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Confronting Failures of Justice:

*Exposing the American Criminal Justice System's
Protection of Criminals, A Book Review*

“Most killers get away with murder.” That is the sobering first sentence in *Confronting Failures of Justice*, a new book by Paul Robinson, Jeffrey Seaman, and Muhammad Sarahne. The book is a damning indictment of the American criminal justice system, exposing how the system has been warped to favor the rights of guilty defendants over the search for the truth or protection of victims. Returning to the authors’ first sentence, fewer than 50% of murderers are arrested and convicted for their crimes in the modern United States.

One of the immediately notable features of this tome is the lead author. Robinson is a distinguished professor at the University of Pennsylvania Law School, one of the most liberal law schools in the nation. A scholarly work attacking the American criminal justice system as too lenient coming from a scholar at Penn is unexpected and intriguing. Robinson’s coauthors are an Israeli prosecutor and a current law student, both also affiliated with the law school.

While the book is 500-plus pages of comprehensive analysis, it is organized in a fashion that makes for compelling reading. In each chapter, the authors describe a particular rule or aspect of the American criminal justice system. They then discuss the competing normative interests underlying the rule at issue, the logical pros and cons of the rule. The authors provide real-life

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examples of cases where the rule has been applied, providing useful context for the theoretical discussion. Each individual chapter ends with some specific recommendations for repairing the American system. The book culminates with a “top ten list” of the highest priority reforms for the United States.

As an example of the authors’ approach, they discuss the famous *Miranda* warnings required for every custodial interrogation by the police—the “you have the right to remain silent, etc.” mantra that every American has heard in popular media. If the police fail to provide the warnings or a court finds that the defendant invoked his right to remain silent or request counsel, a confession will be suppressed. On the one hand, the warnings are designed to reduce coerced confessions. However, this goal is balanced by the concern that the *Miranda* requirement has resulted in fewer confessions, the exclusion of some clearly truthful confessions, and a general message to the public not to cooperate with the police.

The authors justifiably point out that the *Miranda* warnings were created out of whole cloth by Chief Justice Earl Warren and the Supreme Court in 1966. While allegedly based on the Fifth Amendment protection against self-incrimination, the text and history of the Fifth Amendment are entirely devoid of anything like the now-required warnings. Instead, the Warren Court engaged in an “act of judicial policymaking” that “provoked outrage” at the time, both from the dissenting justices as well as legislators. Even as recently as 2022 in *Vega v. Tekoh*, Supreme Court Justice Samuel Alito penned a majority opinion pointing out that *Miranda* warnings are not really a Constitutional right, potentially signaling this Supreme Court’s skepticism with the entire concept of *Miranda* warnings in criminal investigations.

As a case example, the book describes an Idaho gang rape of an 18-year-old woman by four men. As cited by the authors, the confessions by the defendants were suppressed because the phrasing of the *Miranda* warnings provided by police to the suspects was not exactly right (nor do the warnings have to be correct word-for-word, a fact ignored by the trial court). As a result, the defendants were only convicted of misdemeanor offenses. The authors then cite studies showing that confessions have dropped by up to 25 percentage points since the imposition of *Miranda*, resulting in a “non-trivial effect” in tens of thousands of cases.

The authors discuss possible reforms of *Miranda*, including (1) simply overturning it, (2) creating a public safety exception (a step already taken by the Supreme Court), and (3) including in *Miranda* warnings an incentive for defendants to get a lower sentence if they confess. The ultimate reform

proposed by *Confronting Failures of Justice* is to adopt the United Kingdom's model of *Miranda* warnings: suspects are given the warnings but also advised that their silence may be used to impeach them if they later decide to testify at trial. There is some irony in this proposed reform, because the United Kingdom only has its equivalent of *Miranda* warnings because our English cousins belatedly copied the judicial legislating of Chief Justice Warren—such warnings are completely absent from historical English common law.

The authors apply this same analytic framework to a series of other issues in the American criminal justice system. A few deserve particular note as setting the tone for *Confronting Failures of Justice*.

The authors take aim at unconstrained sentencing by judges in criminal cases. In many state court systems, judges have virtually unchecked discretion when imposing sentences for crimes. A defendant in State A convicted of Crime X gets sentenced to 20 years of incarceration, while a defendant in State B convicted of the same Crime X (and with the same prior criminal record) gets sentenced to probation. The book cites to a number of actual cases of homicide or rape where defendants received little or no punishment from lenient judges, a far cry from the usual academic lament that sentencing in the United States is overly punitive.

