

“Reforming Criminal Justice”

The report is divided into four volumes, each covering a broad topic of criminal justice: criminalization, policing, adjudication, and punishment. Each volume is subdivided into chapters covering specific topics within the criminal justice reform movement, and there are 55 chapters in total.

The bulk of Volume 1 analyzes various issues that arise under the general heading of “criminalization,” conceived very broadly. The subjects include the overuse of criminal law, either in general (Husak) or in the federal system (Smith), as well as the abuse of low-level offenses (Natapoff). Likewise, criminalization embraces questions raised by particular substantive crimes and their reform, such as the connection between drug prohibition and violence (Miron), the legalization of marijuana (Kreit), and the modification of sexual offenses (Weisberg). The volume also considers issues related to particular instruments and organizations involved in crime and violence, namely, firearms (Zimring) and gangs (Decker). Moreover, criminalization often implicates borders—sometimes quite literally, as when American criminal justice is invoked to serve immigration goals (Chacón) or applied to crimes committed outside of the United States (O’Sullivan). Volume 1 also examines two special categories of offenders—juveniles (Feld) and individuals with mental disorders (Morse)—and the litany of issues raised by their treatment throughout the criminal process.

Volume 2 examines some of the most critical issues in policing today, beginning with the overarching challenges of ensuring accountability through democratic mechanisms (Ponomarenko & Friedman) and providing remedies for constitutional violations (Harmon). The volume then turns to specific practices by law enforcement. These include the power to stop and frisk individuals in public spaces (Fradella & White), which is a key component of a new style of policing focused on, among other things, aggressive enforcement of minor crimes (Fagan). Much of the underlying debate concerns the role that race plays in police decisions to detain, question, and search particular individuals (Harris), sometimes without even triggering constitutional scrutiny (Carbado). Likewise, issues of race have had a profound impact on recent controversies over police uses of force (Richardson). Other concerns result from the advance of modern technology, such as police access to computer databases (Slobogin). Some problems, however, have long existed in law enforcement: extracting confessions through police interrogation (Leo), identifying suspects by eyewitness testimony (Wells), and obtaining evidence from informants or cooperating witnesses (Richman).

Volume 3 considers some key aspects of criminal adjudication, including the historic but still mysterious institution of the grand jury (Fairfax) and the underappreciated decision to detain a defendant prior to trial (Stevenson & Mayson). The most powerful actor in the process, the prosecutor, has a complex role but often lacks full information and external input (Wright). Among other things, the prosecutor controls plea bargaining—a practice that dominates the criminal justice system (J. Turner)—in the absence of binding guidelines for prosecutorial decision-making (Pfaff). In turn, defense counsel is often charged with representing a staggering number of indigent defendants but without adequate funding (Primus). The ideal of an adversarial process may be undermined further by questionable restrictions on pretrial discovery (Brown) and the use of forensic evidence found to be scientifically unsound (E. Murphy). These

and other issues have contributed to the phenomenon of wrongful convictions of innocent individuals (Garrett). Additional problems may implicate important values besides accuracy, such as racial equality in criminal adjudication (Butler) and consideration of crime victims' interests (Cassell). A thorough discussion must also consider what occurs after trial, especially the correction of errors on appeal (King), or what might happen in lieu of the conventional trial process, such as the use of problem-solving courts (Boldt).

Volume 4 begins with three traditional rationales for punishment—retribution (J. Murphy), deterrence (Nagin), and incapacitation (Bushway)—and the failures of modern sentencing under these theories. The resulting mass incarceration of millions of people calls for new strategies (Clear & Austin), such as well-informed risk assessments in sentencing to gauge the likelihood of recidivism (Monahan). The volume then considers two sentencing schemes typically associated with incarceration: sentencing guidelines (Berman) and mandatory minimums (Luna). Some jurisdictions also retain the ultimate sanction—capital punishment (Steiker & Steiker). These schemes have raised numerous concerns, including racial disparities in sentencing (Spohn). Other approaches, such as community punishments (Tonry) and economic sanctions (Colgan), may avoid incarceration but not without challenges. Turning to confinement and release, a lingering question is whether prison rehabilitation programs can reduce recidivism (Cullen). Other critical issues include the deplorable state of prison conditions (Dolovich), including particular problems faced by prisoners with disabilities (Schlanger), and the prospect of releasing older prisoners (Millemann, Bowman-Rivas & Smith). All of these topics implicate the reentry of former inmates into society (S. Turner). For many convicted individuals, the biggest impediments to a law-abiding life are the collateral consequences of conviction (Chin), including certain registration and notification requirements (Logan). For other offenders, however, the only hope lies in an act of clemency (Osler).

