

Improving Criminal Justice Decisions

Michael Serota*

All government decisions matter. But few matter more—or are more consequential for society—than those involving the criminal justice system.¹ That’s because we depend upon the criminal justice system to perform two of the government’s most critical functions: securing justice and promoting public safety. To achieve these goals, we afford those who operate the criminal justice system great authority: the power to investigate and monitor, to arrest and detain, to convict and punish. But with this delegation of power comes great vulnerability: we must trust that the government officials who make criminal justice decisions will exercise their authority responsibly, in a manner that respects individual rights, preserves communities, avoids undue delay, and conserves limited societal resources.

Today, there is an emerging societal consensus that the U.S. criminal justice system is failing to live up to these obligations—or effectively serve its animating purposes.² This consensus is reflected in our nation’s major

* Visiting Assistant Professor, Arizona State University, Sandra Day O’Connor College of Law; Associate Deputy Director, Academy for Justice. This project would not have been possible without the contributions of Valena Beety, Doug Berman, Tamara Lave, Jenny Carroll, Michele Deitch, Hank Fradella, Christine Scott-Hayward, Alex Kreit, Ben McJunkin, Kristin Henning, Rebba Omer, John Pfaff, Cassia Spohn, and Sonja Starr. I’m grateful for their commitment to this project during a challenging time. Thanks also to Kurt Altman, Adam Chodorow, Molly Gill, Elissa Johnson, Zak Kramer, Emily Levett, Erik Luna, Jeremiah Mosteller, Marilyn Rodriguez, Erin Scharff, Josh Sellers, Michelle Singer, and Dawn Walton for helpful discussions and feedback on different aspects of this project. I am especially thankful to Victoria Romine and the student editors of the *Arizona State Law Journal* for their diligent work on this essay, as well as to Abigail Olson for her excellent research assistance.

1. Or to put a finer point on it, the operation of the many criminal justice *systems* in the United States. See, e.g., Benjamin Levin, *Criminal Law in Crisis*, COLO. L. REV. F., Aug. 16, 2020, at 1, 10, <https://lawreview.colorado.edu/wp-content/uploads/2020/08/Criminal-Law-in-Crisis-Levin.pdf> [<https://perma.cc/WQQ4-DFEW>] (“[T]he ‘criminal justice system’ . . . is not a single system; rather, it reflects an amalgam of different ‘systems,’ different political choices made by different political actors in different contexts.”); VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 178 (2009). For further discussion, see *infra* notes 59–60 and accompanying text.

2. See, e.g., Alfred Blumstein, *Dealing with Mass Incarceration*, 104 MINN. L. REV. 2651, 2651–52 (2020); Marie Gottschalk, *Bring It on: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559 (2015).

political parties,³ endorsed by our most prominent institutions,⁴ and held by many members of the public,⁵ all of which seem to believe we're suffering from a crisis of mass incarceration that is both fiscally unsustainable and morally reprehensible.⁶ Recent events have only bolstered this growing realization. From an overstuffed prison system ravaged by a global pandemic to the slow-motion asphyxiation of George Floyd pinned under the knee of a Minnesota police officer, the myriad injustices of 2020 have opened more eyes to the tremendous moral and economic costs that our criminal justice

3. See, e.g., Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 126–27 (2017). For one concrete example, consider the unanimous decision of four Democrats and three Republicans on the U.S. Sentencing Commission to retroactively reduce the sentences for drug offenders. See Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, 104 MINN. L. REV. 2625, 2632 (2020) (“[W]e lowered all drug sentences—all federal drug sentences in the United States—by two levels in the guideline manual, which in practical terms ends up being about twenty-five months on average for a person. That’s a two-year reduction in sentence and we made this retroactive.” (footnote omitted)). For another, consider the bipartisan effort to mitigate the reentry barriers faced by people with criminal records. See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2462–63 (2020) (“[T]wo-thirds of U.S. states adopt[ed] one or more such policies in 2018, and forty-three states, the federal government, and the District of Columbia pass[ed] an ‘extraordinary 153 laws’ aimed at this problem in 2019.” (footnotes omitted)). *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

4. See, e.g., *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST (July 22, 2010), <http://www.economist.com/node/16636027> [<https://perma.cc/QWZ2-QH57>]; Tim Lynch, *Population Bomb Behind Bars*, CATO INST. (Feb. 20, 2000), <http://www.cato.org/publications/commentary/population-bomb-behind-bars> [<https://perma.cc/XD4S-3TJG>]; BRIAN W. WALSH, THE HERITAGE FOUND. & TIFFANY M. JOSLYN, NAT’L ASS’N OF CRIM. DEF. LAWS., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf [<https://perma.cc/SBD4-237D>]; see also John Pfaff, *Decarceration’s Blindspots*, 16 OHIO ST. J. CRIM. L. 253, 255–56 (2018) (observing “aggressive spending and lobbying by non-profits and think tanks ranging from the ACLU on the left to the Charles Koch Foundation on the right”).

