

Preface

*Erik Luna**

Reforming Criminal Justice is a four-volume report authored and reviewed by leading scholars in criminal law and other disciplines. The contributions to this report describe the need for reform in particular areas of American criminal justice and suggest policy recommendations to achieve such change. The ultimate goal is to fortify reform efforts currently afoot in the United States with the research and analysis of respected academics. In this way, the report hopes to increase the likelihood of success when worthwhile reforms are debated, put to a vote or otherwise considered for action, and implemented in the criminal justice system. The following offers a brief overview of the project.

SOME BACKGROUND

Criminal justice reform has been a hot political topic for several years now, bringing together otherwise strange bedfellows in a common cause. The proponents of reform come at the issue from diverse political and philosophical positions but still agree that something needs to be done about criminal justice in America. One example of this movement's multifaceted, bipartisan nature is the Coalition for Public Safety, a criminal justice reform partnership composed of the ACLU, Americans for Tax Reform, the Center for American Progress, the Faith & Freedom Coalition, FreedomWorks, the Leadership Conference Education Fund, the NAACP, and Right on Crime. With the support of a diverse group of funders (e.g., Koch Industries and the MacArthur Foundation), the coalition has focused on, among other things: ending overcriminalization and mass incarceration; addressing race- and class-based disparities in criminal justice; ensuring fairness in the criminal process for defendants and victims alike; emphasizing rehabilitation and treatment programs; and facilitating reentry of former inmates into society. Those involved in the budding movement may have different motivations—political, economic, social, religious—yet they all subscribe to basic reforms.

This dynamic was on display at a bipartisan summit on criminal justice reform in November 2015, organized and sponsored by the Charles Koch Institute. The event brought together prominent figures in the reform movement—policymakers, community activists, experts from think tanks and nonprofits, elected officials, religious leaders, business executives, and others—

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to discuss the problems of criminal justice and to propose real, meaningful, lasting solutions. The summit was remarkable not only in its breadth and depth, but also in its inclusiveness, drawing in people from across the ideological spectrum. The sentiment of this event—and, arguably, the entire criminal justice reform movement—might be summed up in the words of the great abolitionist Frederick Douglass: “I would unite with anybody to do right; and with nobody to do wrong.”¹

As a participant in the summit, I was struck by the underrepresentation of one group: academics. The small number of scholars in attendance illustrated the lack of academic involvement in the reform movement more generally. 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.

There is something odd about this, since criminal justice scholarship is fundamentally all about reform. Academics spend most of their time studying, critically analyzing, and writing at length about crime, punishment, and processes, with an eye toward providing greater understanding of the criminal justice system and proposing changes to the system. Part of the problem is that academic authors write to themselves—that is, to other academics—not to the public or even to policymakers, legal professionals, or policy analysts interested in criminal justice. As a result, academic 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. But oftentimes scholarly works are physically inaccessible as well—published by academic presses and journals and buried in libraries or hidden behind paywalls.

Immediately following the 2015 summit, a conversation began on whether and how academics could be more involved in criminal justice reform. Eventually, a national academic alliance was proposed to address critical issues of criminal justice in the United States today. The group’s principal work-product would be something akin to a blue-ribbon commission report, containing expert analysis and recommendations of distinguished researchers. The group’s title, Academy for Justice, carries two meanings: [1] the work-product is from the “academy” (i.e., the professoriate) in its attempt to contribute to criminal justice reform; and [2] the endeavor might lead to the creation of an “academy” (i.e., a real or virtual institution) concerned with justice issues.

1. Frederick Douglass, *The Anti-Slavery Movement, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850-1860*, at 352 (Philip S. Foner ed., 1950).

Although the Academy for Justice may well become a platform for future projects, for now at least, it is simply a vehicle for the report. This venture is hardly trivial, however. The cause is a noble one: advancing justice in the United States through the reform of criminal laws and procedures. In particular, the report seeks to make the relevant law and literature accessible to those who might use this information and analysis in discussing and implementing criminal justice reforms. By connecting the world of academics with real-world policy and practice, 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.

Thanks to a generous grant from the Charles Koch Foundation, the Academy for Justice project began in earnest in October 2016. Broken down into volumes with individual chapters, this report takes on some of the most pressing issues in criminal justice today—covering topics within the areas of criminalization, policing, pretrial and trial processes, sentencing, incarceration, and release—with every chapter authored by a top scholar in the relevant field. The goal of each chapter is 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 to the problems raised by the underlying topic.

