PART I: INTRODUCTION AND OVERVIEW

CHAPTER 1

EXECUTIVE SUMMARY

Mark E. Wojcik

I. INTRODUCTION

The State of Criminal Justice 2022 presents a valuable snapshot of significant legal developments in criminal justice during 2021 and, in some chapters, part of 2022. The period was marked by the continuing Covid-19 pandemic, the infectious disease caused by the recently-discovered coronavirus. The disease effectively shut down much of the world – including many aspects of the criminal justice system – since March 2020. As of the start of June 2022, the world has seen an estimated 531 million cases of Covid-19 globally and an estimated global death toll of 6.3 million cases. The United States by itself saw an estimated 84.5 million cases and an estimated death toll of more than one million. Vaccines became widely available for affluent countries and communities, but distribution and availability remained inequitable. Death rates dropped where vaccines were available, leading some to believe that the pandemic was somehow over. In the United States, the wearing of face masks often became a political issue rather than a medical recommendation. Court systems and prisons struggled with how to deal with the pandemic, especially in jails and prisons where individuals could not socially distance themselves from others and where personal protective equipment was often provided to prison guards before prison inmates.

The year 2021 also began in a way no one could have imagined. After weeks of listening to unproven and false claims that the electoral results of the U.S. presidential elections were invalid, the U.S. Capitol was violently attacked on January 6 by supporters of the now-former president as they attempted to stop certification of the election results. Five people died in the riot, and more than 150 police officers were injured. More than 725 people were arrested, some based on evidence taken from their own cell phones and posted on social media. The attack was not just an attack on the Capitol building but was an attack on democracy, the Constitution, and the rule of law itself. Investigations, Congressional hearings, trials, and sentencing continue more than a year after the attack.[1]

The timeframe covered by this volume also includes ongoing "Black Lives Matter #BLM" demonstrations across the country in response to the murder of George Floyd in May 2020 by a Minneapolis police officer who pressed his knee into Mr. Floyd's neck for more than nine minutes. In June 2021, the police officer who murdered Mr. Floyd was sentenced to 22½

[1] *See, e.g.,* Alan Feuer, Adam Goldman, and Luke Broadwater, *Proud Boys Charged With Sedition in Capitol Attack,* N.Y. TIMES (June 6, 2022) (an amended federal indictment charged five members of the far-right "Proud Boys" group with seditious conspiracy for their roles in the January 6 assault; the charge of seditious conspiracy requires prosecutors to prove that force was used either to overthrow the government or to interfere with the execution of federal law), available at https://www.nytimes.com/2022/06/06/us/politics/proud-boys-charged-sedition-capitol-attack.html.

years in prison, with the sentencing judge noting the "particular cruelty" of the crime.[2] In February 2022, three other Minneapolis Police officers were convicted of depriving Mr. Floyd of his civil rights while acting under government authority.[3] Two of those officers were also convicted of failing to stop their fellow officer from using excessive force.[4]

Finally, as we were finishing work on this volume, news came that a gunman in Uvalde, Texas killed 19 children and two teachers at an elementary school.[5] This was the deadliest school shooting since the murders at Sandy Hook Elementary School in Connecticut in 2012.[6] The police response in Uvalde has come under sharp attack. "Rather than confront an actively shooting gunman immediately, as officers have been trained to do since the killings at Columbine High School in 1999, the ever-growing force of increasingly armed officers arriving at Robb Elementary held back for more than an hour."[7]

These and other events form the backdrop for the chapters in this volume.

As in previous editions of *The State of Criminal Justice*, the book is organized by topic, reflecting work being done by more than 40 committees and task forces of the American Bar Association's Criminal Justice Section. The Section was founded in 1920 in St. Louis, Missouri. It is one of the oldest sections in the American Bar Association. For 102 years, the Section has made countless contributions to the development of the criminal law and to the improvement of the criminal justice system.

Each chapter in this book describes major recent developments in different aspects of the criminal justice system and suggests likely directions for the coming years. As well as covering more familiar turf, many chapters also address cutting-edge topics and developing trends in criminal justice. The book also contains an appendix of American Bar Association policies initiated or co-sponsored by the Criminal Justice Section that may drive the future direction of issues in criminal justice.

Each edition of *The State of Criminal Justice* is essentially a new work, and readers will find it profitable to review earlier editions of this annual publication. Earlier editions of this book from 2012 to 2021, for example, included chapters on these subjects (listed alphabetically here):

- Alternatives to Incarceration
- Anti-Money Laundering Act
- Arrest and Prosecution of Low-Level Offenses
- Bail Reform and Risk-Assessment Instruments
- Capital Punishment
- Carbon-Copy Prosecutions
- The Catholic Church Sex Scandal and the Dying Death Penalty

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[2] Tim Arango, *Chauvin Given 22½-Year Term in Floyd Killing,* N.Y. TIMES, June 26, 2021, at A1.
[3] *See, e.g.,* Tim Arango, Nicholas Bogel-Burroughs, and Jay Senter, *Ex-Officers Guilty in Federal Trial Over George Floyd's Death*, N.Y. TIMES (Feb. 24, 2022), available at https://www.nytimes.com/live/2022/02/24/us/george-floyd-trial-verdict.
[4] *See id.*
[5] *What to Know About the School Shooting in Uvalde, Texas*, N.Y. TIMES (May 30, 2022), available at https://www.nytimes.com/article/uvalde-texas-school-shooting.html.
[6] *Id.*
[7] J. David Goodman, Serge F. Kovaleski, Eduardo Medina, and Mike Baker, *No Radio, Old Tactics: How the Police Response in Uvalde Broke Down*, N.Y. TIMES (June 3, 2022) available at https://www.nytimes.com/2022/06/03/us/uvalde-police-response.html.