5. See, e.g., Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175 (2020); Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711 (2019).

6. See, e.g., Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1586 (2019) (“[W]e are sending some people to prison who do not need to be there, we are keeping some people incarcerated longer than is necessary to advance the goals of the criminal law, and as a result, we are imposing unjustified consequences on inmates and unwarranted financial, safety, and social costs on the rest of us. Many of the drivers of high incarceration rates—mandatory prison terms, truth-in-sentencing laws, reduced judicial sentencing discretion—are precisely those that fail to distinguish those who genuinely need to be behind bars and those who do not.”).

system currently imposes—on our families, our communities, and our nation’s collective conscience.⁷

A wide but growing body of research on incarceration in the United States offers a statistical vantage point on this nationwide crisis. We know, for example, that every morning, 2.2 million people wake up in a U.S. prison or jail, while 4.4 million people continue living their lives under some form of correctional supervision.⁸ These two numbers alone set us apart from all other developed countries and make us a world leader in incarceration: although we only possess 5% of the world’s population, we house around 25% of its prisoners.⁹ But these numbers also fail to capture the untold millions cycling in and out of our criminal justice system each year. For example, approximately one million felony convictions are entered in the U.S. each year, while “an estimated ten million misdemeanor cases are filed annually, flooding lower courts, jails, probation offices, and public defender offices.”¹⁰ What remains is a country where nearly one out of every one hundred adults

7. See, e.g., Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 214–16 (2020) (noting the influence of George Floyd’s death on the public’s perception of policing); Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1291&context=nulr_online&preview_mode=1&z=1596157754 [<https://perma.cc/XYQ9-8KJK>].

8. Michael Serota, *How Criminal Law Lost Its Mind*, BOS. REV. (Oct. 27, 2020), <http://bostonreview.net/law-justice/michael-serota-how-criminal-law-lost-its-mind> [<https://perma.cc/327Y-YZTS>]; see, e.g., Pfaff, *supra* note 4, at 253 n.1. As Pfaff explains, the 2.2 million people incarcerated include “1.5 million in prisons (post-conviction), and about 750,000 in jails (short post-trial convictions but also all pre-trial detainees).” It is important to note, however, that this 750,000 number counts the number of people in jail on any one day, not the number of people who pass through our nation’s jails in any year—that latter number is much larger, likely around 10 million. *Id.*; see also Zhen Zeng, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., JAIL INMATES IN 2016, at 2 tbl.1 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/5PZG-E87B>].

9. Pfaff, *supra* note 4, at 253 n.1 (“That 2.2 million is what gets us to 25% of the world total.”) With nearly one out of every one hundred adults behind bars, our incarceration rate is several times higher than all other developed countries—and more than all of Europe combined. NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2, 13 (Jeremy Travis et al. eds., 2014); see also Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1715 (2006) (“The United States’ criminal system is infamous for its excesses: too many laws, overcriminalization, and over-punishment.”).

10. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012); see, e.g., Pfaff, *supra* note 4, at 253 n.1; Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 n.81 (2018) (observing, based on data collected between 2008 and 2016, that misdemeanors make up over 70% of many states’ criminal caseloads).

is behind bars,¹¹ and one out of every three adults possesses a criminal record.¹²

Even more striking than this nationwide data are the racial disparities it reveals.¹³ For example, although African-Americans are only 13.3% of the U.S. population, they make up 34% of the people we incarcerate.¹⁴ “More than 20% of black men born since the late 1960s have been incarcerated for at least a year for a felony conviction.”¹⁵ And “[i]n some cities, more than 40–50% of black men in their twenties are under the supervision of the criminal justice system.”¹⁶ None of these statistics are surprising, however, when one considers the many ways that race influences every aspect of the criminal justice system.¹⁷ The scholarly literature on racial bias in the criminal justice system¹⁸ finds, for example, that people of color (and particularly black men) are more likely to be stopped by police,¹⁹ more likely to be held in pretrial detention,²⁰ less likely to get a fair trial,²¹ and more likely to receive sentences that are longer than those of white people convicted of the same crimes.²² Perhaps most troubling, though, is the extent to which

11. Leipold, *supra* note 6, at 1580.

12. Rachel E. Barkow, *Making Connections with The Wire: Telling the Stories Behind the Statistics*, 2018 U. CHI. LEGAL F. 25, 25 (2018). That amounts to 75 million people, which includes those arrested but not convicted. Prescott & Starr, *supra* note 3, at 2461 n.1. In contrast, “somewhere between 19 and 24 million Americans have felony conviction records.” *Id.*

13. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (“The gap between black and white incarceration rates . . . has deepened along with rising inmate numbers. . . . [T]he transformation of prison policy at the turn of the twenty-first century is most accurately characterized as the mass incarceration of African Americans.”); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74, 78 (arguing that incarceration is concentrated in, and targeted against, certain classes, races, and geographic locales, with its primary target being low-income black men in urban settings).