The 55 chapters are summarized as follows:

VOLUME 1: Introduction and Criminalization

Overcriminalization (Douglas Husak)

Legal philosophers have thought long and hard about the limits of the substantive criminal law and the principles that should be employed to constrain it. The attempt to formulate and apply these principles is a small but important part of an effort to retard the phenomenon of overcriminalization. Regardless of their political ideology, most commentators agree that the tendency to criminalize too much and to punish too many are problems from which the United States currently suffers. Despite this near consensus, concrete proposals to implement a theory of criminalization tend to be embraced or resisted depending upon the socioeconomic class of defendant they would be expected to benefit. Like much else in contemporary politics, specific reforms seem to be stalled on partisan grounds and are not evaluated on their merits.

Overfederalization (Stephen F. Smith)

Since the 1960s, Congress has steadily expanded the crime-fighting reach of the federal government. Unfortunately, the constant drumbeat to “federalize” criminal law by passing more

federal statutes, ratcheting up already severe federal punishments, and expanding the federal prison population has accomplished precious little in terms of public safety. The failed drug war—which has left the nation with a federal prison population bursting at the seams, and a drug problem that has never been worse—proves as much. The number and scope of federal criminal statutes should be drastically reduced, and the definition of federal crimes tightened and modernized, to limit federal enforcement to offenses that are of peculiar concern to the federal government and offenses that defy adequate response within the state system.

Misdemeanors (Alexandra Natapoff)

With over 10 million cases filed each year, vastly outnumbering felonies, the petty-offense process is how most Americans experience the criminal justice system. Characterized largely by speed, informality, and a lack of regulation and transparency, the misdemeanor system generates millions of criminal convictions as well as burdensome punishments that affect employment, housing, education, and immigration. It is also a powerful and problematic governance institution in its own right, producing thousands of wrongful convictions, contributing heavily to the system's racial skew, and regressively taxing its low-income subjects in order to fund itself. Reform efforts should begin by shrinking this enormous pipeline into the criminal system.

Drug Prohibition and Violence (Jeffrey A. Miron)

Drugs and violence might be related because drug use causes violent behavior, because drug trafficking is inherently violent, or because prohibition creates violence by forcing the drug market underground. The main reason for a drugs-violence connection is the third of these three possibilities: Enforcement of drug prohibition increases violence.

Marijuana Legalization (Alex Kreit)

After decades of waging war on marijuana, a majority of Americans have come to see prohibition as a costly failure and believe that legalization is a better option. Since 2012, eight states have passed marijuana-legalization laws. To date, however, legislatures have mostly remained on the sidelines. Every state to legalize marijuana has done so via ballot measure. Legislators should not miss the opportunity to shape this important issue, especially because the details matter a great deal when it comes to marijuana legalization.

Sexual Offenses (Robert Weisberg)

While American penal codes punish a wide variety of sexual offenses, reform efforts and their controversies have focused on the core crime of rape, and in particular on the principle of consent. Over many decades, definitions of rape have moved from egregiously pro-defendant rules requiring strong resistance from complainants to somewhat more nuanced notions of force and ultimately, in many states, to a deceptively simple-looking rule defining rape as sex without consent. Lawmakers and commentators have argued for pushing the line farther to require “affirmative consent,” but that raises proof problems. As a result, at least in the near term and at least outside the college context, the equilibrium might well—and arguably should—settle at the nonconsent point in the continuum.

Firearms and Violence (Franklin E. Zimring)

Policy discussions about crime and about firearms control overlap in the United States more substantially, and are debated more passionately, than in any other nation. At either extreme in

the debate about guns in the United States one hears confident assertions that gun policy is intimately connected to the volume of crime in the United States and its costs. Those who support restrictions blame the proliferation of firearms for the high rates of death and injury associated with crime in the United States, while those who oppose restrictions argue that the many millions of firearms owned, carried and fired by American citizens are a major force for crime prevention.

Gangs (Scott H. Decker)

Interest in gangs by law enforcement, policymakers and the public has grown over the past three decades. Gangs are violent threats not only to the public, but also inside prisons, where they exert control of inmates and distribution of illegal goods and services. Structural, group processes and risk-factor explanations hold promise for understanding the causes of gangs and thereby crafting more-effective responses. Solid evaluation evidence indicates that coordinated responses to gangs that include both law enforcement and the provision of employment opportunities and training have an impact on reducing gang membership.

Criminalizing Immigration (Jennifer M. Chacón)

Over the past two decades, criminal justice systems at both the federal and the state level have been repurposed to serve immigration enforcement goals. Many significant problems in the criminal justice system have been both mirrored in and amplified by this criminalization of immigration. Generous immigration reform and the decriminalization of many migration-related offenses are needed to address the resulting problems comprehensively. But more limited reforms within state and federal criminal enforcement systems can help mitigate some of the biggest problems in the current system. This chapter recommends that all law enforcement agencies develop legal guidelines and training that discourage reliance on racial profiling in immigration policing, that states and localities prioritize their own state public safety goals over cooperation with federal immigration enforcement efforts when such efforts undermine those goals, and that state and local laws and practices be revised so as to send appropriate signals of leniency to immigration adjudicators and enforcement agents.