- Copayments in Correctional Health Care: The Implications of Covid-19 and the Renewed Need to Consider Reforms
- Corporate America Can Be a Powerful Force for Good to Root Out Modern-Day Slavery
- Corrections: Long-Term Isolation
- COVID-19 and Criminal Justice
- Crime Victims' Rights
- Crimmigration
- Criminal Mediation
- Customs Fraud
- Cybercrime
- Digital Privacy and E-Discovery in Government
- Domestic Violence
- E-Discovery
- Economic Barriers in an Unfair and Unjust Criminal Justice System
- Electronic Privacy in Digitally-Stored Data
- Ethics in Criminal Advocacy
- Execution of the Severely Mentally Ill
- Expansion of Military Subpoena Power Under the Military Justice Act
- Extending *Batson* to Peremptory Challenges Based on Sexual Orientation and Gender Identity
- Federal Sentencing Reform Efforts
- Fifth Amendment Implications and Civil Contempt in Bankruptcy
- Health Care Fraud
- Hedge Fund and Bank Fraud
- The Impact of *Alleyne* on State-Level Sentencing Guidelines
- Implicit Bias
- Improving the Criminal Justice System's Response to Child Torture
- Indigent Defense (Public Defense)
- Inequality Heightens in a Worldwide Pandemic
- Innocence Developments
- International Criminal Law
- International Transparency and Related Gatekeeper Standards
- Investigations and Criminal Litigation
- Juvenile Justice
- Law Enforcement Access to Third Party Records
- Mental Illness in the Criminal Justice System
- Military Criminal Law
- National Association of Criminal Defense Lawyers
- Pell Grant Funding for Prisoners
- Plea Bargaining
- Policing Practices
- Pre-Trial Justice
- Privacy in Digital Data
- Pro Bono for the Incarcerated and Those Reentering Society
- Prosecutorial Innovations
- Protecting Children from Child Sexual Abuse
- Public Defense (Indigent Defense)
- Racial Disparities in the Juvenile Justice System
- Racial Justice

- SEC Whistleblower Bounty Rules
- Self-Defense
- Sentencing Reform
- Sexual Assault Proceedings on College Campuses
- State Policy Implementation
- State Sentencing Guidelines
- Using State Courts to Minimize Collateral Consequences of Federal Convictions
- Victims' Rights
- Voir Dire
- White-Collar Crime
- Women in Criminal Justice
- Wrongful Convictions

Some of these subjects will also be found in this edition of *The State of Criminal Justice,* and many chapters contain predictions about the future direction of criminal justice in 2022 and beyond. An overview of the subjects shows that this book is part of a useful, cumulative series that can assist prosecutors, defense attorneys, judges, policymakers, law professors, law students, and others interested in the criminal justice system. Website links in some of the footnotes in the electronic version of this book will lead to cases, statutes, articles, press releases, and other source materials of value to both practitioners and researchers, making this volume even more useful for readers and researchers.

II. OVERVIEW OF THE BOOK

The remainder of this chapter summarizes the parts and chapters in this 2022 edition of *The State of Criminal Justice*.

PART I: INTRODUCTION AND OVERVIEW

The first part of this book is comprised of this overview chapter, a review of the U.S. Supreme Court's Criminal Cases from its 2020-2021 Term, and a summary of recent federal legislative developments in criminal law.

The U.S. Supreme Court's Criminal Cases

Professor Rory K. Little of the University of California Hastings College of the Law presents one of the Criminal Justice Section's most popular panels each year at the ABA Annual Meeting, where he summarizes the criminal law decisions of the U.S. Supreme Court issued during its preceding term. Chapter 2 is an edited version of those CLE materials from 2021. After briefly introducing the cases discussed in the chapter, they summarize those decisions, grouped by subject matter. The chapter also identifies some of the criminal cases for which certiorari was granted. The chapter concludes with a chart showing which Justice authored the majority, concurring, and dissenting opinions in criminal law cases decided that Term.