Addressing the sentencing discretion of judges, the competing interests described by the authors include the benefits of allowing judges to custom-make sentences to fit each defendant and permitting judges to impose changing societal views of the correct punishment for a particular crime. However, the negative impacts of such judicial discretion in sentencing are demonstrated by stark disparities in sentencing for otherwise similarly situated defendants and the judicial branch's failure to defer to the elected legislature on the appropriate punishment for a crime. The authors recommend that states shift to a sentencing model like the U.S. Sentencing Guidelines imposed in federal criminal cases. The federal sentencing guidelines employ a comprehensive list of sentencing factors for every crime, which yields a relatively narrow, consistent sentencing range. Such guidelines vastly decreased disparities in sentencing in the federal system, while also increasing sentencing severity. Of course, in a testament to how much judges despise any constraints on their personal views, the Supreme Court eventually ruled that even the federal sentencing guidelines are merely advisory for life-tenured Article III judges, and federal sentences lost some of their uniformity. For the states to implement the authors' proposed reform, the challenge for each individual state would be to find a cadre of experts to create appropriate guidelines for that state (which some states already have accomplished) and to make such sentencing guideline ranges mandatory for

judges (which almost never survives the wailing of the judiciary).

Confronting Failures of Justice does not limit its criticisms to judges. The authors also call out prosecutors who engage in “ideologically motivated nonenforcement policies,” also referred to in scholarly studies as deprosecution. Generally confined to so-called progressive prosecutors, deprosecution is defined as refusing to prosecute entire categories of crimes, regardless of the evidence of guilt, “to achieve [the prosecutor’s] social or political goals like decarceration” The authors point to prosecutors like Kim Foxx in Chicago and Larry Krasner in Philadelphia refusing to charge shoplifting offenses, gun crimes, drug offenses, and even violent crimes as examples. The guiding philosophy behind these refusal-to-prosecute decisions appears to be a belief that the American criminal justice system is inherently and systemically racist and thus demands decarceration via deprosecution as a means to correct this flaw.

In analyzing the interests at play in this debate, the drafters of this new book cite to nonenforcement policies as potentially aligning with current democratic values that result in progressive prosecutors being elected, saving the expenses associated with incarceration, and capturing shifting societal standards. Cutting against such deprosecution policies, the authors convincingly argue that such prosecutors are ignoring the rule of law as established by the legislature, treating offenders unequally and, most importantly, failing to prevent crimes. Compelling empirical studies cited by the authors demonstrate that where progressive prosecutors refuse to prosecute the crimes that drive violence—like drug dealing and felons carrying firearms—violent crime soars. Ironically, this increased violence disproportionately hurts the poorest and most disadvantaged neighborhoods, often damaging the very minority populations that these political prosecutors had sworn to rescue.

The proposed reform here is to allow state attorneys general to assume jurisdiction over crimes when a local district attorney refuses to prosecute, explaining that the state’s chief prosecutors could have stepped in when Krasner in Philadelphia or Chesa Boudin in San Francisco were refusing to prosecute crimes. The only problem with this reform is that those attorneys general often have political aspirations of their own. The Pennsylvania legislature gave then-Pennsylvania Attorney General Josh Shapiro the ability to overrule Krasner and prosecute gun and drug crimes in Philadelphia, but Shapiro meekly refused to step in because he had his eye on running for governor and did not want to irritate Krasner’s supporters. A more cynical view is that the voters put these prosecutors in office and thus should suffer the consequences of their choices until they decide to “vote the bums out,” in the old electoral vernacular. In fact,

many of the first wave of progressive prosecutors have since been ejected from office, including Boudin, Foxx, Kimberly Gardner in St. Louis, Marilyn Mosby in Baltimore, Pamela Price in Oakland, and George Gascón in Los Angeles. Sometimes, representative democracy is the best remedy for bad ideas.

Another compelling topic addressed by *Confronting Failures of Justice* is the byzantine jurisprudence created by the Supreme Court under the Fourth Amendment to the Constitution, culminating with the exclusionary rule. The exclusionary rule holds that if the police violate any of the rules for searching or seizing evidence, the evidence obtained must be suppressed from trial. The authors point out that the exclusionary rule—like the *Miranda* requirement—was another figment of the judicial imagination, originally envisioned only for federal criminal cases, but subsequently imposed on the states in 1961 by the never-humble Warren Court in *Mapp v. Ohio*.

As always, the authors consider the pros and cons of the rule. For the exclusionary rule, the benefit is that it should act to deter some police misconduct in searching and seizing evidence, as the police are punished by the suppression of the evidence. The negative impacts are multitudinous. Think about a drug dealer getting off because the police violated some technical rule before finding 20 kilograms of fentanyl-laced methamphetamine in his car or a murderer walking free because the knife or gun used in the murder is suppressed by a trial court for a Fourth Amendment violation. As a result of the exclusionary rule, a clearly guilty defendant goes unpunished, victims suffer, and the public perceives that the system is allowing criminals to get off on technicalities. As Justice Benjamin Cardozo pointed out in objecting to the exclusionary rule, “The criminal is to go free because the constable has blundered.” The authors here point out that the Fourth Amendment rules created by the Supreme Court are so random and complex that not only is it impossible for the police to predict where and when the exclusionary rule will apply, but even experienced lawyers have trouble anticipating what will be allowed and what will be excluded by trial and appellate judges.