Extraterritorial Jurisdiction (Julie Rose O’Sullivan)

Assume that a Russian citizen hacked into the e-mail of the Democratic National Committee and then provided masses of stolen DNC e-mails to WikiLeaks for publication. This type of unauthorized access and release is unlawful in many countries. But where was the crime “committed”? At the hacker’s keyboard in Russia? Where the DNC’s servers are? Where WikiLeaks’ servers are? Or perhaps where the actual and intended effect of the criminal activity was felt? If it is concluded that this criminal activity took place outside the territory of the United States—that is, extraterritorially—further critical questions include whether Congress has the constitutional power to regulate such conduct, whether Congress intended the anti-hacking statute to apply extraterritorially, and what, if any, due process limits exist on such exercises of criminal jurisdiction. These questions have increasing importance in a world where criminal activity and criminals regularly cross national borders.

Mental Disorder and Criminal Justice (Stephen J. Morse)

The criminal law treats some people with severe mental disorders differently at every stage of the criminal process and such people often have special needs in the system. People with severe

mental disorders can be treated more humanely at every stage of the criminal justice system without compromising the system's retributive and crime-prevention functions. Various prescriptions for how to accomplish this goal are offered. In particular, mental health services need substantial improvement in jails and prisons.

Juvenile Justice (Barry C. Feld)

During the 1980s and 1990s, states' juvenile justice policies shifted from a nominally rehabilitative system toward a more punitive and criminalized one. Punitive pretrial detention and delinquency dispositions disproportionately affected minority youths. Notwithstanding juvenile courts' increasingly penal convergence with criminal courts, states provide delinquents with less adequate procedural safeguards than those afforded adults. Adolescents' developmentally compromised ability to exercise rights—*Miranda*, competence to stand trial, waiver of counsel, denial of jury—require greater procedural safeguards in a more legalistic punitive system. Get Tough Era laws transferred more and younger youths to criminal courts for prosecution as adults, emphasized offenses over offender characteristics, and shifted discretion from judges to prosecutors making charging decisions. Criminal court judges sentence transferred youths similarly to other adult offenders. Despite a two-decade drop in serious youth crime, most punitive laws remain in effect. The Supreme Court in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama* relied on developmental psychology and neuroscience research, emphasized adolescents' diminished responsibility, and limited the harshest sentences. States require a more consistent strategy to recognize youthfulness as a mitigating factor—a Youth Discount.

VOLUME 2: Policing

Democratic Accountability and Policing (Maria Ponomarenko and Barry Friedman)

Often when people talk about accountability in policing, they are focused on “back-end” accountability, which kicks in after something has gone wrong. What is needed in policing is accountability on the “front end”—which means that the public gets to have a say in what the rules for policing should be in the first place. Having front-end, democratic rules for policing helps to ensure that policing practices are consistent with community values and expectations, and can help build trust and legitimacy between the community and the police.

Legal Remedies for Police Misconduct (Rachel A. Harmon)

Although federal law authorizes private citizens and public officials to challenge constitutional violations by the police in several ways, Supreme Court decisions have made it difficult to exclude criminal evidence, receive damages, impose reforms on departments, or criminally punish officers in response to misconduct. State and local remedies for police misconduct exist, but communities often distrust them. As a result, ironically, officers can feel overregulated at the same time others think police are not sufficiently accountable for misconduct. Policymakers and legislators cannot easily remove some of the obstacles to using litigation to improve policing. Nevertheless, they can promote policing practices that protect rights and build community trust by making it easier for departments to adopt reforms, by encouraging community input into

police policymaking, and by supporting research, data collection, and transparency. In these ways, policymakers and legislators can improve police accountability, even as the Court makes it harder to use legal remedies to do so.

Stop-and-Frisk (Henry F. Fradella and Michael D. White)

Although stop-and-frisk has a long history as a policing tactic rooted in particularized, reasonable suspicion of criminal activity, several U.S. jurisdictions morphed stop-and-frisk into a broad and sometimes aggressive crime-control strategy. The recent experiences in many jurisdictions demonstrate a strong disconnect between constitutionally sanctioned principles and policing practice. Arguably, stop-and-frisk has become the next iteration of a persistent undercurrent in racial injustice in American policing. Although stop-and-frisk has a legitimate place in 21st-century policing, changes must be made to prevent officers from engaging in racially biased or otherwise improper and illegal behavior during stops of citizens.