Professor Little notes that in its unprecedented, completely remote Term, the Supreme Court decided only 54 full merits cases (after full briefing and oral argument), the second-lowest total number of cases in a Term since the Civil War (and second only to the 53

cases in the Court's previous Term, which had been cut short because of the Covid pandemic. Nineteen of the 54 merits decisions related to criminal law – about the normal percentage of the total cases heard each Term. Oral arguments were conducted remotely, with live-streaming audio. Questions were asked "seriatim," with each Justice having a limited time for questioning, in order of seniority. Professor Little noted that this seriatim method of asking questions gave Justice Thomas a "voice" that he previously seldom used – and many were impressed with Thomas's questions and style. As of August 2021, there seemed to be universal agreement that the live-streaming audio of oral arguments will be permanent, even when arguments go back to in-person.

Although there were no "blockbuster" criminal law decisions this Term, the Court's criminal law decisions were still of immense importance. Professor Little believes that the Court's most influential criminal law decision was a statutory case, affecting many aspects of our daily, computerized, lives. The decision in *Van Buren v. United States*[8] defines, somewhat narrowly, under what circumstances a person can be criminally charged with "exceeding authorized access" under the federal Computer Fraud Act. This was also new Justice Amy Coney Barret's first "major" decision for the Court (she also wrote the *Goldman Sachs* securities law decision at the end of the Term). Because criminal law was not the focus of Justice Barret's speedy confirmation process, Professor Little says that it will be interesting to see what directions she takes in criminal law cases over the coming years.

Professor Little also points to three federal statutory cases that address important aspect of federal criminal sentencing. *Greer v. United States*[9] is particularly important, for apparently adopting a general rule that "convicted felons ordinarily know they are convicted felons." I would question whether, empirically, that is true. *Borden v. United States*[10] has an important majority discussion of *mens rea* and the differences between "reckless" and "knowing," often an issue in criminal prosecutions, and always a difficult concepts for law students as well as lawyers to fully grasp. And in *Briggs v. United States,*[11] the Court addressed the statute of limitations for military rape prosecutions, remarkably suggesting that the death penalty for rape may still survive in the military.

Other highlights in this chapter include "[t]wo fascinating decisions . . . in the habeas corpus procedural context," *Edwards v. Vannoy*[12] and *Jones v. Mississippi.*[13] Both cases addressed aspects of the "retroactivity" of landmark constitutional decisions: the *Ramos* (2020) rule that all criminal jury convictions must now be unanimous; and the *Miller* (2012) rule that mandatory life without parole (LWOP) sentences for juveniles are unconstitutional. *Vannoy* also abolished the "watershed change in the law" exception to habeas non-retroactivity that had been around for over 30 years.

The bulk of that chapter is comprised of detailed summaries of all the U.S. Supreme Court's criminal law decisions (and civil cases that the author deems "related") issued during the 2020-2021 Term, grouped by subject matter. Some decisions address more than one subject; they appear in the category that, in the chapter author's view, best fits. Within subject categories, the cases are presented in chronological order, which can sometimes help

[8] https://www.supremecourt.gov/opinions/20pdf/19-783_k53l.pdf
[9] https://www.supremecourt.gov/opinions/20pdf/19-8709_n7io.pdf
[10] https://www.supremecourt.gov/opinions/20pdf/19-5410_8nj9.pdf
[11] https://www.supremecourt.gov/opinions/20pdf/19-108_8njq.pdf
[12] https://www.supremecourt.gov/opinions/20pdf/19-5807_new2_jhek.pdf
[13] https://www.supremecourt.gov/opinions/20pdf/18-1259_8njq.pdf

demonstrate how doctrine and the Justices' thinking develop as a Term progresses. The goal of these summaries is to be broadly inclusive, for the fully-informed criminal law practitioner.

Chapter 2 concludes with a popular and informative chart showing which Justices authored the majority, concurring, and dissenting opinions in criminal law cases decided in the 2020-2021 Term. And even without a "blockbuster" case, this chapter again is a valuable resource for anyone interested in the Supreme Court's ever-evolving jurisprudence in criminal law.

Federal Legislative Update

Chapter 3 presents a Federal Legislative Update drafted by Ken Goldsmith, an experienced Senior Legislative Counsel at the ABA Governmental Affairs Office.[14] This useful chapter reviews the status of federal legislation that was introduced or acted upon in the first session of the 117th Congress, which began on January 3, 2021 and which ended on January 3, 2022.

When the curtain rose on the first session of the 117th Congress, criminal justice advocates believed the time had come for the first major system reforms since the First Step Act (FSA) in 2018.[15] Mr. Goldsmith explains that belief arose because lawmakers had spent the first half of the 116th Congress carrying out oversight of the implementation of the FSA, and they pledged to next focus on bipartisan criminal justice bills that were supported across the ideological spectrum. Before they could do so, the COVID-19 pandemic set in and Congress made a hard pivot to focus almost exclusively on legislation focused on and limited to the health emergency. But by the opening of the 117th Congress, trillions of dollars in economic relief were at work to stabilize Americans' jobs, housing, and education, and the promise of a vaccine signaled that Congress might soon return to regular business.

Mr. Goldsmith also notes the importance of political changes since December 2018: when the FSA was enacted, Republicans controlled the House of Representatives, the Senate, and the White House, but three years later, Democrats were in control of all three. And Democrats had remained vocal about the need for police reform following George Floyd's highly-publicized murder in May 2020 by a Minneapolis officer.