14. Barkow, *supra* note 12, at 25.

15. *Id.*

16. *Id.* at 25–26.

17. See, e.g., Roberts, *supra* note 13.

18. For an easily accessible compilation of studies, see Radley Balko, Opinion, *There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof.*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/> [<https://perma.cc/N33A-UM59>].

19. See, e.g., MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 4 (2016).

20. See, e.g., CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 146 (2019).

21. See, e.g., SAMUEL WALKER, CASSIA C. SPOHN & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 251–92 (6th ed. 2018).

22. See, e.g., *id.* at 293–358.

black men suffer comparatively high levels of police violence, facing one in one thousand odds of being killed by law enforcement.²³

Confronted with these statistics, one must ask: How did we get here? Answering this question has been a central preoccupation of many of our nation's leading criminal justice scholars, who offer nuanced—and sometimes conflicting—accounts of the web of factors and influences that produced our current state of mass incarceration.²⁴ But there's also a simple response, the banality of which obscures the common thread in each of these narratives: bad government decisions.²⁵ That is, we would not have the criminal justice system we have today but for the misguided decisions of: *legislatures* about criminalization, punishment, and funding;²⁶ *law enforcement* about surveillance, arrests, and prioritization;²⁷ *prosecutors*

23. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PNAS 16793 (2019), <https://www.pnas.org/content/pnas/116/34/16793.full.pdf> [<https://perma.cc/KV5D-RDCX>]. To put a finer point on it, for every 100,000 people in the United States, ninety-six black males are likely to be killed by police over the course of their lives compared to thirty-nine white males—meaning black men are two-and-a-half times more likely to be killed by law enforcement than their white counterparts. *Id.* at 16794; see also Gabriel L. Schwartz & Jacquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013–2017*, PLOS ONE, June 24, 2020, at 1, 5, <https://doi.org/10.1371/journal.pone.0229686> [<https://perma.cc/HSS6-5EN5>] (reporting that out of nearly 5,400 police-related fatalities, black people were three times more likely to be killed by police than white people).

24. Compare, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010) (observing that “mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow”), with JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 130–32 (2017) (emphasizing prosecutorial charging decisions, violent crime, and the decisions of public sector officials, such as correctional officer unions and state district attorney associations, as being central to mass incarceration).

25. See, e.g., JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 10–13 (2017) (describing how decisions by multiple government officials in the District of Columbia spread over four decades combined to produce mass incarceration in the District); Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967 (2019).

26. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719–21 (2005); Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006). Punishment would also include the collateral legal consequences that typically flow from criminal convictions, such as restrictions on public-benefits eligibility and occupational licensing. See, e.g., Prescott & Starr, *supra* note 3, at 2462 (“Taken together, these hurdles have been described as amounting to a ‘new civil death,’ and on a collective scale, this phenomenon magnifies racial disparities in employment and other outcomes due to disparities in the distribution of criminal records.”).

27. See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000).

about charging, bargaining, and disclosure;²⁸ *judges* about statutes, sentencing, and the Constitution;²⁹ and *correctional officers* about treatment, order, and confinement³⁰ (among many others).

These are not easy decisions, of course. The creation and administration of criminal justice policy demand a careful balancing of important and sometimes conflicting *values* (for example, fairness, security, and equality), *perspectives* (for example, those of criminal defendants, victims, families, and communities), and *institutions* (for example, the judiciary, jury, prosecutor's and public defender's offices, and sentencing commissions) on emotionally charged issues of great public importance.³¹ In light of these challenges, it would be unreasonable to expect government decisionmakers to get it right each and every time. But given the high stakes and human consequences involved, we do have a legitimate expectation that criminal justice decisions will at the very least be made in the right way—that is, rationally, deliberately, and informed by expertise. After all, we expect nothing less from the private fiduciaries to whom we delegate the authority to make life-altering decisions in areas of extraordinary sensitivity—for example, doctors, lawyers, and legal guardians.³² So it is reasonable to expect

28. See, e.g., Pfaff, *supra* note 4, at 255–56; Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987). And that's to say nothing of prosecutorial influence on the decisions made by other actors in the criminal justice system (through lobbying and other efforts). See, e.g., Michael Serota, *Taking a Second Look at (In)Justice*, UNIV. CHI. L. REV. ONLINE (Jan. 23, 2020), <https://lawreviewblog.uchicago.edu/2020/01/23/taking-a-second-look-at-injustice-by-michael-serota/> [<https://perma.cc/Q79S-AWEF>]; EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