In suggesting reforms to the exclusionary rule, the authors point out that in many European countries, exclusion of evidence is not the default rule. Instead, the alternative approach is discretionary balancing, where the significance of the police rule violation is weighed against the seriousness of the offense and nature of the evidence discovered. Thus, a technical violation by the police would not result in the exclusion of the 20 kilos of drugs or suppression of the murder weapon discussed above but would bar the use of food shoplifted from a store and found in a suspect’s car or a small amount of cocaine found in a suspect’s pocket. The authors also suggest that better police training would

help minimize the impact of the exclusionary rule, although they do not explain how the police will be able to make sense out of rules which flummox seasoned lawyers. Despite hinting that the European balancing rule might be both better and more consistent with history, the authors eventually choose to reform the exclusionary rule by replacing it with direct sanctions for police officers who violate search-and-seizure rules, through department discipline or by making it easier to sue police officers via civil rights claims. This proposal is one of the authors' weakest suggestions and is discussed further in the context of their "top ten" reforms, which includes this proposal.

After excoriating injudicious judges and deprosecuting prosecutors, *Confronting Failures of Justice* takes aim at false narratives from the media and academics addressing criminal justice issues. The authors frankly call out the media for creating the public perception "that police are gunning down Black men for racist reasons with impunity," stating that such perceptions are "simply inconsistent with the facts." Instead, the authors describe how unjustified police shootings are relatively rare and even rarer are police shootings based on racial animus. As an example, the book engages in a graphic retelling of the actual facts of the Michael Brown shooting in St. Louis, resulting in a clear finding by both local prosecutors and the Obama DOJ that the shooting of Brown was justified, as opposed to the false narrative constantly replayed by the mainstream media.

The authors also pull back the curtain on the legal academy, pointing out that the studies churned out by legal scholars about crime and the criminal justice system are "riddled with false claims, half-truths, and deliberate obfuscation, often motivated by ideological biases." Some straightforward examples not mentioned by the authors but plain for historical researchers are the oft-repeated but easily debunked claim that American policing arose from slave patrols (instead of being based on the model of English policing created by Sir Robert Peel), or that American criminal law was designed simply to oppress minorities (instead of the fact that the Model Penal Code that is the basis for most states' criminal laws was created by the American Law Institute, and included a number of liberal scholars as drafters). Researchers who challenge the progressive orthodoxy in academia are attacked, unpublished, and untenured. Instead of suggesting possible reforms in this area, the authors wearily advise that the "ideological lock on criminal justice disciplines is unlikely to be broken anytime soon" and warn that we can expect little honest debate and truth from such a stifled academic environment.

As described by *Confronting Failure of Justice*, the result of this constant drumbeat of misinformation from the media and academics is profound. The

factually inaccurate claims by these putative experts create a vicious cycle. The public grows to distrust the police and the criminal justice system. As a result, citizens stop cooperating in criminal investigations, making it difficult for law enforcement to solve crimes. The failure to solve crimes leads to more crimes, which in turn results in even greater distrust in the police and justice system. The authors convincingly describe a system where the criminals have taken the upper hand—witnesses are regularly intimidated and an entire “stop snitching” culture has made it virtually impossible to convict even violent criminals, with the problem particularly acute in murder cases. The book describes that up to 80% of cases in cities like Baltimore experience some form of witness intimidation. The authors might have used this area as an opportunity to loop back to *Miranda* and the warning issued by the dissent of Justice John Marshall Harlan, who predicted that Chief Justice Warren’s new judicial fiat was going to greatly hinder law enforcement in catching guilty criminals and was “taking a real risk with society’s welfare in imposing its new regime on the country . . . [the] social costs of crime are too great to call the new rules anything but a hazardous experimentation.” In retrospect, given the current state of the criminal justice system, a fitting latter-day sobriquet for Earl Warren would be the “Godfather of the Stop Snitching Movement.”

For those interested in taking on the enjoyable challenge of reading the entirety of *Confronting Failures of Justice*, the book delves into many other worthwhile areas where the American criminal justice system is being confounded by specific rules or particular actors, including such fascinating topics as creating exceptions to the double jeopardy clause for serious crimes, expanding or abolishing statutes of limitations, and constraining the ever-expanding abuses of executive clemency. The above-referenced examples are merely a sampling of the topics explored, and methodology applied by the authors.

