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What Justice? Confronting the Criminal Justice System's Biggest Problem

Introduction

The criminal justice system is supposed to do justice by punishing serious crime, which also advances public safety.¹ At least, this is how the system is supposed to work, and if one reads most legal scholarship, one might get the impression the system is too good at punishing crime. Concerns over mass incarceration, over-punishment, over-criminalization, and unjust or brutal enforcement abound. The picture is often of a draconian system trampling the rights of defendants as it herds both serious and minor offenders behind bars. There is certainly merit to some of these concerns, and we have written extensively about the need to ensure fair law enforcement, prevent over-punishment, reverse over-criminalization, and reduce America's prison population. But none of those familiar concerns are the biggest problem facing America's criminal justice system.

The central problem is not that the system punishes crime too much but that it fails to punish the vast majority of crime at all. Most murders, rapes, robberies, assaults, thefts, and crimes of every kind go unpunished. The justice system is failing at a massive scale to do justice, with catastrophic consequences for victims and vulnerable communities. This is the single greatest problem the justice system faces, and yet it receives shockingly little attention. Exhaustive

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¹ This article is based on, and includes excerpts from, *Confronting Failures of Justice: Getting Away with Murder and Rape*. See PAUL H. ROBINSON, JEFFREY SEAMAN & MUHAMMAD SARAHNE, *CONFRONTING FAILURES OF JUSTICE: GETTING AWAY WITH MURDER AND RAPE* (2024). We thank Muhammad Sarahne, Sarah Robinson, and all others who assisted in the creation of that book.

scholarship and reform attention has focused on when the system does *injustice* by punishing the innocent, over-punishing the guilty, or punishing disparately.

Far too little attention has been paid to far more frequent *failures of justice* where the system fails to punish serious crime at all or punishes it with grossly unjust lenience in the eyes of the community. Research shows ordinary people care deeply about doing justice and believe punishing the innocent and failing to punish the guilty are errors of equal magnitude.² Legal scholars, professionals, and reformers need to open their eyes to the sheer scale of how often failures of justice occur, their costs, why they occur, and the ways they can be reduced. This article is an attempt to do just that, but it provides only a brief introduction. For a more comprehensive study, we recommend our book *Confronting Failures of Justice: Getting Away with Murder and Rape*.

I. The Extent of Failures of Justice³

Most Americans have no idea how bad the justice system is at catching and punishing serious crime. Even many legal scholars are unaware of the full extent of failures of justice. The justice system is at its most effective when punishing murder, but even there, the statistics are damning. Getting away with murder is a coinflip in America, and the odds may even be on the killer's side. During the murder surge of 2020, there were around 22,000 murders in America, and police likely solved fewer than 50%.⁴ In 2023, the official clearance rate rose to a more normal 57.8%, but not every case police clear results in a conviction or even an arrest.⁵ The fact that some “cleared” homicide cases result in no murder conviction means the conviction rate may still be less than 50%.⁶ And homicide has by far the best victimization-conviction ratio of any offense. Most other crimes are rarely punished and often go unreported because victims know the system will do nothing. In 2023, only about 45% of violent and 30% of property crimes were even reported to police.⁷ Among those reported crimes, clearance rates were dismal. Police cleared 41.1% of violent crimes in 2023 and 13.9% of property crimes.⁸ But most of these clearances do not lead to conviction due to a lack of successful prosecution. Thousands of killers and hundreds of thousands of rapists, robbers, and assaulters escape justice each year in America.⁹

² Brandon L. Garrett & Gregory Mitchell, *Error Aversions and Due Process*, 121 MICH. L. REV. 707 (2023).

³ See ROBINSON ET AL., *supra* note 1, at 1–7.

⁴ Estimates vary by data source, with the official FBI homicide clearance rate for 2020 being 54%, although there are reasons to think that may overstate the rate. See ROBINSON ET AL., *supra* note 1, at 1 n.1.

⁵ *Crime Clearance Rate in the United States in 2023, by Type*, Statista (last visited Aug. 1, 2025).

⁶ ROBINSON ET AL., *supra* note 1, at 1.

⁷ Susannah N. Tapp & Emilie Coen, *Criminal Victimization, 2023*, BJS (2024).

⁸ *Crime Clearance Rate in the United States in 2023, by Type*, *supra* note 5.

⁹ ROBINSON ET AL., *supra* note 1, at 1.

It is easy to see why most criminals are undeterred. For any given crime, what do they have to fear? On average, only 2.8% of rapes and sexual assaults, 2.2% of robberies, and 4.1% of assaults lead to a felony conviction.¹⁰ Of course, career criminals eventually do get unlucky and wind up being punished for a tiny fraction of their crimes.

America's justice system does not have to be this way. Many other countries enjoy higher clearance and conviction rates. Consider Japan's 2022 clearance rates: 96% for homicide, 92% for robbery, 85% for rape/sexual assault, and 84% for assault.¹¹ America's homicide clearance rate is also lower than many other Western countries.¹² It is true that low crime and high clearance rates tend to go together, but a large part of the reason is because raising clearance rates lowers crime rates and vice versa. Even in America, there is significant variation in clearance rates by jurisdiction, including across jurisdictions with high crime rates.

It is important to understand that justice system effectiveness can be raised or lowered regardless of current crime rates, and such raising or lowering will affect those crime rates. Jurisdictions often find themselves in either virtuous or vicious cycles of rising crime and falling clearance rates or rising clearance rates and falling crime.¹³ This is a hopeful fact, since it means positive progress can accelerate, but it also means the toleration of high crime rates and low punishment rates are policy choices. The current justice system actively allows most murderers, rapists, and robbers to get away with their crimes and revictimize their communities. It is well and good to talk of "root causes" of crime (and of course, we support targeting those root causes where cost-effective), but this cannot absolve the justice system of its responsibility to do justice and provide safety—a responsibility it is currently failing in many communities across America.

A. The Problem Isn't Going Away: Serious Crime Is Still a Serious Problem

But perhaps focusing on the problem of unpunished crime is unnecessary because the problem of serious crime is solving itself? One common response to worries over crime and lack of punishment is that we are enjoying historically low rates of crime. Are failures of justice really a pressing problem for policymakers if serious crime is continually shrinking?

¹⁰ *The Criminal Justice System: Statistics*, RAINN (last visited Aug. 1, 2025).

¹¹ *RESEARCH AND TRAINING INSTITUTE MINISTRY OF JUSTICE JAPAN, WHITE PAPER ON CRIME 2023* 5–7 (last visited Aug. 1, 2025).

¹² Marike Liem et al., *Homicide Clearance in Western Europe*, 16 EUR. J. CRIMINOLOGY 81–101 (2019).

¹³ ROBINSON ET AL., *supra* note 1, at 4–6.

First, it should be noted that any murders, rapes, robberies, and assaults are too many, and the moral need to solve, punish, and prevent them remains regardless of the total number. However, it should also be noted that America is not enjoying historically low rates of crime (except from a very limited perspective), and rates of serious crimes such as murder, rape, and aggravated assault have stagnated, or are even broadly rising again, in many urban jurisdictions after falling from their peak in the early 1990s. Comparisons to the great crime wave that started in the late 1960s and ran through the 1990s are misleading because they suggest America is enjoying its lowest rates of crime. In fact, America has yet to recover to early 1960s levels. For example, comparing the FBI's crime data from 1960 with 2019 shows that total offenses per 100,000 were 32% higher in 2019. Modern violent crime rates are well above double the 1960 benchmark, mainly due to the explosion in aggravated assault.

Table 1: 1960 vs. 2019 Crime Rates¹⁴

Year	Total Offenses per 100,000	Violent	Murder	Forcible Rape	Robbery	Aggravated Assault
1960	1,887.2	160.9	5.1	9.6	60.1	86.1
2019	2,489.3	379.4	5.4	42.6	81.6	250.2

Even these data understate the size of the problem as the murder rate comparison is deceptive: enormous advances in emergency medical care since 1960 have dramatically improved the survivability of a shooting or aggravated assault. Victims now arrive at hospitals sooner due to better ambulance and helicopter response times, and most hospitals now have dedicated trauma centers skilled in treating severe wounds. For example, serious gunshot wounds treated in hospitals increased almost 50% between 2001 and 2011 even as the death rate decreased, contributing to the murder rate dropping from 5.6 to 4.7.¹⁵ Studies suggest that today's crime rates combined with 1960s medical technology would yield a murder rate up to five times higher than it is.¹⁶ America is not in a period of historically low violent crime but rather a period of advanced emergency care saving many victims from death despite steady, or even broadly increasing, severe violence in many jurisdictions. Addressing failures of justice is more important than ever as the problem will not go away

¹⁴ *United States Crime Rates 1960–2019*, Disaster Center (last visited Aug. 1, 2025).

¹⁵ Gary Fields & Cameron McWhirter, *In Medical Triumph, Homicides Fall Despite Soaring Gun Violence*, WALL ST. J. (Dec. 9, 2012).

¹⁶ Roger Dobson, *Medical Advances Mask Epidemic of Violence by Cutting Murder Rate*, 325 *BMJ* 615 (2002).

on its own. America has unacceptably high levels of serious crime compared to both many Western countries and the America of 1960.

