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Abolishing the Evidence-Based Paradigm

Erin Collins*

The belief that policies and procedures should be data-driven and “evidence-based” has become criminal law’s leading paradigm for reform. This evidence-based paradigm, which promotes quantitative data collection and empirical analysis to shape and assess reforms, has been widely embraced for its potential to cure the emotional and political pathologies that led to mass incarceration. It has influenced reforms across the criminal procedure spectrum, from predictive policing through actuarial sentencing. The paradigm’s appeal is clear: it promises an objective approach that lets data – not politics – lead the way and purports to have no agenda beyond identifying effective, efficient reforms.

This Article challenges the paradigm’s core claims. It shows that the evidence-based paradigm’s objectives, its methodology, and its epistemology advance conventional assumptions about what the criminal legal system should strive to achieve, whom it should target, and whose voices and interests matter. In other words, the evidence-based paradigm is political, and it does have an agenda. And that agenda, informed by neoliberalism and the enduring legacy of white supremacy in the criminal legal system, strengthens – rather than challenges – the existing system.

The Article argues that, if left unchallenged, the evidence-based paradigm will continue to reproduce the system’s disparities and dysfunctions, under the veneer of scientific objectivity. Thus, it must be abolished and replaced with a new approach that advances a true paradigm shift about the aims of criminal legal

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reform and the role and definition of data and empiricism in advancing that vision.

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INTRODUCTION

Despite the seemingly intractable divisions in American society, it appears politicians, scholars, and practitioners across the political spectrum currently agree on one thing: we must reform the criminal legal system.¹ This is not the first time a surprising consensus has emerged around the need for such reform.² In fact, the common

1. See, e.g., Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, NY TIMES (Feb. 18, 2015) (describing the creation of the Coalition for Public Safety, a criminal justice reform coalition comprised of broad-ranging groups such as Koch Industries and the ACLU).

The notion of a united and unitary criminal legal "system" is perhaps a misnomer. See Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55 (2018). However, despite the conceptual and descriptive limitations, I will use the phrase "criminal legal system" throughout this Article.

2. As Ben Levin has emphasized, while there may be widespread agreement on the need to change the system, there is not a necessarily consensus on *why* it should be changed. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

account of the rise of mass incarceration begins in the 1970s with the similarly surprising consensus that the system should be reformed. However, while those reformers offered a variety of paths forward—some more lenient, some more harsh—the momentum they collectively created was funneled in one direction: towards intensely punitive criminal laws, policies, and procedures that dramatically expanded the carceral state.³

The contemporary reformist push promises to be different. Reform advocates insist we can resist being led down a punitive path by Willie Horton-like scare tactics and reactionary politics.⁴ Instead, reformers contend, we will follow data and science toward reforms that will reduce our reliance on incarceration.⁵ Tellingly, the maxims of this new approach turn their predecessors on their head. Instead of being tough on crime, we will be “smart on crime.”⁶ And instead of lamenting that “nothing works” and resorting to lengthy terms of incarceration,⁷ we will employ scientific methods to identify “what works,” and craft our policies

3. See David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1491 (2014) (describing different visions for criminal justice policy from conservative and liberal reformers).

4. Willie Horton was released from a Massachusetts prison in the 1980s under a furlough program and then committed a violent crime. His case was featured in a political attack ad against Michael Dukakis, who had supported the furlough program. This ad is widely believed to have effectively ended Governor Dukakis’ presidential campaign. See RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION*, 66-67 (2019) (describing the “Willie Horton problem”).

5. See, e.g., BARKOW, *supra* note 4, at 15 (arguing that the key to meaningful reform “is to create and foster an institutional framework that prioritizes data, not stories, to drive decision-making”); Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490, 1496 (2018) (“The criminal justice system in the United States is undergoing deep change; the hope is that this change will be well informed by evidence.”).

6. See, e.g., DEP’T OF JUST., *SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY* (2013); TEXAS SMART ON CRIME COALITION, <http://smartoncrimetexas.com/> (last visited Oct. 19, 2022) (describing the Smart on Crime Coalition as a coalition of business, faith, and nonprofit organizations working “to make the criminal justice system smarter, safer, and more cost effective.”). See also Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 NYU L. REV. 870, 893-94 (2015) (describing the “smart on crime” mindset as “adopting approaches supported by evidence of effectiveness and cost effectiveness.”).