29. See, e.g., Rachel E. Barkow, *Criminal Justice Reform and the Courts*, UNIV. CHI. L. REV. ONLINE (Oct. 15, 2019), <https://lawreviewblog.uchicago.edu/2019/10/15/criminal-justice-reform-and-the-courts-by-rachel-e-barkow/> [<https://perma.cc/WTQ8-SKLJ>]; Michael Serota, *Mens Rea, Criminal Responsibility, and the Death of Freddie Gray*, 114 MICH. L. REV. FIRST IMPRESSIONS 31, 33 (2015); Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL'Y REV. 415 (2011).

30. See, e.g., Jamelia N. Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 84 (2018).

31. See, e.g., Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 326 (2004); Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1132–36 (2005); Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 650–58 (2000).

32. Specifically, in the private law context:

A fiduciary relationship emerges in contexts where one person (the fiduciary) has discretionary power over the assets or legal interests of another (the beneficiary). Classic examples of fiduciary relationships in private law

to receive at least this much from the public fiduciaries responsible for operating our criminal justice system.³³

And yet, in this regard, our public fiduciaries have barely given us anything at all. Over the past few decades, U.S. criminal justice policy generally has *not* been produced by a rational process of decision-making centered around a careful examination of costs and benefits informed by scholarly expertise.³⁴ Instead, it has largely arisen from “a pathological

include attorney-client, agent-principal, trustee-beneficiary, corporate officeholder-shareholder, guardian-ward, and physician-patient relationships. In these settings (and others that the law treats as sufficiently similar to them), the beneficiary is vulnerable to the fiduciary’s predatory or self-dealing actions yet must still repose her trust in the fiduciary. Private law traditionally imposes substantial duties upon fiduciaries as a way of keeping them in line and incentivizing them to prioritize their beneficiaries’ interests above their own.

Three indicia mark the fiduciary relationship: discretion, vulnerability, and trust.

Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 705–06 (2013) (footnotes omitted).

33. Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1206 (2017) (arguing that “[t]he democratically elected officials charged with the task of creating and overseeing [our criminal justice system are] ‘public fiduciaries’”). As my co-authors and I have argued, it is sensible to think of government officials as public fiduciaries because of the structural and relational similarities they share with private fiduciaries. *See, e.g.*, Leib, Ponet & Serota, *supra* note 32, at 705–06; Ethan J. Leib, Michael Serota & David L. Ponet, *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109 (2014); Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013); *see also* Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016). This is particularly true where those government officials are responsible for making criminal justice decisions, given the citizenry’s outsized vulnerability to the consequences that follow (e.g., punishment and confinement). *See supra* notes 7, 18–23.

34. *See, e.g.*, Brown, *supra* note 31, at 326; RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1 (2019) (“We do not rely on experts or use studies and rational assessment to minimize crime.”); CHRISTIAN HENRICHSON & JOSHUA RINALDI, VERA INST. OF JUST., COST-BENEFIT ANALYSIS AND JUSTICE POLICY TOOLKIT 2 (2014) (noting that cost-benefit analyses are uncommon in criminal justice), https://www.vera.org/downloads/Publications/cost-benefit-analysis-and-justice-policy-toolkit/legacy_downloads/cba-justice-policy-toolkit.pdf [<https://perma.cc/5YYX-E7EM>]. This is not to say that the current state of cost-benefit analysis on criminal justice issues is a panacea. *See generally* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (exploring the empirical challenges confronting evidence-based sentencing); Sonja B. Starr, Response, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to the Prisoner’s Dilemma*, 98 IOWA L. REV. BULL. 97 (2013) (highlighting the practical difficulties of using cost-benefit analysis in criminal justice policymaking). For example, even when the *financial* costs of specific criminal justice policies are calculated, the resulting analyses often ignore the *social* costs of those policies. *See, e.g.*, John Pfaff, *Policing Studies Measure Benefits to Crime Reduction—But Not Social Costs*, APPEAL (Oct. 2, 2020), <https://theappeal.org/policing-studies/> [<https://perma.cc/C7MG-MFT2>].

political process that caters to the public's fears and emotions without any institutional safeguards or checks for rationality to make sure these policies work or are the best approach to combating crime."³⁵

All too often, the same corrosive pattern presents itself. A heartbreaking tragedy occurs. Understandable outrage ensues. A legislature feverishly passes a criminal justice policy with little debate, consideration, or consultation with experts. Rinse and repeat.³⁶ The end result of this well-worn process is more crimes, punishment, and expansive authority for police and prosecutors³⁷—as well as a broader set of criminal justice policies that are “contrary to what almost everyone with close knowledge of the topic thinks makes much sense.”³⁸