II. The Costs of Failures of Justice¹⁷

The costs of failing to provide justice for serious crimes are severe. One set of costs is moral—failing to provide justice when someone is murdered, raped, or robbed is simply wrong. It is a violation of transcendent morality, basic human instincts, and the government's social contract with its citizens. In addition to these abstract moral costs, failing to punish serious crime produces and exacerbates many concrete harms. These include trauma to victims and co-victims, increased crime, a decline in the law's moral credibility, and disparate impact on vulnerable and marginalized communities.

A. *Costs to Victims and Co-victims*

Many serious, violent crimes leave victims alive but scar them with trauma, especially when justice is not served. A victim may well find some measure of solace and healing in the thought that their attacker has been punished, but most victims of serious crime never experience that comfort. It is impossible to quantify the suffering victims' experience when their victimizers escape justice, but the cost is real and significant. Rape victims are more likely to experience posttraumatic stress disorder if they have negative experiences with the justice system, and the knowledge that one's attacker still walks free can be infuriating and crippling to many victims, as well as conveying the disillusioning message that society does not value them or consider their harm worth the effort of catching and punishing the offender.

Rape is not the only crime with enormous personal costs. When a murderer or other serious violent offender escapes without deserved punishment, the victims' families and friends are emotionally scarred. The relatives and friends of someone lost to homicide are often referred to as "co-victims," a term that acknowledges victimization extends beyond the person killed. Anyone who has had a friend or a family member murdered will have to deal with lifelong grief, but a failure of justice adds anger, upset, and fear to that pain through the constant knowledge that the killer is free. In the United States, it is estimated that roughly 9% to 15% of adults and 8% to 18% of youths are co-victims of homicide.¹⁸ Since justice fails in more than half of such cases, around 5% or more of the population suffers from the knowledge that the killer of their loved

¹⁷ See ROBINSON ET AL., *supra* note 1, at 12–19.

¹⁸ Marilyn Peterson Armour, *Experiences of Covictims of Homicide: Implications for Research and Practice*, 3 TRAUMA VIOLENCE & ABUSE 109–24 (2002).

one got away with murder. Worse, the co-victimization rates are much higher for other crimes, such as rape or aggravated assault, where the punishment rates are so low as to appear almost trivial.

B. Costs to Society Through Increased Crime

But failing to punish serious crime does more than traumatize victims and their families. It also breeds more crime through several mechanisms. First, low punishment rates decrease deterrence as criminals or would-be perpetrators correctly believe they are unlikely to be punished for any given crime. Research suggests that significant deterrence is not generated among offenders until they perceive a 30% chance of being caught—something which is not close to being true for any crime except murder.¹⁹ Second, low punishment rates fail to incapacitate repeat offenders from committing long strings of crime. While most career criminals eventually get caught, their convictions represent only a tiny fraction of their crimes. Surveys suggest the median prisoner in America has committed twelve or more nondrug crimes in just the prior year before incarceration.²⁰ Roughly 20% of criminals commit around 80% of violent crimes and over 50% of all crimes.²¹ Most crime in America is repeat crime committed by offenders with a string of ten, twenty, or even thirty uncaught crimes—many of which would not have occurred had they been punished for their earlier crimes. America's ineffective justice system helps explain its high crime rates because a massive failure to punish crime means a near-total failure of deterrence and massively reduced incapacitation.

In addition to reducing deterrence and incapacitation, failing to justly punish crime carries another criminogenic cost through eroding the law's moral credibility with the community. Communities that witness repeated failures of justice commonly lose faith in the criminal justice system—a loss of faith that undermines the criminal law's ability to gain compliance, deference, and assistance. This leads to legal cynicism, witness noncooperation, and increased lawbreaking. It can also provoke a justice-seeking backlash in the form of vigilantism where individuals deliver punishment with their own hands when the law seems unwilling or unable to do it. A loss of the law's moral credibility is highly damaging because it creates a vicious cycle in which lost credibility produces more crime and less justice, which in turn reduces the system's credibility further. This dynamic is particularly noticeable in many of

¹⁹ Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY, 765, 814 (2010).

²⁰ John J. Dilulio Jr., *The Numbers Don't Lie: It's the Hard Core Doing Hard Time*, Brookings (Mar. 17, 1996).

²¹ See PAUL E. TRACY, MARVIN E. WOLFGANG & ROBERT M. FIGLIO, *DELINQUENCY CAREERS IN TWO BIRTH COHORTS* (2013).

America's urban neighborhoods where high rates of crime go together with high rates of crime nonreporting, witness noncooperation, vigilante killings, and distrust in official justice system processes.

It is worth noting that all the above costs apply regardless of whether a criminal completely escapes punishment or whether they are convicted and punished in a way the community sees as grossly insufficient and unjust. Sometimes, delivering a flagrantly inadequate punishment may be worse than delivering no punishment at all. For example, if an individual rapist escapes capture, it is unlikely to attract public attention. By contrast, the case of a rapist who is convicted but receives a slap on the wrist sentence (e.g., community service) is likely to spark far greater public outrage and cynicism because it showcases that the system is unable or unwilling to do justice even when a perpetrator is caught.

Through these three mechanisms—reduced deterrence, incapacitation, and the law's moral credibility—failures of justice contribute substantially to the cost of crime in America, which is estimated at a staggering 2.6 trillion dollars each year.²² Allowing serious criminals to escape justice is unlikely to be a societally cost-effective decision, and doing justice pays for itself in the long run by reducing the costs of crime.

C. Costs to Marginalized Communities

Yet another cost that should concern everyone (but is likely to resonate especially with progressives) is the disparate impact unpunished crime has on poor and minority communities. Crime clearance rates are significantly lower in poorer areas with high racial minority populations than they are in White middle-income and high-income areas. One analysis of fifty-two of the United States' largest cities found that police arrested someone in 63% of homicides that killed White victims, compared with just 47% of homicides of Black victims, a 16-percentage-point difference in clearance rates.²³ Data from Chicago indicates that homicide cases involving a White victim are solved 47% of the time, cases involving a Hispanic victim are solved 33% of the time, and cases involving a Black victim have a clearance rate of a mere 22%.²⁴ There are several factors that likely contribute to these disparities (such as the type of killing, with street shootings being especially hard to solve), but regardless of the causes, the effect is clear: poor neighborhoods and minority communities

²² *New Research Examines the Cost of Crime in the U.S., Estimated to Be \$2.6 Trillion in a Single Year*, Vanderbilt News (Feb. 5, 2021).

²³ German Lopez, *There's a Nearly 40 Percent Chance You'll Get Away with Murder in America*, Vox (Sept. 24, 2018).

²⁴ Conor Friedersdorf, *Criminal Justice Reformers Chose the Wrong Slogan*, The Atlantic (Aug. 8, 2021).

suffer failures of justice at highly disproportionate rates to their share of the population. This contributes to higher crime in such communities, driving away opportunity and trapping innocent community members in cycles of victimization and poverty. In fact, leaving conviction rates low and crime rates high in minority communities is arguably a continuation of historically racist policies that left Black communities under-protected. As the author of a recent work studying Jim Crow policing in the American South concludes:

For decades, African Americans complained of being underpoliced in the sense that law enforcement officers typically showed little concern for crimes that involved black victims. Supporters of fair administration argued that would-be criminals knew law enforcement officers would not investigate crimes concerning black victims, which led to increased rates of violence committed against African Americans.²⁵

While the racist intent may be gone, the current system's failure to provide justice in Black communities leaves Black Americans to be victimized at higher rates and with greater impunity than others. About 33% of reported crime victims are Black, despite Black Americans making up only 13% of the population.²⁶ Black Americans are far more likely to be affected by the problem of rampant, unpunished crime compared to other Americans. According to a 2018 survey, 75% of Black Americans stated violent crime was a “very big” problem in the country compared to only 46% of White Americans, and 38% of Black Americans said crime was a major problem in their community compared to only 17% of White Americans.²⁷

Too often the same advocates and reformers who protest against police violence and decry the injustices of systemic racism in the legal system are nowhere to be found on the issue of solving and punishing crime. What such advocates need to understand is that solving and punishing serious crime isn't simply a criminal justice issue but is also a social and racial justice issue.

III. What Causes Failures of Justice?

There are numerous reasons why the justice system fails to do justice, both in the sense of convicting an offender for their crimes and in giving them a punishment the community sees as sufficiently just. In our book *Confronting Failures of Justice*, we grouped these individual factors into four conceptual

²⁵ BRANDON T. JETT, RACE, CRIME, AND POLICING IN THE JIM CROW SOUTH: AFRICAN AMERICANS AND LAW ENFORCEMENT IN BIRMINGHAM, MEMPHIS, AND NEW ORLEANS, 1920–1945 63 (2021).

²⁶ *FBI Crime Data Explorer*, FBI (last visited Aug. 1, 2025).