Race and the New Policing (Jeffrey Fagan)

Several observers credit nearly 25 years of declining crime rates to the “New Policing” and its emphasis on advanced statistical metrics, new forms of organizational accountability, and aggressive tactical enforcement of minor crimes. This model has been adopted in large and small cities, and has been institutionalized in everyday police-citizen interactions, especially among residents of poorer, often minority, and higher-crime areas. Citizens exposed to these regimes have frequent contact with police through investigative stops, arrests for minor misdemeanors, and non-custody citations or summons for code violations or vehicle infractions. Two case studies show surprising and troubling similarities in the racial disparities in the new policing in vastly different areas, including more frequent police contact and new forms of monetary punishment. A set of institutional and statutory reforms can regulate and mitigate the harms of this policing regime to avoid compounding other social and economic deficits.

Racial Profiling (David A. Harris)

Racial profiling is a real, measureable phenomenon; and it causes real harm to people, and to public safety. It is not just a matter of concern to African-Americans, Latinos, and other people of color, who feel the sting of the practice directly. It is an issue for all Americans who care about fairness, justice, and public order—in short, everyone.

Race and the Fourth Amendment (Devon W. Carbado)

Few people, including lawyers, journalists, legislators, educators, and community organizers, understand the enormously important role Fourth Amendment law plays in enabling the very social practices it ought to prevent: racial profiling and police violence. For more than three decades, the Supreme Court has been interpreting the Fourth Amendment to empower the police and limit our freedoms and liberties. Nowhere is this more apparent than in a specific body of Fourth Amendment law that determines whether the Fourth Amendment even applies. The Supreme Court’s conclusion that a range of investigation tactics do not trigger the Fourth Amendment means that police officers can follow us, question us, ask us for our identification or permission to search without any evidence of wrongdoing. These and other forms of police interactions expose all of us, but particularly African Americans, not only to ongoing police surveillance, contact, and social control but to the possibility of violence.

Police Use of Force (L. Song Richardson)

Racial disparities in police uses of force persist. Sometimes these disparities are justified because police are simply responding to objectively threatening conduct. Other times these disparities are the result of police racism. But “racial anxiety” can also enable racial disparities in police uses of force even in the absence of racial animus and even when people of color are acting identically to their white counterparts. Concerns about police racism can influence the behaviors and perceptions of officers and people of color in ways that increase the potential for violence. Consideration of racial anxiety highlights the necessity of transforming policing in order to build community-police trust.

Policing, Databases, and Surveillance (Christopher Slobogin)

Databases are full of personal information that law enforcement might find useful. Government access to these databases can be divided into five categories: suspect-driven; profile-driven; event-driven; program-driven and volunteer-driven. In addition to any restrictions imposed by the Fourth Amendment (which currently are minimal), each type of access should be subject to its own regulatory regime. Suspect-driven access should depend on justification proportionate to the intrusion. Profile-driven access should likewise abide by a proportionality principle but should also be subject to transparency, vetting, and universality restrictions. Event-driven access should be cabined by the time and place of the event. Program-driven access should be authorized by legislation and by regulations publicly arrived-at and evenly applied. Information maintained by institutional fiduciaries should not be volunteered unless necessary to forestall an ongoing or imminent serious wrong.

Interrogation and Confessions (Richard A. Leo)

The most important legal and policy reforms for achieving both the elicitation (by police) and admission into evidence (by trial courts) of voluntary and reliable confession evidence are: mandatory full electronic recording of all police interviews and interrogations; improved police training and practice on pre-interrogation investigative procedures; a shift from guilt-presumptive accusatory interrogation techniques that prioritize eliciting confessions above all else to more professional investigative interviewing approaches that prioritize obtaining accurate information above all else; and pretrial reliability hearings to prevent false and unreliable confession evidence from being admitted into evidence at trial and leading to wrongful convictions.

Eyewitness Identification (Gary L. Wells)

Mistaken eyewitness-identification testimony is at the heart of a large share of the convictions of people whose innocence was later proven using forensic DNA testing. A considerable amount is now known about how to lower the rate of mistaken identifications through the use of better procedures for conducting identification. But a large share of jurisdictions have still not made significant reforms, and most courts are still using an approach that is largely unsupported by scientific findings.

Informants and Cooperators (Daniel Richman)

The police have long relied on informants to make critical cases, and prosecutors have long relied on cooperator testimony at trials. Still, concerns about these tools for obtaining closely

held information have substantially increased in recent years. Informants and cooperators have figured prominently in studies, spurred by DNA exonerations of wrongful convictions. In addition to these reliability concerns is an increasing recognition of broader social costs. The challenge is how to regulate how informants and cooperators are used while still recognizing the need to use them.

VOLUME 3: Pre-trial and Trial Processes

Grand Jury (Roger A. Fairfax, Jr.)

