

UNEARTHING ORIGINAL DISPUTES IN CRIMINAL ADJUDICATION

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Abstract: Modern criminal procedure heavily relies on pre-trial plea bargains, summary dispositions, and standardized charging documents that frequently obscure the underlying, authentic factual conflict between the state, the victim, and the accused. This article examines the systemic mechanisms that sanitize or erase the "original dispute" in criminal adjudication. It analyzes how formal legal narratives substitute contextual social conflicts with legal categories, evaluates the constitutional and retributive costs of resolution mechanisms that bypass factual discovery, and proposes reformatory evidentiary and procedural frameworks designed to unearth and address the genuine genesis of criminal controversy.

Keywords: Criminal adjudication, original dispute, plea bargaining, factual discovery, criminal procedure, legal narrative, restorative justice, procedural due process.

Annotatsiya: Zamonaviy jinoyat protsessi ko'p jihatdan sudgacha bo'lgan aybga iqrorklik kelishuvlariga, qisqartirilgan tartibdagi sud muhokamalariga va standartlashtirilgan ayblov hujjatlariga tayanadi. Bu holat ko'pincha davlat, jabrlanuvchi va ayblanuvchi o'rtasidagi haqiqiy, dastlabki faktik nizoni niqoblaydi yoki yo'qotadi. Ushbu maqola jinoiy sudlovda "dastlabki nizoni" rasmiylashtirish va o'chirib tashlashning tizimli mexanizmlarini o'rganadi. Maqolada rasmiy huquqiy talqinlar ijtimoiy nizolarni qanday qilib qonuniy kategoriyalar bilan almashtirishi tahlil qilinadi hamda haqiqiy faktik nizoni yuzaga chiqarishga qaratilgan protsessual islohotlar taklif etiladi.

Kalit so'zlar: Jinoiy sudlov, dastlabki nizo, aybga iqrorklik kelishuvi, faktik holatlarni aniqlash, jinoyat-protsessual huquq, huquqiy talqin, tiklovchi odil sudlov, tegishli protsessual tartib.

Аннотация: Современный уголовный процесс в значительной степени опирается на досудебные сделки о признании вины, упрощенные процедуры и стандартизированные обвинительные акты, которые часто скрывают подлинный фактический конфликт между государством, потерпевшим и обвиняемым. В данной статье исследуются системные механизмы, вытесняющие «первоначальный конфликт» из сферы уголовного правосудия. Анализируется то, как формальные юридические

формулировки подменяют контекстуальные социальные конфликты правовыми категориями, и предлагаются процессуальные реформы, направленные на установление объективной истины.

Ключевые слова: Уголовное судопроизводство, первоначальный конфликт, сделка о признании вины, установление фактов, уголовный процесс, юридическая нарратива, восстановительное правосудие, надлежащая правовая процедура.

Criminal prosecution is rampant within the United States.¹ Politicians, legal scholars, and activists have cried for reform or abolition.² Some of those cries have resulted in the implementation of diversion programs to avoid incarceration.³ But these programs fail to correct the overbearing and disruptive nature of traditional prosecution. When day-to-day disputes include criminal activities, policymakers identify such activities as criminal victimizations, with at least one disputant named an offender and another named a victim.⁴ Each year, such disputes number in the millions.⁵ But prosecution of offenders makes resolution of these original disputes far less feasible. Instead, a state-created criminal dispute revokes access to original disputes. It forces the parties into a new process with potential resolutions far removed from the particularities of the original incident.

Relying upon alternative dispute resolution scholarship and criminal legal theory, this Note pursues abolition by interrogating the theory and practice of prosecution. While short of arguing for outright decriminalization, this Note provides some theoretical groundwork for policymakers to tap into an array of decarceral options. It does so by first demonstrating that prosecution disrupts an original dispute. In place of resolving an original dispute, prosecution creates and attempts to resolve an artificial dispute.

The imagery of a displacing dispute pushing aside an original dispute reflects what occurs in courtrooms and at prosecutors' desks every day in the United States. While many of these new criminal disputes might appear to reach resolution at the end of a trial or the acceptance of a plea, many original disputes throughout criminal law remain unresolved.⁶ States may proclaim that justice has been served by the outcome of a dispute that the prosecutorial system alone has created. But those robbed are often not repaid, and their violations are not corrected. People who have suffered harm remain without individually tailored responses to their damage or grief. And the battered are left with injury that the criminal legal system has not healed.