The report's primary audience includes those groups and individuals who can effect change either directly or indirectly: lawmakers, executive branch officials, other elected and appointed policymakers, judges and other criminal justice actors, think tanks and nonprofit organizations, religious groups, business leaders, community activists, and other professionals interested in criminal justice reform. As a simple example, one might imagine a legislative aide thumbing through the report to find specific sections or recommendations as background for an upcoming hearing or to prepare a draft bill. The report is also intended to be accessible to the general public—accessible in the dual sense that it is readily available to the public and that the prose is not loaded with legalese or its scholarly cousin (academese).

Each chapter runs between 5,000 and 15,000 words in length (with a couple of exceptions²) and is intended to be easily understood and used by professional and lay readers alike. The chapters were edited to be thoughtfully organized and free of unnecessary nuance and jargon. In writing their chapters, the authors were encouraged to draw upon their prior works—such as pieces in law reviews, peer-reviewed journals, and academic books—since originality of

2. The exceptions are the masterful chapters by Stephen J. Morse and Barry C. Feld, who were asked to write on topics that span the entire legal system (mental disorders and juvenile justice, respectively).

ideas and content was not required, nor necessarily even desired. The chapters do not follow the mold of traditional scholarship, however, since this would defeat the report's goal of making the law and literature accessible to those who might use it in discussing and implementing criminal justice reforms.

Although there is a great deal of diversity among the chapters, the authors were asked to do certain things in light of the aim and audience of the report. They were supposed to state up front the areas of concern in the chapter and why it makes sense to regard those as being in need of reform. The authors were expected to lay out the law, policy, and any other information necessary for a reader to have a sufficient, or at least passable, understanding of the background and modern state of affairs of the chapter topic. The authors were also asked to review the scholarly literature and important research, with attention to those works that critically assess the problems raised by the chapter topic and analyze potential solutions to these problems. The authors were encouraged to offer their own evaluation of the best and worst modern practices and proposed reforms for the chapter topic. And finally, the authors were asked to provide reform proposals on the chapter topic for use by policymakers and others involved in criminal justice reform.

To facilitate the writing and review process, the Sandra Day O'Connor College of Law at Arizona State University hosted a two-day event in February 2017 entitled "Bridging the Gap: A Conference on Scholarship and Criminal Justice Reform." With more than 100 participants, including the chapter authors and other leading academics, the conference brought together one of the most remarkable groups of criminal justice scholars ever to be assembled in one place. Indeed, collectively, the participants constituted a veritable "who's who" list of criminal justice scholarship, literally from A to Z—from Professor Alschuler to Professor Zimring, with scores of respected scholars in between.

The heart of the event was a series of simultaneous workshops, during which conference participants reviewed the chapters to provide helpful feedback, to discuss areas of potential consensus for criminal justice reform, and, in general, to ensure the highest quality in terms of content and development. In addition to the workshops, the event featured two keynote speakers who helped demonstrate the intellectual and jurisprudential range of those interested in the challenges of criminal justice reform: Arizona Supreme Court Justice Clint Bolick, who is a research fellow at the Hoover Institute and, prior to his appointment to the bench, was the co-founder of the Institute for Justice and the vice president for litigation of the Goldwater Institute; and Georgetown Law Professor David Cole, a prolific scholar, public intellectual, and advocate

in major constitutional cases who now serves as the national legal director for the American Civil Liberties Union.

Following the conference, chapter authors were given time to incorporate feedback from the workshops into their drafts. On receipt of the final versions, a team of student editors worked on the footnotes and citations in each chapter.³ The process then shifted to reviewing the chapters for consistency, clarity, and comprehension by the target audience. To expedite the review, basic grammatical conventions were adopted and a style guide was created with simple formatting rules, all with the objective of achieving a degree of uniformity across the chapters. Nonetheless, moderate inconsistencies from chapter to chapter were considered perfectly acceptable. The editing process required a balancing act: trying to maintain a fairly consistent style from chapter to chapter, while also seeking to preserve the voice of individual authors. The goal was to communicate clearly to a non-academic and perhaps non-legal audience. This did not mean reducing things to an elementary level, but instead making sure the audience could appreciate the arguments on the first read. With busy professionals, there probably won't be a second read.

After several rounds of edits, the report's contents were delivered to a printer and published in October 2017. Consistent with the animating principle of accessibility, the report is freely available online at a dedicated website: academyforjustice.org.