A central feature of this pathological process of criminal justice decision-making is the marginalization of expertise—and particularly *scholarly* expertise.³⁹ Consider one illustration: at the same time that our nation's politicians were racing to enact increasingly severe sentencing policies (e.g., harsh mandatory minimum and three-strikes laws), our nation's academics, scholarly institutions, and research councils were espousing consensus

35. BARKOW, *supra* note 34, at 1, 5 (“[C]riminal justice policy in the United States is set largely based on emotions and the gut reactions of laypeople. We have been doing this for decades, with the public and politicians reacting to stories or panics about crime with ill-informed laws and punitive policies that extend far beyond the high-profile event that sparked them and without much thought about whether the response will promote public safety.”). In the legal literature, this process is discussed in terms of the “pathological politics of criminal law.” *See, e.g.,* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546 (2001). Criminologists, by contrast, have dubbed this process the “crime control theater.” *See, e.g.,* Timothy Griffin & Monica K. Miller, *Child Abduction, AMBER Alert, and Crime Control Theater*, 33 CRIM. JUST. REV. 159, 160 (2008).

36. For but one of countless examples, see the discussion of the District of Columbia's carjacking legislation in Michael Serota, *Second Looks & Criminal Legislation*, 17 OHIO ST. J. CRIM. L. 495, 507–10, 512–14 (2020).

37. *See, e.g.,* Luna, *supra* note 26, at 719–21 (“To begin with, the escalation of ‘law and order’ politics in recent years has created a one-way ratchet in U.S. governance, churning out an ever-increasing number of crimes and severity of punishments.”); Serota, *supra* note 36, at 498 (“One cause for concern is political: legislators confront hydraulic pressure—stemming from the horrors of the daily news cycle—to pass superfluous statutes of increasing severity that are divorced from the kind of considered judgments of comparative blameworthiness at the heart of retributive proportionality.”).

38. Sara Sun Beale, *What's Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 23 (1997) (quoting HOWARD MARGOLIS, *DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES* 5 (1996)).

39. *See, e.g.,* NAT'L RSCH. COUNCIL, *supra* note 9, at 90 (finding that “consideration of social science evidence has had little influence on legislative policy-making processes concerning sentencing and punishment in recent decades. The consequences of this disconnect have contributed substantially to contemporary patterns of imprisonment.”); BARKOW, *supra* note 34, at 1 (“We do not rely on experts or use studies and rational assessment to minimize crime.”).

findings on just how ineffective—and often counterproductive—these expensive tough-on-crime policies were likely to be.⁴⁰

For example, as early as 1995, there existed:

[w]idespread agreement over time and space that alterations in sanctioning policies are unlikely substantially to influence crime rates. In the United States, this was the conclusion of the President's Commission on Law Enforcement and the Administration of Justice (1967), the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects (Blumstein, Cohen, and Nagin 1978), and the National Academy of Sciences Panel on the Understanding and Control of Violent Behavior (Reiss and Roth 1993).⁴¹

In ensuing years, U.S. lawmakers continued to ratchet upward many of our nation's sentencing laws driven by an unflinching belief that greater punitiveness would—by deterring and incapacitating wrongdoers—effectively yield greater public safety.⁴² As the severity of our criminal justice system continued to grow, however, so too did academic research casting doubt on this belief, by demonstrating the diminishing returns and potential negative consequences associated with marginal increases in sentencing severity.⁴³

Based on this research, in 2014, a group of the nation's leading criminal justice academics released a landmark report through the National Research

40. See generally NAT'L RSCH. COUNCIL, *supra* note 9 (describing the historical development of tough-on-crime criminal justice policies and academic research).

41. Beale, *supra* note 38, at 26.

42. See generally NAT'L RSCH. COUNCIL, *supra* note 9, at 89.

43. Consider, for example, that

[t]hree National Research Council studies have examined the literature on deterrence and concluded that insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects (National Research Council, 1978a, 1993, 2012a). Nearly every leading survey of the deterrence literature in the past three decades has reached the same conclusion (e.g., Cook, 1980; Nagin, 1998, 2013b; Doob and Webster, 2003). Despite those nearly unanimous findings, during the 1970s, 1980s, and 1990s the U.S. Congress and every state enacted laws calling for mandatory minimum sentences (Shane-Dubow et al., 1985; Austin et al., 1994; Stemen et al., 2006).

NAT'L RSCH. COUNCIL, *supra* note 9, at 90; see, e.g., Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13 (2011); MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: STRATEGIC THINKING FOR CRIME CONTROL (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/211204.pdf> [<https://perma.cc/7TD2-X4JD>]; ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> [<https://perma.cc/RE75-EWVU>].

Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (“Report”), which highlighted that the assumed relationship between punishment and public safety animating our tough-on-crime sentencing policies was “largely mistaken.”⁴⁴ Restating the consensus scholarly view that had been built upon decades of empirical work, the Report explained that that in most cases, more harshly punishing a crime is unlikely to effectively deter⁴⁵ and constitutes an inefficient approach to preventing crime by incapacitation.⁴⁶ The Report also discussed how our central reliance on enhanced sentencing severity may have wrought a wide range of unwanted social costs,⁴⁷ including *more crime*,⁴⁸ concentrated most heavily on poor communities of color.⁴⁹

In light of these findings, the Report offered two key recommendations. The first was directed to lawmakers:

Given the small crime prevention effects of long prison sentences and the possibly high financial, social, and human costs of incarceration, federal and state policy makers should revise current criminal justice policies to significantly reduce the rate of incarceration in the United States . . . [and] should also take steps to improve the experience of incarcerated men and women and reduce unnecessary harm to their families and their communities.⁵⁰

And the second was directed to academics:

Given the prominent role played by prisons in U.S. society, the far-reaching impact of incarceration, and the need to develop policies that reduce reliance on imprisonment as a response to crime, public

44. NAT’L RSCH. COUNCIL, *supra* note 9, at 89.

45. *Id.* at 90.

46. *Id.* at 131, 143, 146.

47. *Id.* at 7, 288.

48. This stems from the “‘criminogenic’ effects of imprisonment on individuals—that is, the experience of having been incarcerated appears to increase the probability of engaging in future crime.” *Id.* at 193, 288 (citations omitted). And it follows from the reality that 95% of the people who are incarcerated will one day rejoin all of us. Timothy Hughes & Doris James Wilson, *Reentry Trends in the U.S.*, BUREAU OF JUST. STAT., <https://www.bjs.gov/content/pub/pdf/reentry.pdf> [<https://perma.cc/NW6J-NRCC>] (Apr. 14, 2004); *see also* Leipold, *supra* note 6, at 1586 (“Research supports the common-sense notion that spending years in very close quarters with other convicted felons has a criminogenic effect, particularly when more dangerous inmates are mixed in with less dangerous ones. Longer sentences also increase the difficulties of reentry after release, as family and community ties, connections to the job market, and the development of job skills are increasingly frayed by time spent behind bars.” (footnote omitted)).

49. NAT’L RSCH. COUNCIL, *supra* note 9, at 5 (“[T]he effects of harsh penal policies in the past 40 years have fallen most heavily on blacks and Hispanics, especially the poorest.”); *id.* at 340.

50. *Id.* at 9, 343.

and private research institutions and statistical agencies should support a robust research and statistics program commensurate with the importance of these issues.⁵¹

To some extent, each of these audiences has been responsive to their respective calls. Criminal justice issues are receiving increasing amounts of attention in federal and state governments, which has yielded some meaningful policy achievements and lower incarceration rates in a majority of states.⁵² And academia continues to produce an ever-increasing supply of criminal justice research.⁵³ But the significance of our nation's criminal justice policy achievements, as well as their impact on prison rates, is easy to overstate.⁵⁴ And the influence of academic research on government decision-making on criminal justice issues remains an open question.⁵⁵

Given the increasing political interest in criminal justice reform, one can ask why academic research doesn't receive greater attention or have more influence on government decisions. In large part, this seems explicable in terms of political process; there's little question, for example, that the same tough-on-crime pathologies of yesteryear are alive and well in the present moment.⁵⁶ That said, it also seems clear that academics on the whole could

51. *Id.* at 11.

52. *See, e.g.*, Barkow, *supra* note 3, at 2626 (“[M]ore than half the states have lowered their incarceration rates . . .”).

53. *See, e.g.*, Leipold, *supra* note 6 (compiling relevant literature).

54. Consider, for example, Rachel Barkow's recent snapshot from FRANKLIN ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (2020):

Although more than half the states have lowered their incarceration rates, which is good, sixteen states report an increase in the number of prisoners in 2016 as compared to 2007. Moreover, if we look at the states that have lowered their prison populations, that decrease is actually pretty small when you compare it to the prison buildup that took place before that. There was an increase of seventy-seven percent between 1972 and 1981, but the decrease, from 2007 to 2016, was only about seven percent. So that's an eleven-to-one differential. So the glass is actually eleven-twelfths empty. The overall decrease was really driven by outliers like California, which was responsible for reducing the number of prisoners—and I'm getting a lot of these stats from Frank's draft—by almost 44,000 people. The other forty-nine states combined reduced it only by 38,000. This is just to give you an outline about how this is not a story of large-scale change happening everywhere.