This Note supports the use of dispute resolution methods such as restorative justice circles, victim-offender mediation, and private negotiations for restitution. But it does not prescribe these processes for specific crimes. Implementation of such processes would require an analysis of targeted crimes as specific communities experience them,⁷ an account of scholarship concerning the limitations of alternative dispute resolution when mandated by the state,⁸ and a design informed by community members.⁹

Instead of such an endeavor, this Note demonstrates that, although an original dispute is often the crux of a criminal trial and the substance upon which criminal pretrial negotiations are poised, prosecution does not resolve it. Finding that the prosecutorial framework is generally unsatisfying, this Note then argues for a framework of “primary dispute resolution.” Primary dispute resolution incorporates alternative dispute resolution techniques but attends to the original dispute and acts as the primary method of response to crime. The nature of the relationship between traditional prosecution and original disputes warrants such a reevaluation of the primacy of traditional methods to adjudicate crime. And demotion of the traditional criminal process beneath processes more closely tailored to the resolution of an original dispute benefits the disputants and their respective communities.

Part I identifies the mechanics of dispute displacement and the theoretical frameworks that justify it. Part II shows the current persistence of displacement even alongside tort systems and the use of diversion programs. Part III establishes that dispute displacement is harmful for parties involved in or affected by original disputes. And Part IV demonstrates that primary dispute resolution is appropriate and offers two basic templates for it.

I. Identifying Dispute Displacement in Criminal Law: Policymakers have long adjudicated crime through a coerced dispute resolution process between the state and an offender, also known as prosecution.¹⁰ The denomination of this process, often “State v. Defendant,” illuminates its priority. That priority is the resolution of a dispute¹¹ between a government institution and an offender subject to that institution’s coercion.

Prosecution acts as a domination-form¹² system of resolution that displaces original disputes. The mechanics of prosecution — the assumptions that undergird it, the statutes that actualize it, and the agency relationships that facilitate it — all confirm its role as a dispute resolution system displacing an original dispute. The theories of punishment that justify prosecution illustrate the distinction between original disputes and displacing disputes.



A. Mechanics of Dispute Displacement in Criminal Law: 1. *Displacing Original Victims.* — Prosecution displaces original disputes and their potential resolution through two consecutive assumptions. First, the state assumes that the harm that the original dispute created is harm to the community, not only to a victim.¹³ This assumption arises less from the recognition of harm to the community than from the mere fact that behavior within the dispute was illegal. Second, the state assumes a position both as the representative for the community and as the community itself.¹⁴ Through these steps, the state “activate[s]” the “conflict”¹⁵ so that it may appropriately apply its domination-form resolution system. Generally, these assumptions are inappropriate.

Although the state asserts that it properly represents the community, the community does not practically participate through state actors.¹⁶ It is *possible* that the harm within an original dispute injures an entire community, but an assumption that criminalization of an activity accurately indicates that it always inflicts community harm is ungrounded.¹⁷ And even when there is harm to the community warranting the community’s participation, the greater poignancy of the victim’s harm makes resolution of the victim’s dispute more important.

If the saliency of community harm is greater than that of harm to a victim, then displacement may be appropriate. Such crimes might include mass murder, threats to political leaders or institutions, or public corruption, to name a few. But most crimes create narrowly targeted harms: crimes such as trespass, larceny, assault, battery, or domestic abuse.¹⁸ Such crimes often create harm experienced by one or a few people and largely unnoticed by other community members.

2. *Displacing Original Incidents.* — The state that has drawn these assumptions effectively uses criminal statutes to create a displacing dispute, establishing itself as the new victim regardless of harm.¹⁹ Statutory prohibitions authorize the state to align the new disputants against each other and attempt to resolve the dispute through the prosecutorial process.²⁰ Although adjudicators couch the substance of this new dispute in witness descriptions and evidence regarding an original incident, the dispute’s substance is not really about the incident. Prosecution provides a forum for a battle of narratives regarding the similarities of the incident and the statutory elements of criminalized behavior.²¹ But it does so only to administer punishment to the offender. As a result, the offender, not the original substantive dispute, is the center of the traditional criminal process.²²



3. *Displacing Original Interests.* — Issues of agency create further displacement and confirm prosecution's role as a new dispute. Agents, including public defenders, criminal defense attorneys, prosecutors, judges, and jurors, make the communications and assertions to resolve the dispute. But interests of principals and agents may not align.²³ And an agent's repetitive role in courts may weaken the adequacy of their representation.²⁴

The prevalence of plea bargaining effectuates both displacement of original disputes and manifestation of new disputes. Because most criminal cases evade trial by reaching conclusion through a bargained guilty plea,²⁵ agents effectively engulf original disputes. Ignoring issues that might remain between victims and offenders, agents negotiate new interests and options. For example, prosecutors seek to lower caseloads by avoiding trial,²⁶ and the offenders' counsel seek both low sentences and goodwill with prosecutors.²⁷ All these mechanics of prosecution reveal it as a displacing dispute pushing aside an original dispute.

B. Theories of Punishment and the Supplanting Nature of Prosecution: Theories of punishment that validate prosecution establish its role as a displacing tool. Four theories commonly justify traditional prosecution: retributivism, deterrence, incapacitation, and rehabilitation.²⁸ Despite the complexity of each theory,²⁹ a cursory analysis demonstrates how they cause traditional prosecution to pursue goals unrelated to an original dispute. Adherence to these theories validates displacement and ultimately undermines resolution of original disputes captured within a criminal legal system.

