

PREFACE AND ACKNOWLEDGMENTS

The American Bar Association's Criminal Justice Section prides itself in being the unified voice of criminal justice. We were founded in 1920 and boast over 13,000 members – prosecutors, public defenders, private defense counsel, judges, law enforcement, law professors, law students, and other criminal justice professionals.

The Pandemic tested us as individuals and as an organization. As we emerge from the lockdown, the Criminal Justice Section is uniquely placed to provide advocacy, education, and scholarship regarding those issues which impact this country's promise of equal justice under the law. *The State of Criminal Justice 2023* well exemplifies that role.

As in past years, this volume is organized thematically, although the boundaries are permeable, and issues and topics raised in various chapters will necessarily be raised in others. The time covered is roughly June 2022 to June 2023.

Part I is an introduction and overview. It contains an executive summary, as well as a review of recent U.S. Supreme Court decisions relating to criminal justice during the October 2021-22 term.

Part II is a review of prominent issues for both prosecutors and the defense bar. Chapter 3 is a survey of developments during the past year among what is known as progressive prosecutors. It details these officials' efforts to reduce or eliminate cash bail, divert or decline to prosecute low-level offenses, exonerate the wrongfully convicted, modify excessive sentences, and prosecute police for criminal misconduct. Chapter 4 traces issues of importance for the defense bar, such as the acute shortage of defense counsel, the lack of access to defense counsel, the elimination of cash bail, directives issued by the Department of Justice, and the sweep of sanctions following Russia's invasion of the Ukraine. Chapter 5 details the funding crisis in public defense, with an emphasis on the state of Oregon, and the adoption of a resolution passed by the ABA House of Delegates at its Annual Meeting titled "Ten Principles on Reducing Mass Incarceration."

Part III addresses issues of importance to white collar crime practitioners. Chapter 6 discusses the new DOJ certification requirements which may impose individual criminal liability on C-Suite executives who knowingly and willfully certify what DOJ may view as a deficient compliance program. The chapter also provides certification tips for preventing prosecution. Chapter 7 is an annotated summary of the ethics panel which took place at the National White Collar Crime Institute in Spring 2023 in Miami.

Part IV contains chapters on professional development, racial and gender issues, and specialized practices. Chapter 8 traces the work by the federal judiciary in Minnesota to build two museum-quality, interactive educational centers which will teach young people about civics. Chapter 9 exposes the failure of the Cook County, Illinois Circuit Court to provide the constitutional guarantee of a speedy trial. It examines contributing factors such as "status checks" which last only minutes but require all participants to attend, continuances, late starting times, untimely transmission of police reports, and the crushing caseloads of the Public Defender's Office. Chapter 10 is a survey of the evolution of federal compassionate release motions, namely because of the Pandemic. Chapter 11, using the acquittal of Kyle Rittenhouse, argues that contrary to popular belief, self-defense laws in the U.S. are not less

restrictive in comparison to other countries such as England and Germany. Chapter 12 argues that achieving racial justice is impossible without trust in our government, its leaders, and our institutions. Chapter 13 relays the historical as well as present acts of violence and discrimination against Asian Americans and discusses how the law can serve as a remedy against it. Chapter 14 details the work of the ABA Criminal Justice Section's Women in Criminal Justice Task force which culminated in the passage of a resolution titled "Ten Principles to Achieve Gender Equity in the Criminal Justice Profession" at the ABA Midyear Meeting. Chapter 15, reviews some of the reforms of the 2022 National Defense Authorization Act (NDAA) such as the creation of a Special Trial Counsel, the authorization of the President to issue regulations making sexual harassment a unique offense, judge-alone sentencing in non-capital cases; and the right of suspects to learn that they are being investigated by military law enforcement. The State of Juvenile Justice, Chapter 16, details how the promise of due processes and right to counsel continued to be denied juveniles, particularly juveniles of color and from under resourced communities.

Part V discusses corrections and sentencing. Chapter 17 examines the progress made by the newly-reconstituted U.S. Sentencing Commission in areas such as updating the guideline regarding "extraordinary and compelling reasons for compassionate release and revising the guidelines safety-valve reductions for low-level drug offenders. Chapter 18 reviews developments in capital punishment at the state and federal levels, as well as includes a discussion of the U.S. Supreme Court's granting of a stay of execution of Richard Glossip after Oklahoma's attorney general requested the stay citing multiple errors in the defendant's trial.