The grand jury's dual role of "sword" (as a potent investigative tool to combat crime) and "shield" (as an ostensible protector of defendants' rights) should make it a celebrated feature of our criminal justice system. However, today's grand jury is widely criticized as a vestige of a time before professional prosecutors and additional safeguards were available to filter meritless allegations. Also, many critics believe that the grand jury's "shield" role has all but receded and has given rise to an era in which the grand juries rarely, if ever, refuse to consent to the prosecutor's proposed charges. What remains, many argue, is simply an investigative tool of the prosecutor masquerading as a protection for the defendant. A number of thoughtful reforms have the potential to revitalize the grand jury and help reclaim its significance.

Pretrial Detention and Bail (Megan Stevenson and Sandra G. Mayson)

Our current pretrial system is irrational, inefficient and unjust: The dominance of money bail means that wealthy defendants pay for freedom while the poor sit in jail—regardless of the risk each defendant presents. Pretrial detainees account for 95% of the growth in the jail population over the last 20 years. Many of those detained are low-level offenders who cannot post small amounts of bail. Research suggests that this can actually lead to an increase in crime, since even short periods in jail can destabilize lives through loss of employment or housing. The current state of pretrial practice leaves ample room for improvement. To achieve lasting change, reformers should pursue reform strategies that are supported by empirical research.

Prosecutor Institutions and Incentives (Ronald F. Wright)

Criminal prosecutors must do a complex job, one that is crucial to public safety and the quality of justice. Unfortunately, they must do so under circumstances that are tilted toward failure. The typical local prosecutor, working within the current legal framework, must "fly blind" and "fly solo." The prosecutor flies blind because so little information is available about overall trends in case processing, prevention programs, corrections costs, and voter concerns about public safety. It is equally troubling that prosecutors fly solo. Judges, police, defense attorneys, and community groups have relatively little influence over the diversion, charge selection, and case resolution choices of individual prosecutors.

Plea Bargaining (Jenia I. Turner)

Plea bargaining dominates the criminal process in the United States today, yet it remains highly controversial. Supporters defend it on the grounds that it expedites cases, reduces processing costs, and helps authorities obtain cooperation from defendants. But critics contend that it can

generate arbitrary sentencing disparities, obscure the true facts, and even lead innocent defendants to plead guilty. Lack of transparency and limited judicial involvement frustrate attempts to correct flaws in the process.

Prosecutorial Guidelines (John F. Pfaff)

Reformers are increasingly aware of the central role prosecutors have played in driving up the U.S. prison population. Yet few if any reform efforts have sought to directly restrict prosecutorial power. Reformers should design binding charging and plea bargaining guidelines to limit who prosecutors can charge, what they can charge them with, and what sentences they can demand at trial or during plea bargaining. Such guidelines could advance public safety, reduce the role of race and other impermissible factors, and help smartly reduce our prison population size.

Defense Counsel and Public Defense (Eve Brensike Primus)

Public-defense delivery systems are grossly inadequate. Public defenders are routinely forced to handle thousands of cases per year even though the American Bar Association says no attorney can effectively handle more than 400 misdemeanors per year. Defenders lack funding for investigation or expert assistance. They aren't adequately trained, and there is little oversight of their work. In many jurisdictions, the public-defense function is not independent of the judiciary or the elected branches, which compromises zealous representation. The result is an assembly line into prison, mostly for poor people of color, with little check on the reliability or fairness of the process. Innocent people get convicted; precious resources are wasted; and the legitimacy of the system is undermined. Effective reforms are only possible if policymakers address how defense delivery systems are structured, whether they are independent, the sources and amount of defense funding, and the adequacy of training and oversight mechanisms.

Discovery (Darryl K. Brown)

All U.S. criminal justice systems have evolved from "trial by surprise" models to systems more focused on finding the truth, and parties are now required to make at least some modest disclosures of certain kinds of evidence before trial. But the rules remain remarkably diverse, and there is nothing close to a standard American model of pretrial criminal discovery. And because trials are now rare—nearly all convictions are the result of a plea bargain—the pretrial stage is the only place in which the adversarial process operates and in which parties can evaluate evidence. Disclosure failures have led to wrongful convictions, and experience shows that risks related to certain disclosures are easily managed. States that still adhere to outdated disclosure policies are encouraged to require more evidence to be exchanged between prosecutors and defense attorneys prior to plea bargaining.

Forensic Evidence (Erin Murphy)

The field of forensic science has come under increasing scrutiny in the past decades. Two blue-ribbon government expert panels declared common methods of forensic science to be scientifically unsound or statistically unsupported. DNA-exoneration cases revealed the pervasive problem of misuse of forensic evidence. And a series of laboratory scandals have called into question both the competence and the integrity of the institutions and actors who deliver forensic findings. A series of systemic changes, including the overdue rejection of some

long-standing methods of forensic science, is the only way to minimize the risk of wrongful conviction and restore faith in the reliability of scientific evidence in the criminal justice system.