Barkow, *supra* note 3, at 2626 (footnotes omitted).

55. *See, e.g.*, NAT'L RSCH. COUNCIL, *supra* note 9, at 90 (“[C]onsideration of social science evidence has had little influence on legislative policy-making processes concerning sentencing and punishment in recent decades.”).

56. *See, e.g.*, Blumstein, *supra* note 2, at 2651–52; Roxanna Asgarian, *The Controversy Over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained>

do a better job of making their work accessible to criminal justice decisionmakers.⁵⁷

This is most obvious on the level of communication. For example, scholarly writing often presumes a preexisting knowledge base, familiarity with jargon, and patience for verbosity that many outside of academia lack.⁵⁸ But an even greater challenge is that criminal justice scholarship offers conclusions (and to the extent they're provided, policy recommendations) that are frequently pitched in the most general and universal terms possible—whereas criminal justice decisions are by their nature narrow and specific.

Consider one illustration of this disjunction: although scholars typically focus on the conceptual “U.S. criminal justice system,” or the very real but practically distinct “federal criminal justice system,” it is our *state* and *local* criminal justice *systems* that deal with the vast majority of crime and which are principally responsible for mass incarceration.⁵⁹ But even talking about ways to improve “state and local criminal justice systems” can be misleading, because every state and locality operates in its own legal, political, and

[<https://perma.cc/JT4C-WKZL>]; see also Barkow, *supra* note 25, at 1971 (“[In the future,] [t]here will be new drugs that spread through neighborhoods, the next heroin or crack or PCP, and people in public spaces may act erratically or appear threatening. There will be disorder and crime, and people will want immediate action. Politicians—black and white—in turn will seek to appeal to those fearful sentiments.”).

57. See Erik Luna, *Preface*, in 1 ACAD. FOR JUST., REFORMING CRIMINAL JUSTICE, at xvi (Erik Luna ed., 2017), <https://law.asu.edu/centers/academyforjustice/report> [<https://perma.cc/S4XQ-49S9>] (“Although some academics have participated in reform discussions, their engagement has tended to be intermittent, addressing discrete issues as they arise in individual venues. Moreover, much of the academic scholarship that might inform the debate remains inaccessible to policymakers and reform proponents.”).

For one notable exception, see the Academy for Justice’s accessible four-volume report on the current state of criminal justice scholarship. 2 ACAD. FOR JUST., *supra*; 3 ACAD. FOR JUST., *supra*; 4 ACAD. FOR JUST., *supra*.

58. See, e.g., Luna, *supra* note 57, at xvi (“[A]cademic scholarship is inaccessible in the sense that it is dense, filled with jargon, and, as a general rule, painful to read and unfriendly to normal human beings.”); see also Michael Serota, *Intelligible Justice*, 66 U. MIA. L. REV. 649, 657 (2012) (discussing metrics for evaluating accessibility of judicial writing).

59. On the differences between federal and state criminal justice systems, see ALEXANDRA NATAPOFF, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 71, 72 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (conceptualizing the criminal justice system as a pyramid and arguing that its top “is the world of federal offenses [and] serious cases . . . [in which] rules dominate” and its bottom consists of state and local systems where “offenses are petty and caseloads number in the thousands”). See also Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 315 (1982) (highlighting the importance of “major differences between the federal and state criminal justice systems”).

institutional context—so what makes sense for one state or locality at any given point in time may not for another.⁶⁰

This is not to suggest that scholarship must be targeted in this way to improve criminal justice decisions. Even the most general scholarly contributions can be translated and interpreted to yield important insights and guidance for the criminal justice decisionmakers in a particular jurisdiction. But translating and interpreting academic research can be exceptionally challenging work. And in a political environment where the prerequisites to success—for example, time, objectivity, and expertise—are in scarce supply, one cannot expect that criminal justice decisionmakers will be willing or able to make the necessary investment. So it stands to reason that scholars who undertake the additional steps of translation and interpretation themselves may be more likely to have their ideas considered and—hopefully—acted upon.