Despite all this, Mr. Goldsmith notes that meaningful criminal reform legislation was not to be. Neither the passage of time nor the shift in political winds could overcome practical and political realities in 2021 that again prevented many criminal justice system reforms. Democrats controlled both chambers of Congress but by the narrowest margin in modern history – a majority of just six votes in the House and a 50-50 split in the Senate, where the existence of the filibuster means any Senator can effectively defeat a bill unless there are at least 60 votes to limit debate. So, assuming the Democrats were unified on a bill, they would still need an additional 10 Republicans for the bill to even be considered on the floor. Even before bills come to the floor, they normally must be reported (i.e., voted) out of the committee

[14] For research assistance and contributions to this year's chapter, he wishes to thank Deputy Editors Carling D. Miller and Jacob Weltman of the University of Illinois Chicago School of Law and Professor David Austin of the California Western School of Law.

[15] Pub. L. 115-391. The full name of the FIRST STEP Act or "FSA" is the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person, which was signed into law in December 2018 and was viewed as the most significant criminal-justice-related development in the 115th Congress.

to which they were referred. Because the chamber was evenly split between Republicans and Democrats, so, too, were the committees.

Although many bills were stalled in this First Session, Mr. Goldsmith notes that, just as in prior years, there were isolated bright spots during the year. For example, through the appropriations process, Second Chance programs continued to receive notable increases, and although legislation like the FAMILIES Act did not move (a bill that would authorize a new approach to punishment for parents and caregivers), members of the appropriations committee included millions of dollars to run such pilot programs, anyway. Also, President Biden took several actions within his own power to address longstanding problems, including Executive Order 14006, Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities; and Executive Order 14036, Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People. Those Executive Orders along with others on racial justice and economic opportunity may together have their own lasting impact on the criminal justice system.

The federal criminal legislation set forth in this chapter is grouped by general topic with selected bills listed in the order in which they were introduced. The chapter gives the common names of bills introduced, identifies the number of cosponsors by party affiliation, describes briefly the goal of the legislation, and reports on whether the legislation passed in this first session. All bills not enacted by January 3, 2022 were carried over to the Second Session. If the bill was signed into law, the chapter provides the Public Law number.

The chapter, particularly when read in conjunction with Mr. Goldsmith's chapters in previous editions of this book, is a useful reference not only to see what has been accomplished but also to measure the work that still needs to be done.

PART III: WHITE-COLLAR CRIME

Anti-Bribery in China

Part III of this year's volume has an international focus. Chapter 4 covers" New Chinese Anti-Bribery Guideline Calls for Blacklisting and Expulsion of Foreign Companies that Pay Bribes in China." This chapter is based on Dechert LLP's OnPoint client alert on China's new anti-bribery guideline.[16] The authors are Andrew S. Boutros, David N. Kelley, Maria Sit, John R. Schleppenbach, and Shriram Harid.

The authors advise us that the top anti-corruption watchdogs in the People's Republic of China released a new anti-bribery Guideline designed to focus on multi-national corporations and individuals that pay bribes in China, as opposed to bribe recipients, the traditional target of enforcement. According to summaries of the Guideline, which the chapter authors describe as a confidential Communist Party document not readily available to the public, the anticipated targets of any anti-bribery investigation would be entities and individuals that have engaged in bribery on a significant scale, either by offering large amounts as inducements or engaging in multiple acts of bribery.

[16] https://www.dechert.com/knowledge/onpoint/2021/11/new-chinese-anti-bribery-guideline-calls-for-blacklisting-and-ex.html

With the threat of being barred from doing business in China, the Guideline raises significant concerns for entities doing business there. In particular, the chapter authors note that business organizations should be aware that resolving bribery allegations that involve China elsewhere in the world (say, in the United States) could potentially result in a "carbon-copy prosecution" in China with the full range of potentially devastating penalties. Similarly, multi-national corporations that face bribery charges (or even just an investigation) in China could later find themselves prosecuted in the United States or elsewhere in the world in a "reverse-carbon-copy prosecution" based on the same facts.

The chapter authors advise that the anticipated crackdown on bribe payers in China serves as a fresh reminder for multi-national corporations and individuals to examine carefully their anti-bribery protocols. Landing on the Chinese Communist Party's anticipated bribery blacklist could have business-ending consequences in China and potentially subject bribe-paying entities to prosecutions in China, the United States, and other countries because of the prospect of carbon-copy and reverse-carbon-copy prosecutions.

PART III: DEFENSE ISSUES

Trending Defense Issues in Criminal Justice

Chapter 5 on "Trending Defense Issues in Criminal Justice" is authored by Marissel Descalzo, a partner at Tache, Bronis, and Descalzo, P.A., in Miami. She focuses her practice on white-collar criminal litigation, government investigations, and compliance. She handles criminal and civil matters of vital importance to clients' businesses or their personal lives. She counsels companies from a variety of industries on the adoption and operation of compliance programs and she assists companies in the health care industry and companies with overseas operations with internal investigations and ethics issues.