7. This phrase is attributed to sociologist Robert Martinson, who studied prison rehabilitation programs and concluded that none of the programs he studied effectively rehabilitated people. See Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, NAT’L AFF’S, (1974), https://www.nationalaffairs.com/public_interest/detail/what-works-questions-and-answers-about-prison-reform.

accordingly.⁸ We will, in other words, adopt an “evidence-based” approach to reform.⁹

The idea that criminal law and policy should be evidence-based has become a leading paradigm for reform.¹⁰ This paradigm has informed many of the most popular reforms in policing, bail, sentencing, and corrections as jurisdictions have added evidence-based requirements to criminal reform legislation.¹¹ Paradigm proponents have suggested we expand its influence to

8. See Cecelia M. Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 556 (2015) (“Advocates of evidence-based correctional practice contrast reliance on such research findings with reliance on hunches, instincts, or best guesses about ‘what works’ in corrections—approaches they suggest have defined criminal justice interventions in the past.”); Gert Biesta, *Why “What Works” Won’t Work: Evidence-Based Practice and the Democratic Deficit in Educational Research*, 57 EDUC. THEORY 1, 7 (2007) (“Evidence-based practice conceives of professional action as intervention, and looks to research for evidence about the effectiveness of interventions. Research needs to find out, in other words, ‘what works . . .’”).

9. Brandon Garrett opts for the term “evidence-informed” instead of “evidence-based” to signal that evidence “may not provide a rigid formula for professionals but instead may inform their practices.” Garrett, *supra* note 5, at 1493 n.18.

10. See NAT’L INST. OF CORR., A FRAMEWORK FOR EVIDENCE-BASED DECISION MAKING IN STATE AND LOCAL CRIMINAL JUSTICE SYSTEMS, 10 (4th ed. June 2017) (identifying evidence-based practices as a “new paradigm for the justice system”). See also Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 608 (2016) [hereinafter Eaglin, *The Drug Court Paradigm*] (noting that “criminal justice reforms are driven by the larger shift towards ‘evidence-based policies and practices’”); STAN ORCHOWSKY, BUREAU OF JUST. ASSISTANCE, AN INTRODUCTION TO EVIDENCE-BASED PRACTICES 2 (April 2014) (“The movement toward the use of evidence-based practices (EBPs) has been sweeping the criminal justice community in recent years.”).

11. Federally, for example, each incarcerated person who is eligible for early release credits under the First Step Act must receive “evidence-based recidivism reduction programming”. First Step Act of 2018, Pub. L. No. 115-391, § 101, 132 Stat. 5194 (2018). See also Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325 (2015) (discussing state legislation that requires evidence-based indigent defense policies); Juliene James, Lauren-Brook Eisen & Ram Subramanian, *A View from the States: Evidence-Based Public Safety Legislation*, 102 J. CRIM. L. & CRIMINOLOGY 821, 824 (2012) (surveying evidence-based public safety legislation and noting that “states are now using research to drive comprehensive legislative change”); Jennifer Rosenberg & Sara Mark, *Balanced Justice: Cost-Benefit Analysis and Criminal Justice Policy*, CTR. ON THE ADMIN. OF CRIM. LAW, 5 (Oct. 2011) (providing examples of how state legislatures have “integrat[ed] evidence-based tools into criminal justice policymaking.”). See generally Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 313–14 (2018) (arguing that the “ideas and practices associated with evidence-based criminal justice have made significant headway into law and policy at the state, local, and federal level” and describing legislation).

other areas, including prosecutorial decision-making and public defense practices.¹²

The organizing principle of the evidence-based paradigm is seemingly straightforward and unobjectionable: reforms should be based on data that demonstrate efficacy. But perhaps the most appealing aspect of the evidence-based paradigm is that it appears to be apolitical. In contrast to the politicized and punitive impulses that led to mass incarceration, the evidence-based paradigm demands rationality and objectivity.¹³ It purports to let data—not politics—drive reforms, and advances no agenda apart from identifying the most effective reform strategies.¹⁴ This appearance of objectivity undoubtedly helps explain how this empirical reform project has attracted support from legislators, advocacy organizations, and academics across the political spectrum. The data it produces, it seems, can be enlisted to advance transformative ends.¹⁵

Scholars have recently begun to challenge specific applications and aspects of the evidence-based paradigm. They have, for example, scrutinized predictive algorithms—the pillar of many evidence-based reforms—and questioned their use in policing, bail, and sentencing.¹⁶ Others have analyzed the rise of specialized

12. See, e.g., Jon Gould & Pamela Metzger, *Evidence-Based Paths Toward Criminal Justice Reform*, THE HILL (Feb. 26, 2021); Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1066 (2015).