REPORT CONTENTS

This has been an immense and exhausting project, involving 57 separate contributions, totaling well over 500,000 words and nearly 5,000 footnotes, all written, reviewed, edited, and published in a year's time. But the endeavor has been worth it in the hope that this work will help change public policy for the better. The report is unprecedented, at least as far as I can tell, and it certainly is ambitious and wide-ranging. As such, no introduction can neatly summarize the contents while doing justice to the individual contributions, and I won't even try to do so. For the most part, the chapters are as advertised (so to speak): their titles accurately and succinctly convey the topic at hand, so that, for instance, someone flipping through the table of contents and pressed for time can immediately understand the subject of a given chapter. In addition, each contribution begins with a short abstract summarizing the chapter's purpose. Here, I can only hint at the report's breadth through a brief sketch, with parenthetical references to the relevant chapter author(s) to point the reader in the right direction.

3. The report essentially followed the Bluebook citation system, which is used predominantly in legal scholarship.

Volume 1 introduces the idea of criminal justice reform and the justifications for it, through the keynote addresses of a distinguished right-of-center jurist (Bolick) and a distinguished left-of-center litigator (Cole). The bulk of Volume 1 then 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 the instruments and organizations associated with crime and violence, namely, firearms (Zimring) and gangs (Decker). Moreover, criminalization can implicate 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). The volume concludes by examining two special categories of offenders—individuals with mental disorders (Morse) and juveniles (Feld)—and the litany of questions 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 this debate revolves around the role that race plays in police decisions to detain, question, and search individuals (Harris), sometimes without even triggering constitutional scrutiny (Carbado). Issues of race have also 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). For instance, 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 frequently 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 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). Further problems may implicate important values besides accuracy, such as racial equality in criminal adjudication (Butler) and due respect for the interests of crime victims (Cassell). A thorough discussion must also consider what occurs after trial, especially the correction of errors on appeal (King), or what might happen instead of the conventional trial process, like the use of specialty courts (Boldt).

Volume 4 begins with three traditional rationales for punishment—retribution (J. Murphy), deterrence (Nagin), and incapacitation (Bushman)—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 probability 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 serious issues like racial disparities in sentencing (Spohn). Other approaches—for instance, community punishments (Tonry) and economic sanctions (Colgan)—may avoid incarceration but not without their own challenges. Turning to confinement and release, a lingering question is whether prison rehabilitation programs can reduce recidivism (Cullen). Other critical issues concern the deplorable state of prison conditions (Dolovich), the difficulties faced by prisoners with disabilities (Schlanger), and the prospect of releasing older prisoners (Milleman, Bowman-Rivas & Smith). All of these topics eventually lead to 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).

Given the quality and scope of the volumes, as well as the stature of the authors and reviewers, there is reason to be optimistic that the report can assist in the evolving debate about criminal justice reform. A few limitations should be noted, however. The report does not, and could not, cover the entire universe of potential topics for criminal justice reform. Nor is every subject canvassed in the report likely to be a high priority for policymakers. Rather, the topics were selected with the input of leading academics based on the current state of the literature, with an emphasis on those issues on which scholarship could provide meaningful insights for reform.

The chapters and their discussions sometimes overlap, and a very careful reader of the entire report may occasionally detect a bit of tension among arguments in different chapters. The former is unavoidable, and perhaps even beneficial, in light of the connections among the topics discussed. After all, the report concerns the criminal justice *system*, that is, a set of interrelated, interacting, and interdependent parts—in the form of particular actors and institutions—that work (or are perceived as working) as a single entity. It would be surprising, in fact, if the contributions didn't overlap. As for points of contention, the disagreements among chapters are remarkably few but still to be expected in a multi-volume report involving complicated issues on which there can be a diversity of opinion among scholars.

All of this is to say that the work is not seamless like some finely scripted novel, which raises a final caveat about the report. As mentioned earlier, the project is influenced by the idea of a blue-ribbon commission report, and, to some extent, that model is apt. The Academy for Justice is composed of experts who were brought together to investigate a matter of great significance: the reform of American criminal justice. The authors are independent scholars who, for the most part, have no direct ties to government and exercise no direct authority over the system. The report's value comes from the authors bringing their expertise to bear in analyzing the problems of criminal justice and making recommendations to the institutions and actors who can address these problems.