²⁷ John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, Pew Research Center (May 21, 2019).

categories: formal criminal liability rules (such as nonexculpatory defenses like statutes of limitation), limitations on investigation (such as constitutional limitations, lack of funding, poor training, or failure to adopt new technology), criminal adjudication procedures (such as pretrial release, the exclusionary rule, plea bargaining, and sentencing procedures), and social/political influences (such as legal cynicism or anti-punishment ideologies). Each category—indeed, each individual factor—deserves a book-length treatment of its own, but this section briefly considers each category in turn.

It is important to keep in mind that many justice-frustrating causes exist for a reason due to policymakers balancing competing societal interests. In some cases, such as maintaining certain limits on police investigations, justice-frustrating rules are necessary. But there is often room to reform even necessary rules to make them less justice-frustrating, as well as room to revise or eliminate policies that reflect an incorrect or archaic balance of interests.

A. Formal Criminal Liability Rules²⁸

Some formal legal rules bar prosecution of undeniably guilty offenders. While they do not cause a large percentage of failures of justice, these nonexculpatory defenses are some of the clearest examples of the law attempting to promote other societal interests at the expense of justice, and some of them also provide a clear example of rules in need of updating. Statutes of limitation, double jeopardy, diplomatic immunity, and legality principle defenses (such as relying on the rule of strict construction) can all prevent conviction of individuals who have obviously committed serious crimes.

Statutes of limitation are an especially good example of rules in need of updating to better serve justice. Today, the justice system is very different than when statutes of limitation were first conceived. Fairer trial procedures now make it much easier for defendants to discredit old evidence or witness statements that may have become unreliable over time. Additionally, advances in forensic science, such as the advent of DNA analysis, make it possible to show guilt with high certainty even in old cases, particularly rape cases. Thus, the original justifications for many statutes of limitation may no longer apply. Why should the perpetrator of a rape go free simply because he has escaped detection and capture for ten years while a similar offender goes to prison for committing the same offense nine years ago? Eluding investigators for a fixed period of time should not entitle an offender to walk free, something that was always understood in the case of murder, which never had a statute of limitation. Fortunately, many states are eliminating statutes of limitation for all felonies,

²⁸ See ROBINSON ET AL., *supra* note 1, at 25–51.

all felony sex offenses, or all crimes with DNA evidence. Statutes of limitation are a paradigmatic case of a justice-frustrating rule that could be changed to better serve justice without creating significant damage to other societal interests. Similarly, double jeopardy can also let clearly guilty offenders escape justice. When double jeopardy was first conceived, a second prosecution would almost certainly have been an attempt to jury shop with the same evidence or persecute an individual defendant, but advances in evidence (such as DNA) and the professionalization of police forces mean that it is more likely than ever that new evidence may turn up in acquitted cases. Recognizing the increasing number of high-profile failures of justice being caused by double jeopardy, in 2003 the United Kingdom passed the Criminal Justice Act, which permitted acquittals to be reversed in very limited circumstances and only when new evidence (e.g., DNA evidence or a confession) comes to light in cases of serious crime (e.g., homicide, kidnapping, and sex offenses). Since then, there has been no wave of innocent defendants being hounded in the UK—only a number of serious criminals being brought to justice.

B. Limitations on Investigation

There are numerous factors that reduce police departments' and prosecutors' ability to successfully investigate and prosecute crime. Several stand out as especially important: inadequate financing, poor training and procedures, witness intimidation, and legal restrictions (including on the use of new technology).

*1. Inadequate Financing*²⁹

A lack of financial resources directed toward investigating and prosecuting serious crime is responsible for a large share of failures of justice. It is no surprise that murder, which receives the most investigative and prosecutorial attention and resources, also has the highest clearance and conviction rates.

a. Inadequate Financing of Police

Cases are more likely to be cleared when each detective has smaller caseloads and can investigate each crime soon after it occurred. In most high-crime, low-clearance rate jurisdictions, there simply aren't enough detectives to solve most murders, let alone rapes, robberies, and assaults. The result is that generally only "easy" cases get solved as police pick the low hanging fruit, leaving the offenders in many potentially solvable cases to go free.

Consider a case example of how a lack of financial resources affects clearance rates and crime. Stockton, California had twenty-four murders in 2008. That

²⁹ See ROBINSON ET AL., *supra* note 1, at 97–111.

year also brought a national recession, and Stockton laid off a quarter of its police personnel and instituted pay cuts. The narcotics force was closed entirely, and community policing became an unaffordable luxury. The arrest rate for homicides saw an immediate decline from 68% in 2008 to 24% in 2009. By 2012, the city had to file for bankruptcy, and killings hit a record high of 71. There were six people left in the homicide department to work on the ever-growing mountain of unsolved cases. Would-be offenders correctly understood the police were too underfunded to effectively solve or prevent crime.

High-crime, low-clearance rate jurisdictions are swamped with serious criminal cases, making it impossible for police to devote the attention needed for each case. One reason low-crime jurisdictions often have higher clearance rates is because police have a higher rate of funding and staffing compared to the total amount of serious crime—something which contributes to a virtuous cycle keeping the jurisdiction's crime rate low. One obvious conclusion is that America simply does not spend enough to sufficiently investigate most serious crime. Only about 3.7% of combined state and local budgets go to policing (about 1% of state budgets and 6.1% of local budgets).³⁰ Crucially, the problem of underfunding is not evenly distributed—many suburban police departments are well funded compared to their serious crime rates while many urban ones are not. The primarily local model of police funding means poorer areas are less able to pay for the police they need while richer areas have no trouble paying for sufficient justice and safety.

The problem of police underfunding was not helped by the recent “defund the police” movement which led to twenty-four of the largest fifty American cities cutting their 2021 police budgets or canceling regular increases. While such police budget cuts certainly do not explain all (or even most) of the subsequent crime increases, they likely contributed to murders surging 30% nationwide in 2020 (and surging further in 2021) and clearance rates falling to record lows. Unsurprisingly, cities that cut their police budgets were quick to reverse the move, but funding levels remain woefully inadequate compared to the amount of unpunished serious crime such cities experience.

Underfunding is also compounded by the “mission creep” policing has experienced in the last half-century. Most police departments are expected to do more than ever, whether it is dealing with the mentally ill, domestic violence, homelessness, cybercrime, terrorism, human trafficking, or illegal drug distribution.

³⁰ *Criminal Justice Expenditures: Police, Corrections, and Courts*, The Urban Institute (last visited, Aug. 1, 2025).

b. Inadequate Financing of Prosecutors and Crime Labs

Police departments are not the only part of the justice system that suffers from underfunding. Prosecutors play a critical role in securing justice for serious crimes, but many prosecution offices are overworked and understaffed, leading to criminal cases being dropped or resolved through grossly lenient plea bargains. There are two basic levels of prosecution offices: ninety-four U.S. District Attorney offices, which prosecute federal crimes, and over 2,300 district or county attorney offices which prosecute state and local crimes. All such offices not only employ a chief district attorney but also dozens or hundreds of deputies and line prosecutors who handle everything from charging and plea-bargaining decisions, preparing witnesses for trial, guiding victims through the court system, paying for expert witnesses, and arguing cases before juries. While federal offices are better funded, and such federal jobs are seen as steppingstones to lucrative careers in private law, state and local prosecution offices have chronically struggled with a lack of funds and staff.

Part of the staffing shortage is because of poor prosecutor pay, with entry-level state prosecutors making around \$70,000 compared to salaries of well over \$200,000 at large law firms. Prosecution offices struggle to attract and retain talented lawyers, and caseloads are often so crushing that even the most talented lawyers would struggle. While the problem of overworked public defenders is more publicized, research shows prosecutors and public defenders should have fairly equivalent caseloads, with the national advisory board setting that load at around 150 felonies or 400 misdemeanors per year. In reality, prosecutors in some jurisdictions are assigned more than 1,000 cases annually. As one New Mexican prosecutor, Raul Torrez, stated: “Simply put, we lack both the personnel and the basic resources necessary to provide adequate justice to the citizens of this community.”³¹ Many criminal cases police refer to prosecutors are dropped not because they could not be won, but simply because underfunded prosecution offices must prioritize time and resources. A 2020 study found that state prosecution offices reject an average of 22% of felony cases referred by police, and of the cases that are filed, another 17% of felony cases are dismissed, meaning over a third of felony cases referred by police end up getting dropped.³² What makes the situation worse is that funding prosecution offices is so cheap. In 2020, all state prosecution offices cost only \$6.5 billion³³, or just 0.15% of state and local expenditures—a miniscule

³¹ Raúl Torrez, *Underfunding of DA's Office Must Be Fixed*, Albuquerque Journal (Feb. 8, 2017).

³² George E. Browne & Mark A. Motivans, *Prosecutors in State Courts, 2020*, BJS (2024).

³³ *Id.*

percentage showing how easy it would be to significantly increase prosecution resources.³⁴

Another area where inadequate financing undermines justice is in crime laboratories, which are chronically underfunded and face massive backlogs. For example, at the end of 2020, crime laboratories had a backlog of over 700,000 untested cases.³⁵ This has made headlines in the case of rape kits being left untested despite containing DNA evidence that could have ended serial rapists' careers. For example, in 2009, an assistant prosecutor in Detroit discovered 11,341 untested rape kits dating back to 1984 in a police warehouse. It took ten years to get the funding necessary to test all the kits, which revealed over 800 serial rapists and secured hundreds of new convictions. Tragically, hundreds, if not thousands, of rapes could have been prevented if the kits had been promptly tested instead of shelved.