Her chapter on defense issues opens by noting that the coronavirus pandemic continues to impact the criminal justice system by crippling effective representation of criminal defendants.[17] Defense clients face detention for unreasonably long periods. Courts are backlogged, creating further delays in criminal justice. She notes that the pandemic has also changed the conduct of criminal trials. In some courtrooms, jurors, witnesses, lawyers, judges, and courtroom personnel must wear masks, which could affect how jurors perceive testimony. In other courtrooms, the individuals have been surrounded by plexiglass. The jury venire might be limited to vaccinated jurors, which in some parts of the country could be a political decision rather than a public health measure. She notes that a person's decision to receive a vaccination, a booster, or remain unvaccinated could lead to several inferences into a person's social and political beliefs that could give attorneys a great deal of insight into jurors. Moreover, she notes that excluding unvaccinated jurors could leave a significant portion of society unrepresented on juries to the detriment of criminal defendants. She notes that excluding unvaccinated jurors may even pose a potential Sixth Amendment violation. She finds that there is inconsistency among the courts about whether jurors may be asked about their vaccination status. Some courts do not permit it, some courts require it, and others leave it up to the attorneys. She notes that these and other factors could create

[17] For earlier developments related to COVID and criminal defense issues, see Marissel Descalzo, *Trending Defense in Criminal Justice,* in ABA CRIMINAL JUSTICE SECTION, THE STATE OF CRIMINAL JUSTICE 2021, at 67 (Mark E. Wojcik, ed., 2021).

systematic unfairness in trials, but have been permitted under the guise of health and safety measures.

The Supreme Court was not spared during the pandemic. The Fall 2020 to Spring 2021 term was all done remotely. This is the first time ever that an entire term saw only remote arguments. The Court tackled several Fourth Amendment issues, Sixth Amendment issues involving the Confrontation Clause, among Eighth Amendment issues involving the death penalty, and other cases that will continue to raise important criminal defense issues.

Her chapter also notes some criminal justice reforms that will hopefully have lasting effects. Illinois became the first state to enact legislation that will eliminate cash bail as of January 1, 2023. There is hope that other states will follow, but her chapter already notes opposition to similar legislation introduced in California.

Finally, her chapter notes that the Federal Bureau of Prisons has finally rolled out the credit system connected to the First Step Act.[18] There is hope that many serving unduly harsh and long sentences will benefit from implementation of this federal legislation.

Ms. Descalzo's chapter presents a valuable overview of another tumultuous year in criminal defense issues. Readers interested in the death penalty cases would also benefit from reading Chapter 11 on capital punishment.

PART IV: PROFESSIONAL DEVELOPMENT, RACIAL JUSTICE, AND SPECIALIZED PRACTICE

Part IV on Professional Development, Racial Justice, and Specialized Practice includes four chapters: (1) a chapter examining "court culture" and the administration of justice; (2) a chapter highlighting problematic applications of the mootness doctrine when prisoners are transferred just as they are about to successfully challenge conditions of their confinement; (3) a comprehensive review of recent developments in the juvenile justice system; and (4) a chapter explaining changes to the Uniform Code of Military Justice brought about by the 2022 National Defense Authorization Act.

Court Culture and Administering Justice

The title of this chapter and the title of the law review article it is based on do not sufficiently convey the importance of this chapter or the interest that readers will have once they start reading this chapter. It is a fascinating chapter you are likely to share with colleagues at your workplace and in professional bar associations.

Chapter 6 on "Court Culture and Administering Justice" is adapted from an article first published in the Journal of Criminal Law and Criminology as Maria Hawilo, Kat Albrecht, Meredith Martin Rountree, and Thomas Geraghty, *How Culture Impacts Courtrooms: An Empirical Study of Alienation and Detachment in the Cook County Court System*.[19] Meredith Martin Rountree is Senior Lecturer at the Northwestern Pritzker School of Law. Maria Hawilo is a Distinguished Professor in Residence at The Loyola University

[18] *See supra* note 15.

[19] Maria Hawilo, Kat Albrecht, Meredith Martin Rountree & Thomas Geraghty, *How Culture Impacts Courtrooms: An Empirical Study of Alienation and Detachment in the Cook County Court System*, 112 J. CRIM. L. & CRIMINOLOGY 171 (2022).

School of Law. Kat Albrecht is Assistant Professor at Georgia State University in the Andrew Young School of Policy Studies. Thomas Geraghty is the Class of 1967 James B. Haddad Professor of Law and formerly the Associate Dean for Clinical Legal Education and Director of the Bluhm Legal Clinic at the Northwestern University Pritzker School of Law. In addition to Amy Smekar's rich ethnographical work that forms the basis of the article, the authors thank the private donors and the MacArthur Foundation for financial support of this project.

That money was well spent – this chapter provides an engaged and thoughtful study of Chicago's George N. Leighton Courthouse, the main felony courthouse for Cook County, Illinois. Their article uses ethnographic research from, to show "how courtroom culture can separate courtroom insiders from courtroom outsiders and contribute to those outsiders' cynicism regarding legal institutions." With skilled ethnographic observations and notetaking, many shortcomings and problems in the criminal justice system are documented and presented directly to readers.