13. Cf. Kathleen Nolan, *Neoliberal Common Sense and Race-Neutral Discourses: A Critique of “Evidence-Based” Policy Making in School Policing*, 36 DISCOURSE: STUD. CULTURAL POL. EDUC. 894, 894 (2015) (discussing the connection between “common sense discourses around crime and safety” and evidence-based policy in the context of school policing programs).

14. See generally Biesta, *supra* note 8, at 7 (noting that the “question of effectiveness, the question of ‘what works,’” is “central in the whole discussion about evidence-based practice.”).

15. For example, Arnold Ventures, which is dedicated to funding evidence-based reform, identified the momentum for change that followed the police killings of Breonna Taylor and George Floyd as presenting the “unprecedented opportunity to leverage the power of data” to rebuild the criminal legal system. ARNOLD VENTURES, CAMPAIGN FOR CRIMINAL JUSTICE DATA MODERNIZATION: RECOMMENDATIONS FROM AN EXPERT ROUNDTABLE 23 (April 2021), [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://craftmediabucket.s3.amazonaws.com/uploads/AV-CJ-Data-Report-v7-1.pdf](https://efaidnbmnnnibpcajpcglclefindmkaj/https://craftmediabucket.s3.amazonaws.com/uploads/AV-CJ-Data-Report-v7-1.pdf).

16. See, e.g., Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57 (2018); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017) [hereinafter Eaglin, *Constructing Recidivism Risk*]; Sean Hill, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910 (2021) (drawing on principles of Critical Race Theory to critique risk assessment instruments); Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218, 2224 (2019); Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739 (2022); Rashida Richardson, Jason Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How*

problem-solving courts, raising concerns about their motivating principles and systemic impact,¹⁷ and have identified the perils of evidence-based correctional practices.¹⁸ To date, however, these critiques have remained siloed, providing deep analysis of one particular locus of reform or one particular reform technique. Such scholarship is undoubtedly valuable. Yet, it is limited in its ability to identify the connections between these different reforms and to analyze the evidence-based paradigm qua paradigm.

This Article fills that scholarly gap and makes those crucial connections. It connects the scholarly critiques of specific evidence-based reforms and positions the problems scholars have identified as symptomatic of broader, systemic flaws of the paradigm itself. By doing so, this Article brings new problems into focus and reveals that the evidence-based paradigm—in all of its applications—advances a set of assumptions and beliefs about what the system should strive to achieve, whom it should target, how it should work towards those goals, and whose voices and interests matter.¹⁹ The Article thus shows that this reformist approach is not objective; the evidence-based paradigm *does* have an ideology.²⁰ And that

Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice, 94 NYU L. REV. ONLINE 192, 194 (2019); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014). See generally Stevenson, *supra* note 11, at 304 (noting that algorithmic risk assessment tools are “[a]t the forefront of the evidence-based criminal justice movement”).

17. See Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573 (2021) [hereinafter Collins, *The Problem of Problem-Solving Courts*]; Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1499 (2017) [hereinafter Collins, *Status Courts*]; Eaglin, *The Drug Court Paradigm*, *supra* note 10; Eric Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417 (2009).

18. See generally Collins, *Status Courts*, *supra* note 17, at 1499 (arguing that problem-solving courts are release-valve reforms that may help some people but actually help sustain the dysfunctions of the traditional criminal legal system for most); Klingele, *supra* note 8 (critically examining evidence-based correctional practices).

19. Scholars have made similar arguments about evidence-based education policy. See generally, Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933 (2017). See also Michel Vandebroek, Griet Roets & Rudi Roose, *Why the Evidence-Based Paradigm in Early Childhood Education and Care is Anything but Evident*, 20 EUR. EARLY CHILDHOOD EDUC. RSCH. J. 537, 549 (2012) (“[T]he focus on ‘what works’ makes it impossible to ask the question of what it should work for and who should be able to participate in decisions about what is educationally desirable.”).

20. The meaning of “ideology” itself is contested within different disciplines. By “ideology” here, I mean a “systematic scheme of ideas, usually relating to politics, economics, or society and forming the basis of action or policy; a set of beliefs governing conduct.” *Ideology*, OED ONLINE (3d ed.), <https://www-oed-com.newman.richmond.edu/view/Entry/91016?redirectedFrom=ideology> (last accessed Oct. 19, 2022).

ideology, shaped by neoliberal principles and influenced by the enduring legacy of white supremacy in the criminal legal system, ultimately supports – rather than challenges – the existing system.