2. *Poor Training and Inefficient Procedures*³⁶

Another cause of failures of justice is the inefficient use of existing resources through poor training or inefficient procedures. Increased police funding does not necessarily translate into higher clearance rates if departments use funding inefficiently. Similarly, the justice system can increase justice by making more efficient use of existing resources. One significant area in need of improvement is investigative training and procedures. For example, in 2002 Baltimore lost up to 44% of its homicide prosecutions because investigators had conducted investigations improperly, such as by failing to secure crime scenes, interview witnesses, or follow steps to ensure accuracy in witness identifications. The disastrous state of Baltimore's homicide investigations in the early 2000s illustrates a deficit of training that afflicts many investigative forces.

Police departments with the highest homicide clearance rates tend to offer continuing training for all homicide officers, and better training generally leads to better evidence collection, analysis, and maintenance. There are over 17,500 state and local law enforcement agencies, making standardization difficult and leading to a wide variety of investigator training methods and procedures. Almost all police departments could benefit from improvement in some areas, whether it is chain of custody procedures, standard operating procedures and checklists for investigations, organization of detective units, or taking advantage of new technologies. Sometimes, this means implementing cutting-edge technology like facial recognition algorithms. Sometimes, it means

³⁴ Randy Moore, Kristen Ricks & Jeffrey Little, *Annual State and Local Government Finances Summary: 2020*, United States Census Bureau (Sept. 22, 2022).

³⁵ Connor Brooks, *Publicly Funded Forensic Crime Laboratories, 2020*, BJS (2023).

³⁶ See ROBINSON ET AL., *supra* note 1, at 83–96.

catching up with the twenty-first century. In 2020, the Philadelphia homicide unit was still using typewriters.³⁷

One significant way to improve investigative effectiveness without large additional spending is making greater use of cost-effective technologies. As the next subsection discusses, this may require removing legal barriers that bar the expanded collection or use of DNA or surveillance technology. A failure to adopt new technology may also be due to inadequate financing, but sometimes it is simply due to a lack of knowledge or inertia. For example, while installing new public CCTV cameras may cost money, many police departments could make greater use of public-private CCTV camera partnerships where police integrate private security cameras into a larger usable network. Similarly, using new rapid DNA testing technology can be faster and cheaper than initially relying on older laboratory tests. Given the range of police departments and massive range of potential improvements, what is really needed is a system to match individual departments with needed improvements instead of expecting every department to discover all of them on their own. A similar situation also applies to crime laboratories and prosecution offices across the country, which could likely all benefit from at least some cost-neutral or cost-saving efficiency reforms.

3. *Witness Intimidation*³⁸

Witness intimidation is widespread, although when successful it defies efforts at measurement. But available evidence points to a catastrophe of silence. One study suggests 23% of reported serious crimes are not prosecuted because of witness noncooperation, and prosecutors in Baltimore and Boston report witness intimidation in up to 80% of cases. A National Youth Gang Survey found that 83% of police departments in larger areas reported that witness intimidation was common. Another study found 36% of witnesses who testified in criminal courts in Bronx County, New York, received direct threats. Perhaps the single greatest limitation on the investigation and prosecution of murder cases is the lack of witnesses willing to testify or cooperate. In many of the tens of thousands of unpunished murder cases across America, police or prosecutors suspect who the likely killer is but are unable to proceed due to a lack of witness cooperation. Witness intimidation is also widespread in rape cases and in any criminal case involving gang members.

4. *Legal Restrictions on Investigations and Adoption of New Technology*

In many cases, legal restrictions on investigations or new technology

³⁷ *Crime Without Punishment: Homicide Clearance Rates Are Dropping in Philadelphia as Murder Rates Skyrocket*, CBS Philadelphia (June 29, 2022).

³⁸ ROBINSON ET AL., *supra* note 1, at 288–97.

contribute to many preventable failures of justice. Consider limits on searches and interrogations as well as restrictions on new technology such as DNA collection, surveillance cameras, and facial recognition algorithms.

*a. Limitations on Searches*³⁹

Society faces many tradeoffs in creating criminal justice system rules. One of the most pervasive dilemmas is how to strike the proper balance between protecting personal liberties, including the right to privacy, and the importance of doing justice. Criminal investigations commonly require some intrusion into personal liberty and privacy, whether it is searching personal property, monitoring online traffic, or interrogating suspects. Society imposes limitations on investigators to strike a balance between these interests, but each additional limitation imposed can come at the cost of increasing failures of justice.

The overarching limitation on criminal investigation in the United States is found in the Fourth Amendment to the Constitution, which protects against “unreasonable” searches and seizures. The immediate purpose of the Fourth Amendment was to ban the English practice of general warrants, which allowed law enforcement to enter any building to search for illegal goods regardless of whether probable cause or even reasonable suspicion existed. While the Fourth Amendment clearly bans such general warrants, the proper interpretation of the amendment is not obvious in other aspects, such as exactly when a warrant is needed in the first place and how this relates to reasonableness and probable cause. The result is that search law has generally been constructed by courts. Some judicial rules seem to have little relation to rational policy ends and would likely never have been adopted by a legislature. For example, judicial rulings have variously allowed police to search a car but not the driver and to arrest a suspect but not search the bag he is carrying.

It is hard to precisely quantify how much of a justice-frustrating effect warrant and probable cause requirements have, but it is not insignificant. Thousands of warrant requests are denied each year, but this is just the tip of the iceberg, as hundreds of thousands of potentially useful searches likely do not take place because of the (often reasonable) limitations, which also lead to criminals going uncaught and revictimizing their communities. Consider a case example: Earl Bradley was a Delaware pediatrician who was found to have abused over 1,200 patients when he was arrested in December 2009, and a search warrant turned up photographic evidence of the abuse. What makes his case more disturbing is that complaints led to police seeking an arrest

³⁹ *Id.* at 113–26.

warrant in 2005 and a search warrant in 2008—both of which were denied, allowing Bradley to keep abusing children, some as young as three months old.

*b. Limitations on Interrogation*⁴⁰

Another kind of limitation on investigation applies to interrogation, through the prophylactic judicial requirement that suspects be read their “Miranda Rights,” which include the right to remain silent, a warning that any statement can and will be used against them in court, and the right to have a lawyer present during questioning. Only if a suspect acknowledges they understand and waive these rights can custodial questioning proceed. Statements or confessions obtained without such a waiver will likely be excluded from evidence under the exclusionary rule no matter how volitional and no matter how reliable they are. Moreover, post-arrest silence cannot be used against a defendant even to impeach an “ambush defense”—an exculpatory story or alibi carefully constructed after arrest to be consistent with the facts the prosecution will be allowed to present at trial and mysteriously never mentioned previously to investigators.

Many have questioned who benefits most from the replacement of the pre-1966 voluntariness standard in confessions with the *Miranda* requirement. Most innocent suspects are eager to talk to police to clear themselves, vulnerable suspects can still be coerced into waiving their rights, and the main beneficiaries appear to be those guilty criminals who previously would have impulsively or foolishly spoken, either confessing their crimes or accidentally revealing inculpatory information. This fact was apparent to Justice Byron White, who dissented from the *Miranda* decision, stating “in some unknown number of cases the Court’s rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.”⁴¹ The extent of these predicted justice failures has become clearer since the advent of *Miranda*. Research suggests that *Miranda* did indeed reduce confession and clearance rates, with even conservative estimates suggesting the new rules led to a loss of almost 5,000 violent crime convictions per year—over a quarter million since the *Miranda* decision. Other estimates put the loss in crime convictions in the tens of thousands per year. Suspects have a right to remain silent, but society may wish to reconsider the consequences of encouraging silence.

⁴⁰ *Id.* at 126–36.

⁴¹ *Miranda v. Arizona*, 384 U.S. 436, 542 (1966) (White, J., dissenting).

*c. Limitations on Adopting New Technology*⁴²

Sometimes, the widespread use of new technology, like certain forms of online or location monitoring, run afoul of judicial search rules. However, even when the use of new technology is judged constitutionally permissible, some jurisdictions have not authorized its use, either from inertia or an excessive concern with potential effects on privacy. For example, the Supreme Court has found that states and the federal government have wide constitutional authority to collect DNA from offenders and arrestees.⁴³ The federal government mandates DNA collection from all arrestees, just like fingerprinting, but many states have lagged behind the federal government in taking advantage of the crime-solving potential of DNA collection. One reason is many privacy advocates mistakenly believe that the DNA stored in police databases contains a great deal of personal information—in fact, it contains little more than a genetic fingerprint.