Unlike a commission report, however, this work has not been written as a group and it does not carry the collective endorsement of everyone involved in the project. Rather, each chapter bears the weight only of its author(s). The other participants in this project have not approved the arguments made in each chapter. Moreover, an author's cross-references to other chapters in the report are provided for the convenience of the reader and do not indicate that the author necessarily approves of the arguments presented in the cited chapters. Nonetheless, the authors were chosen to contribute to the report

precisely because they are leaders in their respective fields and are known to be thoughtful and reasonable. Their chapters were reviewed in a process involving some of the best and brightest in the academic world. Besides, this work is not intended as the end-all of debate about criminal justice reform. To the contrary, the report hopes to rekindle the discussion with the input of those whose lifework is the study of criminal justice.

ACKNOWLEDGEMENTS—AND A FINAL THOUGHT

As mentioned above, this project was made possible by a generous grant from the Charles Koch Foundation. Special thanks to Allison Kasic, associate director of research at the Charles Koch Foundation, who recognized the need for academic participation in criminal justice reform, helped develop the concept of this project and its work-product, shepherded the application through the grant process, and provided ever thoughtful and effective support for the report. To their great credit, the Charles Koch Foundation and its staff have sponsored the project without any expectation of editorial input or control over the report and its contents or any involvement in the selection of authors and project participants.

A large debt of gratitude is owed to Dean Douglas J. Sylvester and his staff at the Sandra Day O'Connor College of Law. The exceptional team of professionals at ASU Law were engaged in every aspect of this project, and their diligent efforts are the reason for its success.⁴ My great thanks also goes to a group of outstanding law students who helped orchestrate the criminal justice reform conference, took notes during the workshops for later use by the chapter authors, and put in countless hours editing the footnotes and citations in each chapter.⁵ Most of all, I am extremely grateful to Chad Snow for his unflagging efforts to help bring this report to fruition. Drawing upon his experience as a senior newspaper editor, Chad served as my chief advisor throughout the review process and provided extraordinary editorial guidance, operational management, and wise counsel.

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4. Among others, the following ASU Law staff members helped facilitate this project (listed in alphabetical order): Christopher Baier; Keith Chandler; Lynn French; Edward Garcia; Hal Haanes; Melissa Harris Thirsk; Katherine Howland O'Brien; Rebecca Hutchison; Melanie Knerr; Xavier Sifuentes; Michelle St. Amour; Judy Stinson; Karen Sung; Matthew Villa; Leanna Walker; Qi Wang; Jessica Wells; Thomas Williams; and William Wilson.

5. They are (in alphabetical order): Ashley Fitzwilliams; Kia Grass; Ryan Hogan; D. Eric Lystrup; Nic Martino; Madeline Mayer; Daniel Peabody; Jennifer Piatt; Andrea Prigmore; Ashley Repka; Aaron Taylor; John Thorpe; Elizabeth Turnbull; and Chase Turrentine.

Fulbright Distinguished Chair at the University of Birmingham. In addition to enabling research unrelated to the present project, my stay in the United Kingdom provided the opportunity to review the report and its contents with a fresh eye, and to view American criminal justice from the mirror of another constitutional democracy with a shared legal heritage. Indeed, the birthplace of the common law offers historical examples of criminal justice reform resonating not only with political liberals and progressives, but also political conservatives and libertarians. Consider, for instance, the following words from a British prison reformer:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the state and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry of all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes and an unfaltering faith that there is a treasure, if only you can find it in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored up strength of a nation, and are the sign and proof of the living virtue in it.⁶

The speaker was the then-Home Secretary, Winston Churchill, proposing major improvements to the British penal system. The greatest conservative politician of the 20th century, Churchill reminds us that improving criminal justice is not merely for the political left. Today, the United States is unique among Western nations in terms of the scale and punitiveness of its criminal justice system. And on this, Churchill's later words may also ring true: "The Americans can always be trusted to do the right thing, once all other possibilities have been exhausted."⁷ I hope that this report can in some small way assist those interested in making sure the United States does the right thing when it comes to criminal justice reform.

6. Speech, House of Commons, July 20, 1910.

7. CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 124 (Richard Langworth ed., 2008). Admittedly, not all of Churchill's positions would be considered enlightened by modern (or even historical) standards. For present purposes, however, it is enough to reiterate an adage often attributed to Churchill (but apparently dating back several centuries): "Great and good are seldom the same man."