The overwhelming strength of *Confronting Failures of Justice* is its comprehensive and unstinting look at exactly how biased the American criminal justice system has become in favor of defendants and prejudiced against victims of crime. The main casualty of the current system is the truth, as clearly guilty individuals are regularly set free on technicalities. As a result, the public has become less trustful that the criminal justice process in the United States actually is delivering justice. Instead of a solemn process to discover the truth, the system described by the authors has devolved into an asymmetrical game with most of the rules favoring usually guilty defendants.

And how did we get here? The authors scatter the evidence throughout the book, but a clear path emerges. The majority of the legal rules criticized by the authors originated with the wild and unconstrained jurisprudence of

the Supreme Court led by Chief Justice Warren, as decisions on criminal law were rendered with little regard for the text of the Constitution. Later versions of the Supreme Court then oscillated between conservative and liberal iterations, but always reacting to the “burning bush” pronouncements of the Warren Court, rather than simply overruling those flawed prior decisions. Also notable is that the Supreme Court has been occupied almost entirely by judges with no professional or personal experience in the criminal justice system, with the antipodal exceptions of Thurgood Marshall and Samuel Alito. As chronologized by the authors, academics and the mainstream media then piled on with ideological attempts “devoted to advancing narratives of racism and systemic oppression that always cast the justice system as the problem and offenders as largely victims of forces beyond their control.” Finally, this parade of misdirection was followed by the election of progressive prosecutors, who assured the public that not prosecuting criminals certainly would lead to less crime, relying on the groundwork laid by the Supreme Court and academics. In the face of all of this “evidence” from “experts,” it is not surprising that the American public has been led down the primrose path to endorsing a criminal justice system favoring defendants instead of justice. The authors of *Confronting Failures of Justice* skillfully confront and critique each of these ideological groups and faulty arguments throughout their analysis.

Confronting Failures of Justice is an outstanding, well-researched, and well-written book by serious scholars. But no review would be complete without at least some criticism, even if it is minor. The authors conclude the book with their top ten highest priority suggestions for reform. After the roaring criticisms raised in the body of this work, readers will be expecting truly bold and innovative proposed transformations of the American criminal justice system.

Instead, the authors make some fairly quotidian suggestions. For instance, they advocate replacing the exclusionary rule—suppressing evidence when police fail to follow the endlessly evolving search-and-seizure rules of the Supreme Court—with a system of directly sanctioning the offending police officers, mainly through monetary or job-related sanctions. This remedy is a tired trope suggested by many other academics but is doomed to failure both because internal police procedures already address such a remedy and because it would discourage the police from doing anything for fear of losing money. The authors also suggest establishing a national group of experts on criminal procedure and investigative practices to help guide training and reforms. The problem with this suggestion is that it was tried by the Obama administration with the President’s Task Force on 21st-Century Policing, which mainly resulted in a series of ideologically tilted recommendations on police use of force and

de-escalation, gender identification, and racial profiling, consistent with that administration's view of the world. In the history of expert panels attempting to guide criminal justice reform, such panels traditionally end up in one of three categories: (1) politically motivated ideologues trying to crash the system; (2) politically motivated ideologues trying to defend the status quo; and/or (3) politically motivated ideologues who eventually are stymied by the power of judges, police unions, and misinformation from academics and the media. The only common theme is failure.

The authors missed a chance to recommend some fundamental reforms that might truly change the nature of American criminal justice. They could have suggested that the current Supreme Court revisit and reverse wholesale the atextual and ahistorical rules of criminal procedure created out of thin air and then imposed willy-nilly on the states by the Warren Court, reinvigorating the Tenth Amendment and the states as laboratories of democracy. They could have suggested consolidating the over 18,000 fragmented law enforcement agencies in the United States into fewer but more centrally organized police forces, resulting in better trained and disciplined police officers. While addressing law enforcement, the authors could have explored the salutary effects of ending the hegemony of public sector unions like the police fraternal organizations, which both stymie effective change and protect bad cops. They could have suggested abolishing the process of electing increasingly political judges at the state level, as a means to reimpose the rule of law from the bench. While these are fair criticisms, they are quibbling when compared with the outstanding scope and refreshing candor of the balance of the book.

Confronting Failures of Justice is a book that should be read by scholars and ordinary citizens. The tragedy of a book like this is that it will be ignored by politicians, activists, and members of the mainstream media who regard it as a collection of inconvenient truths best swept under the rug. The players in the American criminal justice system with actual skin in the game – crime victims, police, prosecutors, defense lawyers, honest judges, and people who live in communities devastated by criminals—will recognize the integrity of this scholarly work. Robinson and his fellow authors are the proverbial *vox clamantis in deserto*, and we should hope that somebody is listening.