With a wide enough database, practically every crime where the perpetrator leaves DNA should be solvable. The federal DNA database, CODIS, has 25 million profiles and has produced over 750,000 hits as of 2025.⁴⁴ The larger the database, the higher the hit rate, and the more serious crimes are solved. Among one set of 295 Louisiana cold cases, the CODIS hit rate increased from 47% to 58% between 2011 and 2021 purely due to database expansion—meaning 11% of the unsolvable cases with DNA evidence were solved purely by adding more profiles to the database.⁴⁵ Adding an offender's DNA to a database also reduces recidivism by massively increasing specific deterrence—a reduction that can be up to 42% in terms of one-year recidivism risk.⁴⁶ Yet despite the incredible cost-effective benefits of expanding DNA databases, most states do not collect DNA from all arrestees the way they do for fingerprints.

As of 2021, thirty-four states allowed DNA collection from at least some arrestees. Among these thirty-four states, fifteen generally allowed collection from only arrestees of certain serious felonies, twelve allowed collection from any felony arrestee, and six also allowed for collection from misdemeanor arrestees. The rules across the remaining sixteen states ranged from barely utilizing DNA collection to allowing it for all convicted offenders. There are additional state-by-state differences with respect to issues such as juvenile

⁴² See ROBINSON ET AL., *supra* note 1, at 137–66.

⁴³ See, e.g., *Maryland v. King*, 569 U.S. 435 (2013).

⁴⁴ *CODIS-NDIS Statistics*, FBI (last visited Aug. 1, 2025).

⁴⁵ Ray A. Wickenheiser, *Expanding DNA Database Effectiveness*, 4 FORENSIC SCIENCE INTERNATIONAL: SYNERGY 100226 (2022).

⁴⁶ Anne Sofie Tegner, Anker Jennifer L. Doleac & Rasmus Landerso, *The Effects of DNA Databases on the Deterrence and Detection of Offenders*, 13 AM. J. ECON.: APPLIED ECON. 194–225 (2021).

offenders and whether DNA records are automatically expunged if charges are not filed or if the case ends in acquittal.

There is also the problem of patchwork DNA databases because some jurisdictions do not cooperate or consolidate with the national CODIS network. Additionally, the federal government and almost no states utilize DNA databases for familial searching—an incredibly powerful tool that allows investigators to identify partial matches, indicating an offender’s relative is in the DNA database, which then allows investigators to identify possible suspects. California’s infamous Golden State Killer was caught in 2018 through such a familial DNA search of the private ancestry DNA database GEDmatch. Without it, the Golden State Killer’s thirteen murders, over fifty rapes, and some 120 burglaries would never have been punished.

Another technology that is often not fully exploited, either due to lack of funding, legal barriers, or political opposition is surveillance of public spaces. Studies show that CCTV has helped solve numerous serious crimes including kidnapping, murder, and assault and has been especially useful when other forms of evidence such as DNA are not available. A study in Milwaukee found that clearance rates were 82% higher for violent crimes occurring on street intersections with PTZ (pan-tilt-zoom) cameras than at intersections without the cameras. Washington D.C.’s former police chief Peter Newsham explained that CCTV is “one of the advances in technology that has been most significant in helping law enforcement,” noting that CCTV footage advanced the investigation in 70% of homicide cases and “contributed to closing 40%” of homicide cases in D.C. in 2018.⁴⁷ In Vancouver, Canada, murder suspects are tracked with CCTV footage in 41% of cases, and CCTV identifies murder suspects in 13% of cases. Many high-crime, low clearance rate U.S. cities lag behind police CCTV coverage in places like London or parts of Asia. The sacrifice to privacy of monitoring public spaces is low, and a 2013 poll found 78% of Americans view street surveillance cameras as a good idea.

Another new technology that complements CCTV cameras is the use of increasingly advanced facial recognition algorithms that allow investigators to quickly identify suspects and track their movements across public spaces. A great deal of misinformed fearmongering has led to substantial legal restrictions on law enforcement use of facial recognition technology despite its obvious benefits. Claims that facial recognition algorithms are racially biased are massively overblown. Larger disparities in accuracy that existed in the past were caused by the greater prevalence of certain faces in original training set

⁴⁷ Natalie Delgadillo, *Amid Spiking Homicide Rate, D.C. Will Spend \$5 Million to Install New Security Cameras Around the City*, *dcist.com* (Nov. 24, 2019).

data, which also explains why facial recognition algorithms developed in East Asia have higher accuracy for Asian faces than non-Asian faces. However, as far back as 2018, advances in facial recognition technology had brought the accuracy rate up to 99.97% for all races, and false matches were almost never due to race or gender but due to aging or injury. Moreover, fears about rare inaccurate identifications completely neglect the fact that inaccurate identifications by human investigators or witnesses are far more common. Indeed, facial recognition may actually reduce the risk of innocent people becoming suspects.

C. Criminal Justice Adjudication Procedures

Even after a criminal has been arrested with sufficient evidence to prove their guilt beyond a reasonable doubt, there are still many factors that can result in a failure of justice. An offender can escape conviction entirely via the exclusionary rule, pretrial release, or speedy trial rules, and even if they are convicted, they may receive a lenient punishment the community sees as grossly unjust due to plea bargaining, sentencing discretion, early release, or executive clemency.

1. Escaping Conviction

The exclusionary rule is famous for letting obviously guilty offenders escape justice if police gathered the inculpatory evidence in violation of search or interrogation rules.⁴⁸ Suppression motions are filed in somewhere between 4% to 10% of all felony cases, and a conservative estimate is that at least “10,000 felons and 55,000 misdemeanants evade punishment” each year due to the exclusionary rule.⁴⁹

Pretrial release is another mechanism that some offenders use to escape justice.⁵⁰ Historically, about a quarter of defendants released pretrial fail to appear in court, leading to a bench warrant for their arrest. While many of these defendants eventually show up in court or are later arrested, some evade justice for years, and all cause delays and waste justice system resources. The move to eliminate cash bail in some jurisdictions without replacing it with adequate flight risk assessment tools has also added to this problem. While no one should stay in jail because they are poor, some bail reform efforts have focused on decarceration at any cost, including justice and safety, as opposed to pursuing more thoughtful bail reform measures.

⁴⁸ See ROBINSON ET AL., *supra* note 1, at 169–85.

⁴⁹ Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 443 (1999).

⁵⁰ See ROBINSON ET AL., *supra* note 1, at 193–206.

Speedy trial rules (which vary significantly by jurisdiction in terms of the maximum time allowed between charging and trial) also lead to some cases being dismissed.⁵¹ Strict time limits can also lead prosecutors to decline a greater number of provable cases to focus on completing open ones before the deadline.

2. *Escaping a Just Punishment*

Even if an offender is convicted, this does not mean justice has been fully done. In many cases, offenders receive sentences that are unjustly lenient from the perspective of the community. While some punishment is usually better than no punishment, there are even cases where extremely lax sentences may be worse than no punishment because it signals to the community that the justice system is not committed to actually doing justice.

a. *Plea Bargaining*⁵²

Over 90% of criminal cases are resolved by plea bargains, including a majority of serious criminal cases. The discount prosecutors give varies by crime, jurisdiction, and individual case, but it can be quite high, with punishments often being more than double for those defendants who go to trial. Plea bargains also routinely lead to below-guideline sentences for serious crimes: 38.3% of federal murder sentences fall below minimum sentencing guidelines due to plea bargaining, and the average below-guideline sentence for murder is 52.1% less than the minimum recommended sentence. Additionally, charge bargaining is rampant, with many felonies being downgraded to misdemeanors. Research suggests that about one in five felony arrests that end in a conviction end in a *misdemeanor* conviction, often allowing serious offenders to be convicted for crimes far more minor than the harms done to their victims.

b. *Judicial Sentencing Discretion*⁵³

Judges often have wide sentencing discretion in determining punishments. Some discretion is clearly necessary to allow an individualized assessment of blameworthiness based on case circumstances. However, when too much discretion exists, this can create wide sentencing disparities and failures of justice when judges apply their own idiosyncratic views instead of those of the community. The problem of lenient sentencing has been particularly criticized in cases of rape. For example, in the 1980 case *People v. Guthreau*, the judge sentenced a forcible rapist to a year in jail (which in fact meant seven months because of standard early release). Indeed, the probation officer had been

⁵¹ *Id.*, at 206–13.

⁵² *Id.* at 215–28.

⁵³ *Id.* at 229–47.

reluctant to recommend any incarceration in the presentencing report because, “after all, [the victim] wasn’t hurt.”⁵⁴ Many Americans were so infuriated with the six-month jail sentence given to Brock Turner, a Stanford swimmer who was convicted of sexually assaulting fellow student Chanel Miller in 2015, that a petition requesting the judge’s removal acquired more than 240,000 signatures. The judge was successfully recalled from office over the lenient decision, which itself was partly due to lenient sentencing guidelines for sexual assault.

*c. Early Release*⁵⁵

In most states, the sentence passed in court is not the punishment served in prison. Early release mechanisms like parole mean most offenders get out of prison early. While the federal system has abolished parole and implemented an 85% time-served requirement (allowing a 15% reduction for good behavior in prison), most states have not, although two-thirds have adopted the 85% time-served requirement for violent offenders. Overall, state prison data show that violent offenders serve on average 54% of their original maximum sentence, though this varies significantly by state. It would be one thing if early release was truly successful at identifying rehabilitated offenders, but there is no evidence that it is. Only 42% to 49% of those on parole successfully complete their term of supervision.