Actual Innocence and Wrongful Convictions (Brandon L. Garrett)

The National Registry of Exonerations has documented more than 2,000 individuals who have been exonerated in the United States in just the past 20 years. While in decades past it was thought to be rare if not impossible to convict the innocent, large numbers of exonerations in the U.S. have prompted wholesale re-examination of traditional rules that limited ability to raise new evidence of innocence post-conviction, as well as investigative procedures that did not accurately collect or document evidence.

Race and Adjudication (Paul Butler)

At virtually every step of adjudication—charging, setting bail, plea-bargaining, jury selection, trial, and sentencing—law enforcement officials exercise discretion in ways that disproportionately harm people of color. Studies have shown that African American and Latino defendants are, for example, significantly more likely than white defendants to be arrested on charges that are not prosecutable, to be detained pretrial, and to be wrongly convicted. The Supreme Court has made it very difficult to challenge racial discrimination in the criminal process, effectively silencing a defendant’s claim to equal protection of the law unless “smoking gun” evidence of racist intent can be provided. Given inadequate legal recourse, efforts to reduce racial discrimination in criminal adjudication should focus on limiting contact between people of color and law enforcement officials and constraining those officials’ discretion.

Crime Victims’ Rights (Paul G. Cassell)

Over the last 40 years, a consensus has developed around the country on certain core rights for crime victims. Included in the core are the right to notice of court hearings, to attend court hearings, to be heard at appropriate court hearings, to proceedings free from unreasonable delay, to consideration of the victims’ safety during the process, and to restitution. The current challenge for the country is ensuring that these core rights are fully and effectively implemented and that victims have a means for enforcing these rights. Strengthened enforcement language in state constitutions and, ultimately, perhaps placing victims’ rights in the United States Constitution offer the best prospects for fully protecting crime victims’ interests in the criminal justice system.

Appeals (Nancy J. King)

Three costly and persistent problems plague judicial review in state criminal cases: its failure to correct wrongful convictions, the absence of supervision of lower courts’ handling of certain categories of issues of particular public concern, and unnecessary delay. Suggested reforms include steps to identify and remedy errors that research has shown evade correction, provide appellate vigilance of activity in the lower courts that too often escapes oversight, and reduce delay in appellate processes.

Problem-Solving Courts (Richard C. Boldt)

Problem-solving courts emerged in the last part of the 20th century as a pragmatic response to perceived dysfunction within the criminal justice system. Two of the most prominent examples are drug treatment courts and mental health courts. The research on problem-solving courts

indicates that this approach poses significant risks as well as some potential benefits. Policymakers are encouraged to rely on a “risk-need-responsivity” model that identifies offenders who would benefit most from criminal system-located rehabilitative interventions and identifies the particular interventions that are most likely to reduce reoffending in a given case. Under this model, they should minimize the use of problem-solving courts where the benefits are outweighed by their costs, shift the focus of problem-solving courts from low-level drug offenses and other relatively minor infractions to higher-risk offenders, and adopt procedures for these courts to prevent the collapse of rehabilitative intentions into overly punitive results.

VOLUME 4: Punishment, Incarceration, and Release

Retribution (Jeffrie G. Murphy)

Many scholars and jurists who rightfully deplore the excessive punishments in our system of criminal justice—excessive in both length and cruelty—place the blame for this excess on the influence of retribution and what they view as the vile emotions of anger, hatred, and vengeance that drive retribution. This understanding of retribution is totally mistaken and, indeed, the best corrective for the evils in our present system of punishment is to be found in retribution properly understood. When properly understood, retribution will be seen as grounded not in vengeance but in respect for human dignity and a concept of desert grounded in human dignity.

Deterrence (Daniel S. Nagin)

The criminal justice system in a democratic society serves many vital social purposes. Among the most important is deterring crime. Going back to the pioneering work of the Enlightenment philosopher Cesare Beccaria, deterrence theorists have distinguished between the certainty and severity of punishment. Conventional wisdom, backed by considerable research evidence, is that the certainty of punishment, not its severity, is the more effective deterrent. Further refined, it is the certainty of apprehension not the severity of the ensuing consequences that is the more effective deterrent. This conclusion has several important implications for policy. First, it calls into question the effectiveness of over four decades of U.S. crime-control policy predicated on the premise that lengthy prison sentences are an effective deterrent to crime. Second, according to the revised certainty principle, crime-prevention policy should instead focus on bolstering the certainty of apprehension.

Incapacitation (Shawn D. Bushway)

There are many different purposes of sentencing in criminal law, including incapacitation, which reduces crime by incarcerating criminals. But incapacitation should not be relied on as a primary motivation for a broad-based incarceration regime. Incapacitation cannot be used to justify the current levels of incarceration in the United States; “release valve” policies to reduce the prison population in the short term should focus on releasing individuals who are at lowest risk for offending; and policymakers should be aware of the relative incapacitative effects of different policies, even if their main motives do not include incapacitation.