The Appendices contains resolutions adopted by the ABA House of Delegates at its midyear and annual meetings which relate to criminal justice issues. Specifically, these resolutions were either sponsored or co-sponsored by the Criminal Justice Section.

This is my first year editing *The State of Criminal Justice*. I want to acknowledge and thank Professor Mark E. Wojcik, my predecessor, who edited this volume since 2014. Thanks to him, my job has been relatively easy. He established processes and developed a model of excellence. Indeed, I have not stepped into his shoes; rather, I stand on his shoulders.

I owe a world of thanks to Kyo Suh, the Managing Editor, who serves as the Criminal Justice Section's Publications and Technology Manager. With unfailing good humor and equanimity, he has kept me on task as well as prepared the book for publication.

Simply put, *The State of Criminal Justice* would not be possible without the contributions of its authors. Each chapter is infused with their expertise, passion, and commitment to educating fellow criminal justice professionals.

Thanks are also due to our team of deputy editors: Nicholas Haley, Tony Leyh, Christopher Merken, Kaelee Overfield, Molly Shaffer, Joseph Simpson, and Rachel Fanny Wittenberg. They performed the necessary but unglamorous tasks of cite checking and proofreading.

The State of Criminal Justice 2023 has benefitted from the strength of the Criminal Justice Section as a whole. Section Chair Justin Bingham has been superb. He follows the equally superb leadership of Immediate Past Chair Wayne McKenzie. And the Section will only grow and prosper under Chair-Elect Tina Luongo. The Section has long enjoyed a strong reputation within the larger ABA because of the representation of Section delegates Professor Steven Salzburg and Neal Sonnett. Additionally, the work of the Section is made possible by

Section officers, council members, committee chairs, task force chairs, division directors, section liaisons, and various others who give of their time. Section Director Kevin Scruggs and his entire team support and enhance every aspect of the Section's work. To them, we owe all our gratitude.

Elizabeth Kelley, Editor

TABLE OF CONTENTS

PREFACE AND ACKNOWLEDGMENTS		<i>iii</i>
AUTHOR BIOS		<i>ix</i>
PART I	INTRODUCTION AND OVERVIEW	
Chapter 1	Executive Summary	1
Chapter 2	Annual Review of the U.S. Supreme Court’s Criminal Law Cases ..	9
PART II	PROSECUTION AND DEFENSE ISSUES	
Chapter 3	Progress and Pushback in the Prosecutorial Reform Movement	61
Chapter 4	Trending Defense Issues in Criminal Justice	75
Chapter 5	Public Defense	85
PART III	WHITE COLLAR CRIME	
Chapter 6	New Liability Risks for Corporate Executives: DOJ Begins Requiring CEOs and CCOs to Provide Compliance Certifications Under Penalty of Prosecution	91
Chapter 7	Ethical Challenges in High-Profile White Collar Crime Cases and Congressional Hearings: A Summary of the Ethics Panel from the 2023 White Collar Crime Institute	97
PART IV	PROFESSIONAL DEVELOPMENT, RACIAL AND GENDER ISSUES, AND SPECIALIZED PRACTICE	
Chapter 8	The Justice and Democracy Centers of Minnesota: A Bold Step to Provide Civics Education by Our Courts	103
Chapter 9	The System of Complex Delays in Criminal Court	111
Chapter 10	From Pipedream to Lifesaver: The Evolution of Compassionate Release	119
Chapter 11	U.S. Self-Defense Law: “Harsh” by International Standards?	131
Chapter 12	Racial Justice Reforms Is Near Impossible Without Transparency, Accountability, and Trust: Understanding the Nation’s Distrust and Divide	135
Chapter 13	“Kung Flu”: A History of Hostility and Violence Against Asian Americans	141
Chapter 14	Voices Heard, Voices Resolved: The Women in Criminal Justice Task Force and Ten Principles to Achieve Gender Equity in the Criminal Justice Profession	151
Chapter 15	The Road Toward Military Justice Reform	163
Chapter 16	The State of Juvenile Justice	171

PART V CORRECTIONS AND SENTENCING

Chapter 17	From Hobbled to Hopping: The U.S. Sentencing Commission Back in Action	185
Chapter 18	Capital Punishment	193

APPENDICES

ABA Policies Related to Criminal Justice	227
About the ABA Criminal Justice Section	237