*d. Executive Clemency*⁵⁶

One final post-sentencing mechanism that can lead to failures of justice is executive clemency. While clemency is fairly rare at the federal level (where it is often associated with corruption and midnight pardons as presidents leave office), around 10,000 or more acts of clemency occur at the state level every year. The lack of transparency and accountability in clemency decisions at all levels is disturbing, and many criminals with powerful connections have benefited from having their punishments short-circuited.

D. Social/Political/Ideological Factors

There are numerous social, political, and ideological factors that contribute to failures of justice. The ones covered here include legal cynicism, anti-justice system narratives, opposition to the concept of desert-based justice, and a lack of awareness or political attention.

⁵⁴ Isabelle B. Reyes, *The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy*, 12 UCLA WOMEN’S L.J. 355, 357 (2003).

⁵⁵ See ROBINSON ET AL., *supra* note 1, at 249–59.

⁵⁶ *Id.* at 269–84.

1. *Legal Cynicism*⁵⁷

Legal cynicism can be defined as “a cultural frame in which the law and the agents of its enforcement are viewed as *illegitimate, unresponsive, and ill equipped* to ensure public safety.”⁵⁸ At its core, legal cynicism is a loss of faith in the justice system caused by the belief that the system cannot or will not provide justice or keep communities safe. A primary driver of such legal cynicism is high crime and low clearance rates that seem to prove the claim that the system is failing. Legal cynicism leads to less crime reporting, less cooperation with police, and more failures of justice, thus causing more legal cynicism in a vicious cycle. In addition to affecting specific communities, legal cynicism can also occur around specific crimes, such as rape, where the system seems unable to deliver the justice the public demands.

Legal cynicism is also especially widespread in poor and minority neighborhoods that are often worst affected by crime and have some of the lowest clearance rates. Studies across many decades show that Black Americans have less favorable views of police than other racial groups. A 2016 survey found that 68% of White Americans, 59% of Hispanic Americans, and only 40% of African Americans had favorable views of police.⁵⁹ Unsurprisingly, research has found African Americans are 20 percentage points less likely than White Americans “to say they definitely would report a crime.”⁶⁰ In fact, 55% of Black respondents agreed that calling the police often does more harm than good, a perception shared by just 25% of White Americans.⁶¹

As noted previously, only 45% of violent crime and 30% of property crime is even reported in America. A significant reason for this is a belief that reporting crime will do no good—a belief that is sadly true in many cases. However, for the justice system to even have a chance at punishing crime, the crime must be reported. Legal cynicism also makes witnesses less likely to cooperate with police even if they are not intimidated.

2. *Anti-Justice System Narratives*⁶²

Most people of all political backgrounds agree it is important to solve and punish serious crime. However, views of the criminal justice system and police

⁵⁷ See ROBINSON ET AL., *supra* note 1, at 301–07.

⁵⁸ David S. Kirk & Mauri Matsuda, *Legal Cynicism, Collective Efficacy, and the Ecology of Arrest*, 49 CRIMINOLOGY 443, 444 (2011).

⁵⁹ Emily Etkins, *Policing in America: Understanding Public Attitudes Towards the Police: Results from a National Survey*, Cato Institute (Dec. 7, 2016).

⁶⁰ *Id.*

⁶¹ David Nather, *Axios-Ipsos Poll: Black Americans' Police Experiences Are Getting Worse*, Axios (May 22, 2021).

⁶² See ROBINSON ET AL., *supra* note 1, at 307–26, 357–83.

have been increasingly politicized, with several ideological narratives leading to misguided beliefs or reform efforts that sometimes reduce the chance of doing justice.

A prominent example is the popular false narrative that policing in America is marked by an epidemic of systemically racist police killings. While police do unjustly kill suspects (as in the case of George Floyd), such unjustified killings are rare and almost never racially motivated (even in the case of George Floyd, there was no evidence of racial animus). However, the perception that there is an epidemic of racially motivated police killings is deeply entrenched and leads to legal cynicism. One study found that “eight in 10 African-Americans ... said that they thought that young black men were more likely to be shot to death by police than to die in a car accident,” when in reality, Black men are more than 15 times likelier to die in a car accident than be killed by police.⁶³ When asked to estimate how many unarmed Black men were killed by the police in 2019, 44% of self-identified liberals estimated between 1,000 and 10,000 or more (20% of self-identified conservatives gave this estimate).⁶⁴ In reality, in 2019, around ten unarmed Black men were killed by police. Only around 20% of self-identified liberal respondents (and 45% of the conservative ones) guessed anywhere close to the right answer. Similarly, the average survey participant guessed that 50% of those killed by police are Black, while the actual percentage is 25%.

The truth is that there is no widespread problem of racist police killings in America. Police kill around 1,000 people in the United States each year, of whom around 250 are Black. Only around 6% of suspects police kill are unarmed, and even unarmed suspects often pose a serious risk. No scientific study has ever found that Black Americans are more likely than White ones to be killed by police in a given police–suspect interaction; indeed, the reverse may even be true.⁶⁵ Yet the well-accepted current narrative portrayed by the media, activists, and many politicians is just the opposite and contributes to anti-police sentiment that increases legal cynicism, reduces crime reporting, reduces witness cooperation, and increases opposition to better funding police or providing more effective justice system intervention.

⁶³ Robert VerBruggen, *Fatal Police Shootings and Race: A Review of the Evidence and Suggestions for Future Research*, Manhattan Institute (Mar. 9, 2022). Black men die in fatal traffic accidents at a rate of 52.1/1,000 and from police related encounters the rate is 3.4/1,000.

⁶⁴ Kevin McCaffree & Anondah Saide, *How Informed Are Americans About Race and Policing?*, Skeptic Research Center (Feb. 20, 2021).

⁶⁵ Ronald G. Fryer, *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210–1261 (2019).

There is also a widespread narrative that portrays the current justice system as racially discriminatory against minority, particularly Black, offenders. However, the popular claim that Black Americans are more likely to end up in prison because of racial discrimination in arrests, prosecutions, and sentences is unsupported.⁶⁶ The share of Black offenders in prison reflects the share of Black offenders who commit serious crimes. For example, in 2018, Black offenders made up 33% of America's sentenced prison population, while Black offenders made up 36% of arrests for serious nonfatal violent crime in 2018. Nor do arrest rates for Black offenders reflect discrimination as 42% of serious violent victimizations reported to police involved a Black offender in 2018. Indeed, Black offenders were more likely to escape arrest for serious violent victimizations reported to police than White offenders were in 2018. While it is true that Black drug offenders may be more likely to be arrested than White drug offenders, there is no evidence this is due to racial discrimination, and it seems more likely to be due to the fact drug enforcement is focused around cities, high-crime communities, and street dealing for logistical reasons.

None of this is to say that it is impossible to find individual cases of racist mistreatment in the justice system today. There are always bad apple police, prosecutors, and judges, and to the extent data really does show racial discrimination at play—inexplicable by crime rates and other relevant factors—that deserves to be taken seriously. For example, there is evidence in some jurisdictions that police are more likely to use some (nonlethal) forms of force in interactions with Black suspects. But what is truly ironic about these narratives is they miss the most obviously present form of systemic racism in the justice system: the systemic under-provision of justice system resources to Black communities. It is not Black offenders who are unfairly treated by the system but Black victims, who are left vulnerable to victimization at higher rates and with greater impunity than other Americans. This is a serious problem that must be remedied, and it requires more justice system intervention, not less. It is also not helped by false narratives that paint the justice system as the enemy of minority communities.

Another false narrative holds that America's justice system frequently gives brutal and undeserved punishments. It is certainly important that criminalization and punishment decisions reflect community intuitions of justice, and this may require rolling back some punishments (such as mandatory minimum or three-strike sentencing laws) or decriminalizing certain conduct

⁶⁶ See e.g., Christopher J. Ferguson & Sven Smith, *Race, Class, and Criminal Adjudication: Is the US Criminal Justice System as Biased as Is Often Assumed? A Meta-Analytic Review*, 75 *Aggression and Violent Behavior* 101905 (2024).

(such as marijuana possession). However, the popular narrative of America being a carceral state with barbaric punishments is simply incorrect. If anything, the average American might be surprised at just how lenient some punishments are. Over 60% of state prisoners are incarcerated for a violent offense, and most of the rest are recidivists.⁶⁷ One study found “that fully 94% of state prisoners had either committed one or more violent crimes (62 percent) or been convicted more than once in the past for nonviolent crimes (32 percent).”⁶⁸ Only 17% of the prison population is sentenced for drug charges (mainly trafficking/distribution), and only 3.7% are sentenced for drug possession—despite popular myths about prison being filled with drug possessors. Most prisoners are also quickly released. The median time served in state prison is 15.6 months, and the mean time served (which is influenced by longer sentences for the most severe offenders) is only 32 months.⁶⁹ Moreover, only about 40% of state felony sentencing even result in a prison sentence, with around another 30% resulting in a jail sentence (of a year or less), and the rest resulting in probation.⁷⁰ Also, despite popular claims, the system has not massively increased in harshness compared to the past. The median time served in 1960 was 21 months, and the mean time served was 28 months.⁷¹

It should be noted that we are no friends of prison and fully support decarceration conducted in a manner that ensures justice and safety. Indeed, we have suggested elsewhere the use of non-incarcerative punishments combined with electronic monitoring to create “electronic prison” sentences that might safely and justly replace a majority of prison sentences.⁷² However, even decarceration advocates like ourselves must acknowledge that many popular claims in the mass incarceration narrative are simply false.