1. *Retributivism.* — Under retributivism, prosecution is the process by which punishment is duly provided for an action that has created harm to society.³⁰ Retributivism justifies punishment by the measurement of an offender's moral culpability.³¹ Taking such an approach, a society that suffers some harm will repay it with new harm.³²

Retributivism causes the prosecutorial system to displace the original dispute by exchanging the previous harm and original victim for a new harm — punishment — delivered by a new disputant — the state. It dispenses this repayment against the offender through an artificially created second dispute. Although the first harm is the reason that the new harm is applied, the first harm does not receive resolution but only response — and response by the state as an institutional third party. Retributivism may underpin the state's reasoning for displacing an original dispute, but it also explains why a victim would allow the state to displace their dispute. The retributivist desires that an initial harming person gets their just deserts.³³ And a victim who concludes that state-



administered punishment is the just desert of their opposing disputant will likely welcome any process that gives the state this task.

2. *Deterrence and Incapacitation.* — Under deterrence theory, lawmakers attempt to hinder future crimes by applying punishments at magnitudes high enough to discourage other community members from engaging in those prohibited activities.³⁴ Similarly, incapacitation encourages the prevention of future harms at the cost of addressing present ones. It hinders an offender from creating future harm by physical confinement or state monitoring.³⁵

Deterrence and incapacitation cause displacement by inserting a societal goal into a situation that most often should concern only two disputants. Restricting people from prohibited activity may prevent future harm.³⁶ But it does not provide correction or healing for the present harm perpetrated between the disputants. Rather than orienting the criminal legal response around present issues, deterrence and incapacitation are entirely anticipatory.

3. *Rehabilitation.* — By rehabilitation, society treats individuals so that they either avoid committing such crimes again or live upon release in a manner that society deems contributory and successful.³⁷ A future-oriented goal,³⁸ rehabilitation leads to displacement by distracting from the present dispute and focusing a criminal legal response upon the offender.³⁹ While rehabilitation arguably may provide healing for the offender, it does not provide appropriate healing for the victim.

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Each of these objectives adds to an understanding that prosecution is a criminal dispute superseding an original dispute. Policymakers make the new dispute publicly accessible to deter future crime.⁴⁰ They apply an unbalanced legal framework and limited options to realize goals of incapacitating, rehabilitating, and giving retribution. Such results may arguably be in the state's interest, but they are not directly related to the original disputants' interests, which might include restoration of their relationship or apology for inflicted harm.

II. Persistence of Dispute Displacement in Criminal Law: Current systems that might respond to displacement fail to address original disputes adequately. Tort litigation provides an opportunity for disputants to attend to their dispute but fails to do so effectively on several accounts. Diversion programs sometimes aim to resolve original disputes, but their entanglement with prosecution hinders their ability to achieve resolution.



A. Tort Law's Inefficacy in Capturing Disputes Displaced by Prosecution: The availability of tort remedies does not excuse criminal law's displacement. Indeed, if tort law effectively resolved original disputes, prosecution's displacing nature might be acceptable, but to do so, the tort system would need to cover the same behavior as criminal law and violations in tort statutes would need to mirror those in criminal statutes. If so, even displaced disputants could successfully rely on tort remedy. But tort law does not consistently capture disputes that include criminalized behavior. Even if it did, tort claims still suffer from inaccessibility.

While tort law is better at responding to original disputes than criminal law, it is not always available. Both systems mandate that individuals bear the burden of some harm⁴¹ and are designed to counteract nonpreferred behavior.⁴² But criminal law uses punitive consequences to prohibit behavior, and tort law uses monetary damages to price behavior.⁴³ While criminal law displaces the original dispute, tort law retains the dispute and channels it through a judicial process. Some disputes may result in criminal prosecution, others in civil tort litigation, and many in both. Crimes such as negligent endangerment, misrepresentations, and many "victimless" crimes that veil reporting disputants may displace original disputes without an available tort claim.⁴⁴ Instead of welcoming encroachment by tort law to capture these claims, criminal law has encroached on tort law.⁴⁵ Today, criminal prohibitions cover not only traditional torts but also activities not captured by tort remedy.⁴⁶

Inaccessibility further weakens the tort system's ability to address original disputes. Even when lawmakers use the same language to authorize criminal prosecution as they use to authorize civil remedies,⁴⁷ difficulties in using the system arise from its reliance on monetary compensation from the wrongdoer. Victims may struggle to pay high legal costs and court fees.⁴⁸ Deduction of those costs from final judgments and settlements⁴⁹ discourages potential claimants. And victims may settle for less than full compensation because of their circumstances.⁵⁰

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