Mass Incarceration (Todd R. Clear and James Austin)

A bipartisan consensus has developed that the U.S. should reduce the number of people in prison, and most states have proposals on the table to accomplish this aim. The framework known as *The Iron Law of Prison Populations* demonstrates (a) why most of these current proposals will not lead to significant reductions in prison numbers, and (b) how changes in prison entry rates and length of stay can produce significant decreases in incarceration. Current studies give confidence that large declines in the number of people in prison will not endanger the public.

Risk Assessment in Sentencing (John Monahan)

One way to reduce mass incarceration and the fiscal and human sufferings intrinsic to it is to engage in a morally constrained form of risk assessment in sentencing offenders. The assessment of an offender's risk of recidivism was once a central component of criminal sentencing in the United States. In the mid-1970s, however, sentencing based on forward-looking assessments of offender risk was abolished in many jurisdictions in favor of set periods of confinement based solely on backward-looking appraisals of offender blameworthiness. This situation is rapidly changing, however. After a hiatus of 40 years, there has been a resurgence of interest in risk assessment in criminal sentencing. Across the political spectrum, advocates have proposed that mass incarceration can be shrunk without simultaneously jeopardizing the historically low crime rate if we put a morally constrained form of risk assessment back into sentencing.

Sentencing Guidelines (Douglas A. Berman)

For the first three-quarters of the 20th century, there was vast discretion in both state and federal sentencing. There has since been extraordinary evolution in the laws, policies, politics, and practices of sentencing systems nationwide. Though the uneven and often uninspired experiences of the federal system have often cast a negative light on the "guideline model" of sentencing reform, there still is no serious dispute that a well-designed guideline structure provides the best means for the express articulation of sound standards to inform and shape individual sentencing outcomes and to promote transparency and the rule of law throughout a jurisdiction's sentencing system. There are challenges to designing and managing the particulars of an effective guideline sentencing system, but these are challenges that lawmakers should embrace, not avoid.

Mandatory Minimums (Erik Luna)

Mandatory minimum sentencing laws eliminate judicial discretion to impose sentences below the statutory minimum. These laws can produce punishment that is unjust in its disproportionality. Studies have also shown that mandatory minimums are unlikely to reduce future crime. As a practical matter, mandatory minimums transfer sentencing power from judges to prosecutors, who may place unfair pressures on defendants to plead guilty while also distorting the legal framework of separated powers. The laws tend to create sentencing disparities by treating similar offenders differently and different offenders the same. Because of their inflexible nature, mandatory minimums encourage manipulations of the system and even outright deceit. For these and other reasons, policymakers should not create new mandatory minimums or expand existing ones. Instead, officials should limit the scope of these laws, enact mechanisms to prevent unjust application of mandatory minimums, empower correctional or parole authorities to reconsider lengthy sentences, and, ultimately, eliminate many mandatory minimums.

Capital Punishment (Carol S. Steiker and Jordan M. Steiker)

Despite extensive constitutional doctrines regulating capital punishment, state systems are still fraught with arbitrariness, inaccuracy, and unfairness. Although many of the problems are intractable, some can be addressed by improving capital representation, centralizing prosecutorial charging decisions, and limiting the application of the death penalty against people with serious mental illness.

Race and Sentencing Disparity (Cassia Spohn)

Although the overt and widespread racism that characterized the operation of the criminal justice system during the early part of the 20th century has largely been eliminated, racial disparities in sentencing and punishment persist. Research conducted during the past four decades concludes that the continuing racial disparity in incarceration rates and use of the death penalty can be attributed to the policies pursued during the war on drugs and to criminal justice officials' use of race-linked stereotypes of culpability and dangerousness.

Community Punishments (Michael Tonry)

The case for use of community punishments in a rational society is a no-brainer. Compared with confinement in a jail or prison, they are less expensive to administer, less likely to lead to future offending, and more humane. They do less collateral damage to the lives and futures of offenders and their loved ones. They can be scaled to the seriousness of crimes for which they are imposed. When well-managed, well-targeted, and adequately funded, they result in lower reoffending rates. Those are among the reasons why most Western countries use community punishments much more, and imprisonment much less, than do American jurisdictions.

Fines, Fees, and Forfeitures (Beth A. Colgan)

The use of fines, fees and forfeitures has expanded significantly in recent years as lawmakers have sought to fund criminal justice systems without raising taxes. Concerns are growing, however, that inadequately designed systems for the use of such economic sanctions distort criminal justice priorities, exacerbate financial vulnerability of people living at or near poverty, increase crime and jail overcrowding, and even decrease revenue.