3. *Opposition to Desert-Based Justice*⁷³

Of course, even the justice system’s current levels of punitiveness are unacceptable to prison abolitionists and others who oppose the concept of retribution and desert-based justice. There is no need to argue the moral merits of punishment here. Even if one rejects the deontological arguments in its favor, there are still the utilitarian and democratic arguments founded on the

⁶⁷ Paul H. Robinson & Jeffrey Seaman, “Mass Incarceration” *Myths and Facts: Aiming Reform at the Real Problems*, 50 AM. J. CRIM. L. 1, 20 (2024).

⁶⁸ Dilulio Jr., *supra* note 20.

⁶⁹ Robinson & Seaman, *supra* note 67, at 44–46.

⁷⁰ *Id.* at 42–43.

⁷¹ *Id.* at 44–46.

⁷² See, e.g., Paul H. Robinson & Jeffrey Seaman, *Electronic Prison: A Just Path to Decarceration*, 58 UIC LAW REVIEW, 307 (2024).

⁷³ See ROBINSON ET AL., *supra* note 1, at 53–79.

fact that the vast majority of ordinary people have a strong, innate desire to see retributive justice done in cases of criminal wrongdoing.

A large body of research shows that laypeople assign punishments based on desert (as opposed to other factors) even if they endorse other sentencing principles as a general matter (such as deterrence, incapacitation, or rehabilitation). Of course, it is possible to achieve all those other goals through a properly constructed desert-based sentence, but ordinary people put desert first. Additionally, laypeople's intuitions as to the seriousness of different offenses are closely correlated with one another, allowing the criminal law to use these shared intuitions as the basis of a criminal code. The correlation is around 0.9 for all subgroups, indicating an impressive societal consensus.

Not only do people have shared intuitions about what justice means and when it should be done, but they also have a strong innate desire to see it done, even if they have no personal interest in the case. As one meta-analysis notes, "Unfair treatment triggers a desire to punish the offender, both among victims (i.e., 'second-party punishment') and among uninvolved observers (i.e., 'third-party punishment'). This finding is so universal and robust that it does not require any more replication studies."⁷⁴ Even preverbal infants display a third-party desire to punish offenders—demonstrating just how deep and instinctual the human desire for desert-based justice is. Research leaves no question that ordinary people care deeply about imposing a just, desert-based punishment on offenders and are even willing to sacrifice their own resources to achieve it.

In any democratic society, this means punishments should be assigned on the basis of desert in order to satisfy the community's sense of justice. Indeed, a utilitarian argument for why desert-based justice is important for crime control is because the community will lose faith in the law if desert-based justice is not done. While some individuals may oppose the concept of desert-based punishment and see no value in punishing serious crimes, they are a small minority whose voice should not be allowed to control criminal justice policy in a democratic society. Unfortunately, anti-punishment activists often gain outsized political influence through spreading false narratives or pitching reforms aimed at reducing justice system resources to advance other goals.

4. Lack of Awareness and Political Attention

A critical sociopolitical cause of failures of justice is that there is a shocking lack of awareness about the problem and a lack of political attention or will toward solving it. There are numerous reasons for this lack of awareness, but a

⁷⁴ Mathias Twardawski et al., *What Drives Second- and Third-Party Punishment?*, 230 ZEITSCHRIFT FÜR PSYCHOLOGIE, 77–83 (2022).

significant one is that most people live in neighborhoods where serious crime is not a serious concern. Moreover, the availability heuristic likely makes people think crime is punished at greater rates than it actually is since people are used to hearing or reading stories about arrests and convictions. Similarly, crime TV and entertainment shows usually end with the crime being solved—not a more accurate depiction where over 90% of the episodes should end with the criminal never being found or punished. There is also the sad truth that those with the most political power are also the least likely to be affected by failures of justice or crime. There is no powerful, well-funded lobby in favor of solving and punishing crimes, and as a result, addressing failures of justice is often pushed off policymakers' priorities list.

IV. Reducing Failures of Justice⁷⁵

Given the prevalence and cost of failures of justice, policymakers urgently need to address the problem. The multitude of causes of justice failures also means policymakers have many potential levers to pull. However, clearly not every justice-frustrating rule should be eliminated, and every reform should be the result of a thoughtful balancing of competing societal interests.

A. Balancing Competing Societal Interests

There are several considerations policymakers should keep in mind when balancing competing societal interests. First, different communities may prefer different balances, and the preferred balance of interests may shift over time. This means that where possible, important decisions should be made in a democratic, local, and flexible manner. A natural corollary of this observation is judicially made criminal justice rules often strike an undesirable balance of interests for the community. Claims that courts are better placed to make rules because of their lack of political partisanship also ring increasingly hollow as accusations of judicial partisanship and threats of court packing are made with ever greater regularity. There is also no reason to believe that judges—who are generalists by necessity—possess more relevant expertise in specific criminal law policymaking than legislative committees. It is unfortunate that the latter half of the twentieth century saw courts strip legislatures of their ability to weigh the balance of interests in matters such as search and seizure, interrogation, and the question of excluding improperly obtained evidence. A better approach would be for courts to more frequently decline opportunities to become lawmakers and to more regularly signal the legislative branch that a balancing debate needs legislative resolution or even that a particular reform

⁷⁵ See ROBINSON ET AL., *supra* note 1, at 53–79.

is needed. Even if the legislative branch refuses to act on such judicial advice, any judicial remedy should be limited and open to revision by later legislative enactment.

A second important consideration is that balancing requires compromise. A proper balancing of interests is likely to produce more compromise policies than the partisans of a particular issue might like. On the issue of privacy, for example, a proper balancing of interests reflecting society's preferences would likely satisfy neither extreme privacy advocates nor extreme justice proponents. The importance of interest-balancing is often ignored by those who might be called "rights absolutists" who believe that any attempt at accommodating a competing interest fatally undermines the other interests at stake. For example, a privacy rights absolutist might see no room for expanding DNA collection, as they fear it would lead to a slippery slope to totalitarianism. Such absolutist thinking creates false dichotomies in policymaking where policymakers and the public are confronted with an either-or fallacy and asked to choose between two extreme versions of the world. Such absolutism can occur on all sides, of course.

Third, rational, well-intentioned people should agree on at least a general decision-making principle that considers the interests of everyone in a democratic society—not merely the ones with the most political power. John Rawls, for example, suggested the decision-maker should stand in the "original position" under a "veil of ignorance"—whereby they imagine making the decision not knowing what their place in society will be. Policymakers should consider what financial allocation decisions and rulemaking they would engage in from such a position. Performing this exercise in an intellectually honest way can be a challenge, especially for those people with strong ideological commitments, but it does provide a useful way for good-faith actors to come to a "correct" decision for a democratic society. It seems likely that if policymakers seriously considered the possibility that they might suffer from being victimized with impunity, they would devote greater attention (and financial resources) to reducing failures of justice in society.

B. The Need for Experimentation

Failures of justice occur in all states and localities across America, but the beauty of federalism is that America also offers a laboratory for experimentation on how to fix any problem. There is a wealth of useful information that can be gleaned from examining the variation in policies and outcomes across jurisdictions, both domestically and internationally. In our book, *Confronting Failures of Justice*, we devote a section in each chapter on causes of justice failures to reforms that have been tried by various jurisdictions. We

are also working on another book, *Experiments in Criminal Justice*, detailing the motivations, outcomes, and lessons of some of the most important criminal justice experiments in America over the last century. Policymakers at every level, from police captains to presidents, need to experiment and learn from other jurisdictions' experiments instead of bowing to inertia. America's justice system is in desperate need of improvement, and improvement will often require that policymakers be willing to experiment and try new ideas.

*C. A Sample List of Reforms*⁷⁶

Each jurisdiction may have different reform needs, abilities, and priorities when it comes to reducing failures of justice. What follows is a sample list of suggested reforms (in no particular order) that provides a starting idea for how some of the previously mentioned causes of justice failures might be tackled. More detailed suggestions can be found in our book *Confronting Failures of Justice*.