This Article shows that the evidence-based paradigm, as it has been adopted and applied by government agencies and prominent research organizations, embraces a set of normative commitments that prioritize reducing financial costs and increasing (or at least not decreasing) public safety.²¹ This equation for reform, which seeks the most public safety at the lowest financial cost, is neither neutral nor inevitable. It is the product of a choice – and a deeply political one at that – to prioritize these aims over others.²² And the terms of this cost-benefit analysis are also value-laden, as the equation narrowly defines the cost of a reform in fiscal terms while holding fast to a reductive notion of public safety that excludes the safety of those most directly impacted by the system itself.²³ Thus, just as the reformist consensus of the 1980s was enlisted in service of the punitive war on crime, the contemporary bipartisan enthusiasm for evidence-based reforms is being marshaled in favor

The claim is not that *only* the evidence-based approach to reform has an ideology. Rather, it is that, despite its proponents' claims to the objectivity and neutrality of this approach, the evidence-based paradigm – like all other reformist approaches – is ideologically driven. See Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020) (arguing that all “approaches to reform reflect ideological commitments, critiques of or acquiescence to underlying systems, aspirations for the future, and theories of change. Reforms communicate analyses of our conditions, tell stories about possibilities, and contribute to dynamic relations of power.”).

21. For example, the National Institute of Corrections speaks of the possibility of research to provide “clear and specific strategies that will reduce crime, ease rising costs, and, most importantly, prevent future victims.” NAT'L INST. OF CORR., *supra* note 10, at 4. See, e.g., Rosenberg & Mark, *supra* note 11, at 11 (“Rather than being a political liability, empirically-grounded policymaking rooted in cost-benefit analysis is politically prudent today, given states' budget crises.”).

22. As Ruha Benjamin remarks, “even just deciding *what problem* needs solving requires a host of judgments; and yet we are expected to *pay no attention to the man behind the screen*.” RUHA BENJAMIN, *RACE AFTER TECHNOLOGY*, 11 (2019). See also Nolan, *supra* note 13, at 896 (“[A]n essential part of the neoliberal project is the manufacturing of discourses that work to normalize current social arrangements and help to construct them simply as ‘the way things are.’”).

23. See Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. (forthcoming 2022). See also Kay Whitlock, *Endgame: How “Bipartisan Criminal Justice Reform” Institutionalizes a Right-wing, Neoliberal Agenda*, THE PUBLIC EYE, Spring 2017, at 3, 6 (“Tax- and cost-based arguments advance austerity politics, which in turn intensify violence and abandonment suffered by the communities that are already most criminalized.”).

of a specific project: the creation of a more fiscally conservative, efficient criminal legal system.

In addition to uncovering the biases inherent in the paradigm's metrics, this Article challenges the purported objectivity of both the data that fuel the paradigm and the methods that produce it. As the vast scholarship on predictive algorithms has revealed, data about the criminal legal system perpetuate racial bias.²⁴ This Article amplifies this critique and adds a new one: the empirical inquiries and methodologies that produce such data are themselves biased. The decision to valorize the evidence-based methodology is itself a choice to privilege quantitative scientific inquiry over other ways of knowing. And this choice has political and epistemological ramifications.²⁵ It creates a hierarchy of knowledge that values narrowly-defined, quantitative-focused empirical expertise over other forms of expertise, such as that emanating from lived experience and qualitative, community-focused methodologies. This hierarchy thus privileges the insights of those with the status, formal education, and resources to qualify as an expert and conduct quantitative studies – and undermines the insights and knowledge of those without. Meanwhile, it imposes a new burden of proof that requires the people most impacted by the criminal legal system to prove what they know to be true about its inequities, violence, and injustice before their concerns can be taken seriously.

In short: the evidence-based paradigm is biased not only in *what* it measures, but *how* it measures and *why* it measures at all.²⁶ And these biases – and thus the entire paradigm itself – favor of the status quo.²⁷ The paradigm presumes that the existing system is

24. Specifically, the scholarship demonstrates that the data are gathered from practices that disproportionately target Black communities and, therefore, produce unjust, inaccurate, and biased predictions of future behavior. See *infra* Section II.C.

25. Jerome M. Culp Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN L. REV. 2435, 2446 (2003) (“[T]he re/turn to empirical truth” is an “evasion of the challenge critical race theory poses – a challenge that ultimately is not only epistemological but also political.”).