Correctional Rehabilitation (Francis T. Cullen)

Beginning in the late 1960s, the rehabilitative ideal suffered a stunning decline, sharply criticized for permitting inequality in sentencing, coercion inside prisons, and treatment programs that did not work to reduce recidivism. The get-tough era that ensued proved to be a policy nightmare, marked by mass imprisonment, the intentional infliction of pain on offenders, and ineffective interventions. A consensus has emerged among elected officials of both parties that reforms are needed that take a more balanced crime-control approach that includes efforts to improve offenders' lives. Two important considerations favor the movement of policy in this direction. First, scientific advances have been achieved that identify a treatment paradigm—the risk-need-responsivity (RNR) model—capable of lowering reoffending. Second, opinion polls show clearly that the public supports offender rehabilitation as a core correctional goal.

Prison Conditions (Sharon Dolovich)

In American prisons, two of the worst pathologies—hypermasculine performance and gang activity—are best understood as strategies of self-help engaged in by people who cannot trust the prison authorities to keep them safe. If we want the people we incarcerate to grow and change,

we need to design and operate the prisons so that people can be in company with others without needing to be constantly afraid. There are several strategies prison administrators can pursue to reduce the threat of violence in men's prisons and provide access to meaningful pursuits that can give individual prisoners a sense of purpose.

Prisoners with Disabilities (Margo Schlanger)

A majority of American prisoners have at least one disability. So how jails and prisons deal with those prisoners' needs is central to institutional safety and humaneness, and to reentry success or failure. Statutory and constitutional law mandate non-discrimination, accommodation, integration, and treatment—but jails and prisons have been very slow to learn the most general lesson of these strictures, which is that officials must individualize their assessment of and response to prisoners with disabilities. What is needed are programs that bridge the wall separating the inside and outside of prison, with respect to record-keeping, personnel, and finances; together, these have the potential to greatly improve care, and the lives and prospects, of prisoners with disabilities.

Releasing Older Prisoners (Michael Millemann, Rebecca Bowman-Rivas, and Elizabeth Smith)

The rising number of older prisoners is a major factor in the nation's exponential prison growth over the last four decades. Many of the older prisoners have redeemed their lives but will die behind bars because of restrictive changes in sentencing and corrections laws. These are America's most expensive prisoners, costing up to or more than \$60,000 per prisoner a year. The continued incarceration of many serves no public-safety purpose; indeed, it undermines public safety by wasting scarce resources, particularly prison beds. Over the last four years in Maryland, judges have implemented a 2012 appellate court decision by approving the negotiated releases on probation of over 160 long-incarcerated lifers. To date, none has been convicted of a new crime other than driving/traffic offenses.

Reentry (Susan Turner)

With an enormous prison population, the United States sees large numbers of individuals going into—and out of—incarceration each year. More than 650,000 leave prison annually, but more than two-thirds are rearrested for a new crime within three years of release. Although there are many reasons offenders return to crime, one aspect gaining notice is the difficulty released prisoners face integrating back into society. Challenges include poor educational achievement, employment difficulties, limited access to mental- and public-health services, housing restrictions, and limited civic and community opportunities.

Collateral Consequences (Gabriel J. Chin)

For many people convicted of crime, the greatest effect will not be imprisonment, but being marked as a criminal and subjected to collateral consequences. Consequences can include loss of civil rights, public benefits, and ineligibility for employment, licenses, and permits—and many are applicable for life. Collateral consequences should be: (1) collected and published, so that defendants, lawyers, judges and policymakers can know what they are; (2) incorporated into counseling, plea bargaining, sentencing and other aspects of the criminal process; (3) subject to relief so that individuals can pursue law-abiding lives, and regain equal status; and (4) limited to those that evidence shows reasonably promote public safety.

Sex Offender Registration and Notification (Wayne A. Logan)

Since the 1990s, U.S. jurisdictions have had laws in place requiring that convicted sex offenders, after their release from confinement, provide identifying information to authorities, which is then made available to community residents in the dual hope that they will undertake safety measures and that registrants will be deterred from reoffending. The laws remain popular with the public and political actors alike, but have long been criticized for being predicated on empirical misunderstandings, most notably that sex offenders as a group recidivate at higher rates than other offenders and that most sexual offending involves strangers. Today, moreover, a considerable body of social-science research calls into question whether registration and notification achieve their avowed public safety goals.

Clemency (Mark Osler)

Clemency is deeply rooted in the history of Western civilization. American clemency systems are as varied as the jurisdictions themselves. While the contemporary federal system is a poor exemplar, there are worthwhile examples to be found in the states and in a federal experiment in the wake of the Vietnam War. Commonalities exist between the higher-functioning processes, including the use of a horizontal and deliberative process rather than one that is vertical and rooted in sequential review.