1. **Abolish Statutes of Limitation for Serious Felonies, and for Other Felonies Restart the Limitation Clock after Any New Felony.** While statutes of limitation might have had more justification when introduced centuries ago, the reasons for their continued use are lacking, especially when they regularly produce failures of justice for serious offenses. The fact that some jurisdictions have successfully abolished them for felonies, without any significant ill effect, shows they are outdated. However, for cautious policymakers, one solution might be to abolish statutes of limitation for serious felonies and maintain current limits for less serious felonies while adding a “clock restart” feature that would mean the limitation only applies if the offender has not committed another felony during the limitation period.
2. **Increase Funding for Police and Prosecutors and Also Make Greater Use of Centralized Resource Sharing.** If policymakers are serious about tackling failures of justice, most high-crime, low-clearance rate jurisdictions will have to spend more. With police spending only making up 3.7% of state and local budgets, even a small, sustained increase could go a long way. Similarly, increasing funding to America's woefully underfunded prosecution offices involves what amounts to spare change at the national level—an extra \$5 billion would almost double prosecutors' funding and significantly ease the problem of justice failures caused by overstretched prosecution offices.

⁷⁶ See ROBINSON ET AL., *supra* note 1, at 385–402.

One way to sustainably increase justice system resources to high-crime, low-clearance rate communities, while minimizing the increase in spending, is to modify the way policing (and prosecution) is funded and provided. Instead of some communities suffering from an under-resourced justice system while others enjoy more than enough, it may make more sense for state and national governments to provide more centralized justice system funds and personnel that can be deployed differently each year to address shifting crime challenges. Such a system would still see local communities control their police departments and fund them primarily through local taxes, but the state would deploy a much larger set of funding grants and state police officers, particularly detectives, who could deploy to local communities as needed based on crime trends. To an extent, this model already exists as it is common for local police departments to call in backup for certain kinds of investigations—such as state police or the FBI for some serious crimes. Expanding that successful model to play a much larger role in providing investigative resources to overwhelmed localities could significantly reduce failures of justice while minimizing costs through exploiting economies of scale. This same model could also apply to prosecution resources, with a larger group of statewide or federal prosecutors deploying to help local district attorneys’ offices tackle larger loads or more complex prosecutions.

3. Establish National/State Expert Groups to Set Best Practices, Help Local Departments Meet Them, and Oversee Experiments.

An enormous number of failures of justice come from investigative errors, poor training, and failures to adopt the most efficient policies. There is a real need for a national expert group to set best practices standards and help individual police departments meet them. Such a group could exist as part of the Department of Justice and also work to facilitate existing (or newly created) grant funding to meet such goals (indeed, the Bureau of Justice Assistance could be transformed into this sort of organization). Similar groups could also exist at the state level and for prosecution offices. Such groups could also serve a valuable role in arranging for controlled experiments and data collection around policy changes aimed at improving clearance and conviction rates.

4. Enlarge Investigative Databases and Capabilities but Establish Limitations on Their Use.

There is understandable reluctance to allow governments to be too intrusive in our private lives, but at the same time there seems to be strong support for the idea that minor intrusions in our collective privacy are worth the enormous benefits to justice and safety

that can be obtained by allowing investigators to have greater access to modern technology. Greater access can dramatically improve justice with only minor intrusions on privacy, as in the collection of a genetic fingerprint from all arrestees, perhaps only to be used when investigating serious offenses (or perhaps familial DNA searching should only be allowed for serious offenses). Additionally, expanding the use of CCTV in public spaces and facial recognition algorithms improves justice at little cost to privacy. However, a key to adopting modern investigative technology is making sure sufficient limitations and safeguards are put in place to prevent its abuse by bad apple government agents and assuage public concerns. Even if the threats created by new technology are small, it will improve the political feasibility of adoption to add some safeguards.

5. **Create a Police-Community Oversight Commission Designed to Build Trust with Both the Community and the Police.** Poor police–community relations stem from a variety of factors and have an enormous negative effect by producing a regular stream of serious justice failures and increased crime. The solution to the problem cannot be found simply in “fixing” bad policing (though improving policing is essential), but rather in building a police–community relationship that changes community views as well as police practices. What might help is a new kind of joint police–community oversight commission that has broad jurisdiction to cooperatively oversee police–community interactions and to actively promote better policing and combat false narratives. The goal of such a commission would not just be to monitor police but also to work to increase clearance rates and reduce crime through leveraging community insights and cooperation.
6. **Alter or Replace the Exclusionary Rule with Direct Sanctioning of Offending Officers.** For some people, the exclusionary rule stands as one of the most offensive doctrines disregarding the importance of doing justice. Should a serial torturer and murderer like Larry Eyler have gone free (to kill again) because he was held too long during a *Terry* stop?⁷⁷ Such applications of the exclusionary rule bring into disrepute the entire criminal justice system, and the existence of the rule is even more offensive because it commonly fails in its stated justification of deterring police overreach. Replacing the rule with direct sanctioning of offending officers would make more sense, and if that proves infeasible, the rule could at least be transformed into a discretionary rule that balances the seriousness

⁷⁷ See ROBINSON ET AL., *supra* note 1, at 170–71.

of the offenses against the size of the infraction (as is common in other countries).

7. **Use Consolidated Offense Drafting with Particularized Offense Grading to Reduce the Justice-Frustrating Costs of Plea Bargaining.** Plea bargaining may be the most common source of justice failures in the current system among convicted criminals. Nearly every “bargain” is a case in which the offender is getting less criminal liability than they deserve, with the prosecution trading that deserved punishment for the efficiency and certainty of a guilty plea. While it may be impractical to stop offering plea bargains, there is no reason to have a system that offers any greater reduction in justice than is needed to induce a plea. Prosecutors can try to work around the problem in a variety of ways, but the most obvious and cleanest solution is simply to draft criminal codes in a way that consolidates all related offenses into a single offense provision (for homicide, theft, assault, sexual assault, fraud, etc.) and provides many offense grades within each consolidated offense, as some modern and proposed codes already do. This gives prosecutors greater room to maneuver within the correct offense category and ensures each grade reduction given up in a plea has a smaller effect on the resulting punishment.
8. **Adopt Comprehensive Sentencing Guidelines, as per the Federal System.** While some sentencing discretion is clearly required, there is no good reason to provide incredibly loose or vague sentencing guidelines. A lack of sentencing guidelines pegged to community intuitions of justice invites overly lenient, overly harsh, and unfairly disparate punishments. Crafting detailed sentencing guidelines is a simple and effective step in the direction of justice.
9. **Abolish Early Release on Parole, as per the Federal System.** The federal system provides transparency with the public (and individual offenders) about how offenders are punished: the sentence publicly imposed in court really is the sentence served. Compare such honesty with the shell game currently played in many states where the sentence publicly imposed means little or nothing, with the actual punishment determined later out of public view by a parole commission prone to inaccuracy and bias. This systemic deception simply contributes to the lack of confidence many have in their criminal justice system. Of course, abolishing parole may require giving shorter sentences, but this is a small price to pay since most offenders understand the longer court-imposed sentences in parole jurisdictions are meaningless.

10. Adopt a Desert-Based Distributive Principle, as per the Model Penal Code. Half a century ago, when the Model Penal Code was first drafted by the American Law Institute, the state of criminal law theory left it unsettled as to whether criminal law ought to primarily aim at doing justice—giving offenders the punishment they deserve, proportionate to the seriousness of the offense and the blameworthiness of the offender—or aim at avoiding future crime through general deterrence or incapacitation of the dangerous, even if doing so meant violating principles of deserved punishment. But as the 2007 amendment to the Model Penal Code illustrates, it should now be clear that abandoning desert as the guiding principle for criminal liability and punishment creates its own enormous costs to effective crime control by eroding the moral credibility of the justice system. Lawmakers should explicitly dedicate the justice system to the task of doing justice through adopting a desert-based distributive principle in their criminal codes.

Conclusion⁷⁸

The tragic irony of the American justice system is that so little justice is done by it. Change begins with awareness, however, and this article is an attempt to provide a brief introduction to failures of justice, their costs, their causes, and some ways they might be reduced. We are not one-sided activists—there are serious tradeoffs faced in crafting criminal justice policy, and it would likely not be worth creating a system that could punish literally every crime. Our ultimate goal is a justice system that punishes the guilty in proportion to their blameworthiness, protects the innocent from liability and crime, and upholds the moral credibility of the law in the eyes of the community—all to a degree consonant with overall societal well-being. Given the current system is failing to do justice at such an extreme rate and with such high costs, we believe it is clear that societal wellbeing demands more justice be done. Addressing the problem should be criminal justice reformers' top priority, and failures of justice should concern everyone who wishes to make the American justice system and American society more just for all. Failing to do justice for serious crime is failing one of government's most fundamental responsibilities under the social contract, and the human cost is staggering. As one mother of a murdered son pleaded: "I'm sick myself. I got cancer. I wasn't expecting to bury my son, I was expecting my son to bury me. I need some justice before I lay my head down. I want him [the killer] caught."⁷⁹ When we fail to provide

⁷⁸ *Id.* at 402.

⁷⁹ Ted Scouten, *Video Murder of Suspect Released as Dying Mother Asks Public to Forget "No Snitch Code," Bring Killer to Justice*, CBS Miami (June 8, 2021).

justice in such situations, we compound the suffering of victims, ensure there will be more victims, and fail a basic moral duty. It is time to stop failing that duty and confront failures of justice.

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