The problems described are – unfortunately – hardly unique to Cook County or the city of Chicago. Other large, urban court systems face the same or similar obstacles to swift, efficient adjudication: a continuous churn of cases, lack of respect for people's time, inefficient case management, and, for many, the simple indignity of the experience. Further, the danger that the article authors identify – that court operations can decrease the legitimacy of law in their communities – is relevant to every court.

The authors identify and describe a series of micro-level problems, including: (1) inaccurate or unavailable information about court calls and other "elementary information about the court process"; (2) absent legal actors, such as attorneys who are unexpectedly late, leaving defendants to rely on information from the opposing side to understand the next steps in their legal case; and (3) attorneys who are ill-prepared for their cases. The authors also identify and describe structural-level problems in the criminal justice system, including: (1) systemic delays in the pace of how cases are adjudicated; (2) a courtroom culture of inaccessibility, comprising both the use of difficult legal language, inability to hear proceedings in the room, and the habit of courtroom "insiders" who "would mix informal personal conduct with formal court business, making court proceedings inaccessible to the public and underscoring their "separation from the court's work by drawing a line between the insiders in the court and the outsiders who fill the gallery"; and (3) a lack of accountability for actors who created courtroom delays and confusion, such as police officers who did not show up for court hearings or judges who kept courtrooms waiting while they watched television in their chambers.

The chapter authors state that delays, inaccessibility, and lack of accountability create and perpetuate cyclical courtroom dysfunction. These practices have become so entrenched that, "barring a few exceptions, no one expects court to start on time or swiftly resolve cases." The authors state that there is no organizational pressure for judges to behave otherwise, that lawyers are likely late to court because they are juggling multiple court appearances and have learned that their tardiness will be accommodated, and that cases will be continued without complaint, largely because that suits the needs of the courtroom working group. Importantly, the authors also point out that a dysfunctional courtroom culture also has inherently racist and classist undertones, particularly in courtrooms where most defendants, victims, and family members are persons of color.

This chapter details a culture of alienation and detachment in courtrooms by that starkly separates courtroom insiders from outsiders. It identifies both micro-level and

structural-level failures in the courtroom and explains how these practices risk embedding legal cynicism in outsiders' views of courts and law.

The article also offers some examples of "positive court culture" that "offer the possibility of creating more inclusive adjudication." These examples include: (1) holding the correct actors accountable when things go wrong; (2) specific improvements to courtroom transparency; and (3) encouraging a culture of attachment and inclusion.

This chapter, in short, may prove to be a valuable discussion tool for courts, attorneys, and bar associations to identify similar problems in other courts and to begin fixing those problems.

Prison Transfers and the Mootness Doctrine

Chapter 7 on the topic of "Prison Transfers and the Mootness Doctrine: Disappearing the Rule of Law in Prison") is authored by SpearIt, a Professor of Law at the University of Pittsburgh School of Law. SpearIt is a frequent contributor to *The State of Criminal Justice*.

The chapter correctly notes that access to the legal system does not come easily for people in prison. Administrative procedures must be exhausted and federal legislation like the Prison Litigation Reform Act[20] imposes significant limits on damages and creating financial disincentives for lawyers to take up cases. And sometimes, the chapter notes, legal doctrine may prevent the Rule of Law from functioning in prison, particularly when a prison-transfer moots a legal claim.

SpearIt writes that "[i]n the most egregious situations, a transfer [of a prisoner from one prison to another] perverts justice by serving as a subterfuge for prison officials to avoid liability for abusive conduct, unethical prison policy, or the continued violation of constitutional rights." Additionally, prisoner-petitioners may also face retaliation and other unfavorable treatment at the hands of administration and staff for the act of filing a grievance or lawsuit.

This chapter considers how prison transfers and mootness "partner together to perform a vanishing act; like a skillful magician and trusty assistant, transfer and mootness can make justice disappear right before our very eyes." The chapter notes that although mootness has been conceived "as a doctrine of fairness," it is anything but fair when the doctrine is triggered by a prison transfer designed to derail a prisoner's successful case. SpearIt writes that "[t]ransfer and mootness are a lethal combination that can kill a legal claim and reduce to nothing all the time, effort, and sacrifice of an individual who, under the hardship of prison, has managed to crack through the judicial bureaucracy and get an audience in court."

The chapter identifies possible judicial, legislative, and executive remedies to this problem. These remedies are worthy of serious examination, discussion, and implementation. SpearIt believes that "[t]he most ideal solution would be for the executive branch to self-regulate on these unfair and unseemly practices," but "the idea that prisons might crack down on themselves may be wishful thinking given the dual nature of the task, which involves actually accounting the misconduct of their employees and ensuring that transfer is

[20] Prison Litigation Reform Act (PLRA) of 1996, 42 U.S.C. § 1997e.

never used to circumvent attempts to redress the harm." SpearIt admonishes that when it comes to lawsuits against prison personnel, prisons should be trying to uphold the Rule of Law and set an example for the rehabilitation of their wards. Banning dismissals of cases for "mootness" only by reason of a prison transfer would help achieve that goal.

