamic and almost evolutionary process, and which are often at odds with the formal judicial system and its “legally established entitlements.”

The residents of the bazaar, like Ellickson’s rural ranchers, show how “close-knit non-hierarchical groups can achieve much of the internal order that legal centralists have regarded as the job of a Leviathan [government].”¹⁰³ This means living with some uncertainty, with social norms trumping legal rules, haggling a necessity, and punishments not fully predictable, but considering the proliferation and longevity of the bazaars in Banaras, and across South Asia for that matter, and the ways they allow for diverse communities to live together peacefully, maybe it is a bargain worth making.

IV. POSTSCRIPT: BETTER BARGAINING FOR PLEA BARGAINS

The law systems in India and the United States have quite a bit in common and quite a lot they could learn from one another. There are parallels between the bazaar law system in Banaras and the way that neighbors settle disputes in Shasta County, and surely elsewhere in America, with adaptive norms being developed and enforced through forms of bargaining and negotiation. And while the criminal justice system in India might seem like a far-flung outlier, with its *jugaad* approach to justice and with both ends and means a compromise, bargaining is also central to the criminal justice system in the United States, even though there is much fretting about this fact.

Plea bargaining is the norm, not the exception, in the American justice system, as most criminal cases are settled without a trial. A very small percentage of defendants in federal criminal cases go to trial—around 2%—and “there is even less likelihood of a case proceeding to trial in state court than in federal court.”¹⁰⁴ Instead, most defendants plead

101. *Id.* at 167.

102. *Id.* at 4.

103. *Id.* at 238.

104. Jeffrey Q. Smith & Grant R. Macqueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 28, 28 (2017).

guilty in exchange for a reduced sentence; this is plea bargaining—“the exchange of official concessions for a defendant’s act of self-conviction”¹⁰⁵—and roughly 97% of federal criminal convictions and 94% of convictions at the state level are obtained through them.¹⁰⁶ Yet this exchange of concessions is not especially “official,” considering that “the real world of plea bargaining is . . . frequently off the record,”¹⁰⁷ “all but unregulated,”¹⁰⁸ and not always the best of bargains. Defendants, for example, have little bargaining power and are susceptible to various forms of coercion, including “overcharging” prosecutors who bring additional charges that they know they cannot prove but which increase their leverage in the plea bargaining process and pressure the defendant to plead guilty.¹⁰⁹

Plea bargaining is now intrinsic to our court system, and yet many deride the idea that justice can result from bargaining; bargaining is for bazaars, not courtrooms. “The idea of allocating criminal punishment through what looks like a street bazaar,” note two American law professors, “has proved unappealing to most outside observers.”¹¹⁰ Many commentators have applied the same analogy, disgruntled that “the Court has brought law to the shadowy plea-bargaining bazaar.”¹¹¹ Another American law professor, John Kaplan, in an article entitled *American Merchandising and The Guilty Plea: Replacing The Bazaar With The Department Store*, pushes the analogy further:

The plea bargain convinces criminals that the majesty of the law is a fraud, that the law is like a Turkish bazaar. Just as there is no moral difference between buyers and sellers, there is no moral difference between the criminal and his attorney, the prosecutor, the judge, and the probation officers.¹¹²

Kaplan, of course, is not trying to understand the bazaar; he wants to disparage bargaining as neither just nor justifiable. So, he invokes the foreign bazaar as a domain governed by fraud, with neither legal nor moral codes, and he casts the American department store as an embodiment of

105. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3 (1979).

106. *Missouri v. Frye*, 132 S. Ct. 1399, 1402, 1407 (2012).

107. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 155 (2012).

108. *Id.* at 151.

109. Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85 (1968); Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 191, 197 (2015).

110. Robert E. Scott and William J. Stuntz, *Plea-Bargaining as a Social Contract*, 101 YALE L.J. 1901, 1912 (1992).

111. Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. F. 35, 35 (2012–2013).

112. John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 218 (1977).

honesty, surety, and fixity. I believe Kaplan is wrong here on all counts, but his analysis also represents a missed opportunity. Plea bargaining is now pervasive worldwide, primarily because America has exported the practice to scores of countries, including India, where it officially arrived in 2005.¹¹³ And plea bargaining is rife with inequities, in America and elsewhere, such that all too often the innocent are coerced into pleading guilty to avoid the possibility of an even worse outcome if the case were to go to trial.¹¹⁴ Scholars and activists have offered a bevy of suggestions to make plea bargaining more just, such as allowing defendants more options and power in the bargaining process,¹¹⁵ but there are few easy fixes.

One can imagine why scholars like Kaplan might want to jettison plea bargaining and vilify the bazaar as the source of the problem. But what if the bazaar were the source of an answer? The bazaar generally excels at creating conditions whereby bargaining empowers the individuals involved, making them feel as though their negotiations were just, they bargained well, and the bargaining process itself was guided by a moral sensibility that was worth preserving because it holds together an otherwise disparate community and helps create a world in which the community determines the law and how it should be enforced rather than the police or courts.

Regular haggling in the bazaar also creates a bargaining culture such that individuals are trained in the arts of compromise, capable of being advocates, arbiters, mediators, and judges as the situation necessitates. And although this *jugaad* approach to justice creates moral instability and can reify inequities and hierarchies, it also helps prevent moral absolutism and even moral authoritarianism.

Or do we want to follow the model of the department store and possibly suffer its fate?

Department stores, just like prosecutors, are often accused of overcharging, being callous and unjust, and disregarding local norms and institutions if not undermining them. And their reputations and revenues have suffered accordingly.¹¹⁶ Nearly forty percent of department stores in

113. Máximo Langer, *Conviction Without Trial, and the Global Administratization of Criminal Convictions*, 4 ANN. REV. CRIMINOLOGY I.1, I.4 (2021).

114. RAM SUBRAMANIAM, LÉON DIGARD, MELVIN WASHINGTON III & STEPHANIE SARAGE, IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 6 (2020).

115. John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 182 (2015).

116. VICKI HOWARD, FROM MAIN STREET TO MALL: THE RISE AND FALL OF THE AMERICAN DEPARTMENT STORE 190–210 (2015); Lauren Hirsch, *Great American Department Store Shakeout—And There's No Stopping It*, CNBC (Aug. 13, 2019), <https://www.cnbc.com/2019/08/13/we-are-in-the-middle-of-the-great-american-department-store-shakeout.html> [https://perma.cc/QW8Q-8FRF]; see generally *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); Joel A. Eisenberg, *Business*

the United States have closed since 2016, about half of the remaining 1,600 mall-based locations are expected to close by 2025, and many predict their imminent demise.¹¹⁷ The bazaar is likely a better model—and a better bargain.

and Professions / Chapter 752: Making Grocers Pay the Price for Overcharging Customers, 36 MCGEORGE L. REV. 790 (2005).

117. Abba Bhattarai, *Mall Department Stores Were Struggling, the Pandemic Has Pushed Them to the Edge of Extinction*, WASH. POST (Apr. 16, 2021), <https://www.washingtonpost.com/business/2021/04/16/half-countrys-remaining-mall-based-department-stores-are-expected-shutter-by-2025> [<https://perma.cc/52PS-C5AR>].