That, at the very least, is the hypothesis I'm hoping to test through *Reforming Arizona Criminal Justice (RACJ)*, which is collaborative project between the Academy for Justice and the *Arizona State Law Journal (ASLJ)*. *RACJ* is comprised of eleven accessible law review articles written by some of the nation's leading criminal justice scholars on critical issues of Arizona criminal justice policy. They are:

- (1) Valena E. Beety, *Forensic Evidence in Arizona: Reforms for Victims and Defendants*;
- (2) Douglas A. Berman & Alex Kreit, *Ensuring Marijuana Reform is Effective Criminal Justice Reform*;
- (3) Jenny E. Carroll, *Safety, Crisis, and Criminal Law*;
- (4) Michele Deitch, *Raising Arizona's Commitment to Health and Safety: The Need for Independent Oversight of Arizona's Prison System*;
- (5) Henry F. Fradella & Christine S. Scott-Hayward, *Advancing Bail and Pretrial Justice Reform in Arizona*;
- (6) Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*;
- (7) Tamara Rice Lave, *Arizona's Sex Offender Laws: Recommendations for Reform*;

60. See, e.g., John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013) (reviewing ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2011)) (“[T]he criminal justice ‘system’ in the United States . . . is not a ‘system’ at all, but rather a chaotic swirl of local, county, state, and (less frequently) federal actors, all with different constituencies and incentives.”); Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 56–57 (2018).

- (8) Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*;
- (9) John F. Pfaff, *The Incentives of Private Prisons*;
- (10) Cassia Spohn, *Reforming Sentencing Policies and Practices in Arizona*; and
- (11) Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for a Clean Slate*.

Each of the articles that comprise *RACJ* offers an intimate look into Arizona law, provides an overview of relevant academic research, and proposes concrete recommendations for reform.⁶¹ Together, these articles address a broad spectrum of topics across all major stages of the criminal process, with a particular eye toward the most pressing and salient issues of criminal justice reform in Arizona. Through these contributions, *RACJ* demonstrates why Arizona is an ideal laboratory for this kind of scholarly experimentation: although the state has one of the highest incarceration rates in America, Arizona also appears to be more resistant to criminal justice reform efforts than other jurisdictions of similar size, resources, and political orientation. In so doing, these contributions do more than just offer general directional encouragement—such as, “Arizona should punish less” or “invest more money in prison programming.” Rather, they offer concrete guidance on how Arizona (and its localities) might chart a realistic path forward on a diverse set of criminal justice issues.

While the policy case for implementing this kind of criminal justice reform project in Arizona is clear from the articles, it’s worth briefly noting a few other factors motivating the creation of *RACJ*. The first is personal: this project is the product of numerous conversations with criminal justice stakeholders in Arizona, during which it became clear that there is a marked need for research in a state where written policy analyses of criminal justice issues are few and far between. This is in stark contrast to the situation in many other states, as well as my own experience formulating legislative

61. In this sense, *RACJ* is inspired by the four-volume report, *Reforming Criminal Justice*, which was directed and edited by my colleague Erik Luna, the Academy for Justice’s Founder and Faculty Director. See ACAD. FOR JUST., *supra* note 57. That report is comprised of more than fifty accessible chapters addressing all major aspects of the criminal justice system written by leading scholars drawn from across academia. *Id.* In compiling these chapters, the report seeks “to increase both professional and public understanding of the subject matter, to facilitate an appreciation of the relevant scholarly literature and the need for reform, and to offer potential solutions. . . .” Luna, *supra* note 57, at xvii. “By connecting the world of academics with real-world policy and practice,” Luna writes, “it is hoped that the report will help bridge the wide gap between scholarship on the books and the reform of criminal justice on the ground.” *Id.* These same ideals drive this (albeit far less ambitious) Arizona-focused project.

recommendations on criminal justice issues in the District of Columbia on behalf of the D.C. Criminal Code Reform Commission (CCRC)—a non-partisan, independent government agency established by the D.C. Council.⁶² During my six years with the CCRC, even comparatively minor policy proposals were informed by the current state of academic research and accompanied by a detailed written analysis of relevant national legal trends. So it was with great surprise that upon moving to Phoenix to teach at Arizona State University's Sandra Day O'Connor College of Law, I discovered that criminal justice reform proposals in Arizona rarely have meaningful written work product to support them. Hopefully this project will constitute a small step toward remedying that.

Another important contributing factor is a generous grant by the criminal justice reform organization *FWD.us*, which offered to support this project without any limitations on or preconditions about what research would be produced. In that regard, the selection of all contributing authors and topics was based upon my independent judgment, aided by and in consultation with my extraordinary colleagues at the Academy for Justice.

Finally, this project could not have been realized without the exemplary work of two Editors-in-Chief of the *ASLJ*—Delilah Cassidy (2020–2021) & Sarah Pook (2019–2020)—as well as the journal's committed staff. Aside from providing outstanding editorial work during a global pandemic, a number of *ASLJ* editors participated in legal research fellowships, through which they provided interested authors with introductory research on and analysis of Arizona law. For those authors who received them, these memoranda were incredibly helpful starting points for their written contributions. The Academy for Justice is grateful for the *ASLJ*'s role in making this project possible.

62. See *Mission*, D.C. CRIM. CODE REFORM COMM'N, <https://ccrc.dc.gov/page/ccrc-mission> [<https://perma.cc/3V8Y-YF7E>].