Juvenile Justice

Chapter 8 on "The State of Juvenile Justice" was authored by Jay D. Blitzman, a retired First Justice for the Middlesex Juvenile Court in Middlesex County, Massachusetts. As his chapters did in previous editions of this book, he reminds us that despite considerable progress in juvenile justice reforms, many of the reforms promised more than 50 years ago by the U.S. Supreme Court's decision *In re Gault*[21] still remain largely aspirational.

One focus of Justice Blitzman's chapter this year focuses on the applying developmental research and science to practice, given the growing evidence that promoting community-based programming best supports positive youth development, reduces racial and ethnic disparities, and reduces recidivism at significantly lower cost. The chapter also includes developments involving police in schools, jurisdiction of juvenile courts, and legislative developments from across the country.

Justice Blitzman writes that the evidence proves that community-based and public health-oriented models support the socially-connective tissue that children need. These models thus promote positive youth development and best protect public safety. He believes that applying developmental research and science to policy and practice is essential in achieving more favorable outcomes.

Justice Blitzman's chapter this year and his contributions to previous editions of *The State of Criminal Justice* provide a compassionate and comprehensive review of juvenile justice issues.

Military Justice

Chapter 9 continues a useful series of articles on changes to the Uniform Code of Military Justice (UCMJ). The "Overview of UCMJ Changes in the 2022 National Defense Authorization Act" is authored by Michael S. Waddington, Alexandra González-Waddington, Major M. Arthur Vaughn II (of the U.S. Air Force Reserves, speaking in his personal capacity), who are among the regular contributing authors to *The State of Criminal Justice.* Joining them this year as an additional co-author is Tiffany Lopez, a student at Florida International University College of Law.

As many readers know, the laws and rules that the military justice system follows differ from those governing the civilian criminal courts and justice systems. The U.S. military services continue to update its rules and enforcement concerning sexual assault, hazing, and other criminal matters. Military justice reforms are intended to promote justice, maintain good order and discipline, and enhance military effectiveness and efficiency.

[21] 367 U.S. 1 (1967).

Their chapter explains that every year for the past 61 years, Congress has reached a bicameral, bipartisan agreement to pass a National Defense Authorization Act (NDAA). The NDAA authorizes funding and provides statutory guidelines so that the U.S. Military has adequate training, equipment, and resources needed to conduct missions. After agreement in the U.S. House of Representatives and the Senate, President Joseph Biden signed the NDAA into law on December 27, 2021.

The chapter authors explain that the focus of the NDAA was on vital national security priorities for the United States. In addition, the legislation sought to improve the lives of service members and their families. In focusing on improving the lives of service members and their families, the NDAA includes provisions on personnel's quality of life, military justice reform legislation, and other military justice and investigation matters. In addition to these necessary provisions, the NDAA also amended many Uniform Code of Military Justice (UCMJ) articles to change gender-specific terms to gender-neutral terms. Before this change, many articles referred to service members primarily as male.

Section 521 of the NDAA focuses on crime victim rights. It amends the UCMJ's Article 6b(a) to include the victim's right to be informed promptly of pre-trial separations-in-lieu-of-trial and non-prosecution agreements. It also requires that within the year of the enactment of the NDAA, a uniform policy be established so that any recorded statements of the victim to the investigators, records of any forensics of the property or person of the victim, and any personal or medical records of the victim are shared with a Special Victims' Counsel or Victims' Legal Counsel. However, both of these victim rights are subject to the exception of withholding of information to protect the integrity of the investigation or proceeding and the privacy of an individual other than the accused. The chapter authors write that giving this information to victims allows them to be well informed on the results of any investigation and the agreements made regarding their accuser. Each military legal service provider is also required to provide victims with a list of approved civilian victim service organizations that can assist the victim in seeking legal services. This requirement allows victims to seek legal services outside of those provided by the military. The chapter authors explain that allowing victims to seek assistance outside of the military is beneficial for the wellbeing of victims because victims may not feel comfortable discussing their assault with another service member.

The NDAA also provides important reform on how the military investigates and prosecutes sexual assault and harassment offenses under the UCMJ. The NDAA establishes an Office of the Special Trial Counsel (STC) for each military branch, except the Coast Guard. The chapter explains this and other changes to the UCMJ under the NDAA.

As in past years, this chapter on developments in military law is an important one for lawyers and scholars who have a particular interest in the military justice system. The chapter authors note that the changes made to this year's bicameral agreement alone will not solve all the issues that impede the quality of life for service members and their families, but they describe these provisions as a great step in the right direction. Because of the importance of the military to our country, the chapter is again an important one for all readers who care about justice.

PART V: CORRECTIONS AND SENTENCING

Part V on Corrections and Sentencing contains two chapters. The first examines copayments in correctional health care. The second is a comprehensive chapter on the death penalty.

Pandemic Justice Responses to Behavioral Health Needs

Chapter 10 is titled "Pandemic Justice Responses to People Who Have Behavioral Health Needs: Deflection, Diversion, and Alternatives to Incarceration." It is authored by Deanna M. Adams, a Senior Analyst with the Judicial Council of California, where she serves as a subject-matter expert on issues related to the intersection of mental health and the adult criminal court system.

In her chapter last year, Ms. Adams identified the COVID-19 pandemic and the social justice movements of 2020 as "unprecedented opportunities to rethink the roles and functions of every aspect of the criminal justice system." She wrote that "what was considered business as usual pre-pandemic made way for scrutiny and reconsideration about what immediate and long-term solutions are needed to protect public health, promote public safety, and create equitable access to justice." Her chapter this year continues that dialogue.

Her chapter notes that many U.S. jurisdictions tried to mitigate the spread of the coronavirus by reducing jail and prison populations. Mechanisms ranging from early and compassionate release of people serving out their sentences and limiting sanctions for community supervision violations, to releasing people housed in jail pre-trial, instituting zero-dollar bail for specified offenses, and expanding cite and release initiatives, to name a few, helped U.S. jurisdictions achieve unprecedented reductions in incarcerated populations.

Ms. Adams writes that as legal and social functions return to a post-pandemic form of normal, jurisdictions are examining opportunities to replicate pandemic reductions in jail and prison populations by translating innovative responses into long-term solutions. By the summer of 2020, over 520 counties across the country reported drastic declines in jail populations due to immediate responses to the onset of the pandemic. Jail and prison population reductions, however, were not a reflection of criminal case filing rates. With many courts reducing operations or experiencing other pandemic-related interruptions, case filings and pending caseloads outpaced case dispositions, causing backlogs.

Ms. Adams writes that case backlogs and case processing delays deny justice and fairness in case outcomes. For people who have behavioral health needs, Ms. Adams notes that case delays are all the more consequential because they disrupt the continuum of care by denying access to community-based treatments and supports. Moving towards post-pandemic responses, courts, attorneys, and other criminal justice agencies began examining opportunities to reduce case backlogs through creative case processing and alternative disposition structures. With an eye towards improving case processing for people who have mental illness and other behavioral health needs, many of these opportunities embrace the concepts of deflection, diversion, and alternatives to incarceration.

In her chapter, Ms. Adams explains that jurisdictions are looking to resolve cases by expanding the use of justice alternatives to address the circumstances that led to criminal behavior. She writes that the strategies of deflection, diversion, and alternatives to

incarceration meet the needs of people moving through the criminal justice system who have behavioral health needs while protecting public safety, reducing recidivism, and promoting public health.

Capital Punishment

Ronald J. Tabak is again the author of our traditional final chapter of *The State of Criminal Justice*, a chapter on the death penalty. He is Special Counsel and firmwide pro bono coordinator at Skadden Arps Slate Meagher & Flom LLP and affiliates in New York. Since the late 1980s he has been chair of co-chair of the Death Penalty Committee of the ABA Section of Civil Rights and Social Justice. Mr. Tabak provides readers with a comprehensive overview of capital punishment in the United States. His chapter is a useful, comprehensive, and up-to-date resource for anyone working on death penalty cases.

At the outset of his article, Mr. Tabak notes that public support for the death penalty had declined to its lowest level in decades, and for the first time, when Gallup asked whether the public preferred capital punishment or life without parole (LWOP), LWOP was selected by a significant majority of persons surveyed.

As in past years, the chapter recounts a full range of activity relating to the death penalty. He notes that the unprecedented 13 federal executions at the end of the Trump administration accelerated the public's already increased understanding of major systemic problems with capital punishment. This greater understanding led to the abolition or discontinuation of capital punishment in ten states and to statewide moratoriums in four additional states.

Mr. Tabak notes that the death penalty *in practice* has been increasingly attacked by people who have served in the judiciary or law enforcement, taken part in executions, written death penalty laws, or are politically conservative. Indeed, he notes that many more conservatives now say that capital punishment is a failed, inefficient, expensive government program that accomplishes nothing. Religious-based support for executions has dropped significantly and should further decrease in view of Pope Francis' having changed the Catechism to be unequivocally against capital punishment. Opinion polls continue to show much lower support for the death penalty than in the past, even when the actual alternative – LWOP – is not presented as a choice.

Mr. Tabak believes that there is greater public appreciation of serious problems with the death penalty. He argues that it is vital that the legal profession and the public be better informed about how capital punishment really works, because the more that people know about how the death penalty is actually implemented, the more they oppose it. As in past years, this chapter is essential reading for anyone interested in the death penalty.

APPENDIX

The Appendix at the end of the book contains policies adopted as official policy by the ABA House of Delegates at the midyear and annual meetings. Each policy recommendation is followed by a supporting report. These policies relating to criminal justice were initiated or cosponsored by the ABA Criminal Justice Section and provide insights into the most pressing issues and trends in criminal justice.