26. I use “biased” to connote non-objectivity or non-neutrality. The paradigm has a “tendency, inclination, or leaning” in a particular direction. *Bias*, OED ONLINE (3d. ed.) <https://www.oed-com.newman.richmond.edu/view/Entry/18566> (last accessed Oct. 19, 2022).

27. Indeed, the evidence-based analysis has been applied primarily to attempts to institute alternative systems of punishment and accountability, while the traditional punishment-focused system remains largely immune from such scientific scrutiny. See Carolyn Boyes-Watson & Kay Pranis, *Science Cannot Fix This: The Limitations of Evidence-Based Practice*, 15 CONTEMP. JUST. REV. 265, 272 (2012) (“It seems to us that we apply evidence-based practices in a very limited arena, namely, to challenge any correctional reform or practice

sound in principle, if not in application; it suggests that if we collect more data about its impact and refine reforms accordingly, we can fix its dysfunctional and unjust outcomes. Prison abolitionist activists and scholars reveal the flaws in this foundational premise. They underscore that these inequities are not a symptom of a broken system, but rather proof that it is working as it was intended.²⁸ The evidence-based paradigm, which seeks to refine the application of this system, cannot and will not meaningfully alter its outcomes. If left unchallenged, the paradigm will reproduce the disparities and dysfunctions of the existing system—albeit, perhaps, on a *slightly* smaller scale, and under the veneer of scientific objectivity.

The Article does not contend that those who promote the evidence-based paradigm necessarily intend these results. Indeed, in light of the increasingly inescapable conclusion that anecdote and unchecked bias were key tools in the construction of mass incarceration, and especially in this era of “alternative facts,” it makes sense that many are looking to data and empirical methods for guidance. However, this Article cautions that in this rush to change course, evidence-based proponents have overlooked other key insights about the roles structures and history play in the creation and (re)creation of biased systems and practices and the ways that science and data themselves provide cover for bias. This Article does not claim that decisions about the future of criminal legal institutions and practices should be data-less or void of “evidence.” Rather, it calls for policymakers to re-envision what information “counts” as data, what we ask data to do, and—crucially—whose voices matter in setting the research agenda.

The discussion begins in Part I by briefly examining the rise of the evidence-based paradigm, describing reforms that show how it has been applied, and identifying key tenets of its ideology. Part II questions the paradigm and its ideology. Drawing, in part, on principles of critical theory and Critical Race Theory (CRT)—in particular QuantCrit scholarship, which uses CRT principles to

which is not based on punishment. The vast majority of evidence-based research efforts are used to scrutinize small positive efforts within a sea of intentional harm. It is only here that evidence-based practice is held up as the gold standard for public or private investment.”).

28. See, e.g., MARIAME KABA, *WE DO THIS 'TIL WE FREE US* (2021). See generally Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75 (2020).

examine the use of quantitative methods—it reveals the bias inherent in the paradigm’s objectives, methodology, and epistemology. The paradigm, it contends, largely searches for “what works” to maintain the scaffolding of the existing system, including its hierarchies, privileges, and priorities, while spending less money. The Article concludes in Part III by calling for a profound change in how we conceptualize the aims of criminal legal reform, measure success, and define and integrate data and empiricism into our reform agenda. In making this final claim, the Article joins the burgeoning scholarship that connects social movements with the academy and calls for a power shift to the communities that have been the most harmed by mass incarceration and identifies ways to center and value the knowledge these communities produce.²⁹

Ultimately, this Article concludes that the evidence-based paradigm cannot be reformed; it must be abolished. But abolitionism is not simply about deconstructing what exists; it also involves affirmative steps towards reconstructing a new and different path forward. To chart a different course for the future, we need a true paradigm shift—a change in world view—about the aims of criminal legal reform efforts and the role and definition of data and empirical methodologies in advancing that vision.³⁰

I. EXAMINING THE EVIDENCE-BASED PARADIGM

Until recently, criminal law, policy, and procedure were, in many ways, anti-empirical.³¹ But today, the notion that new policies should be data-driven and “evidence-based” has become a paradigm for reform.³² How has criminal legal policy transformed

29. See generally Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

30. The concept of a “paradigm shift” is itself borrowed from the philosophy of science. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). For further discussion, see *infra* Part III.

31. Indeed, the laws that epitomize the tough-on-crime era’s approach, such as mandatory minimum sentences and life without parole, and its signature law enforcement policies, including broken windows policing, and mass prosecution of low-level drug dealers, proliferated *despite* voluminous social science research demonstrating their inefficacy. Michael Tonry, *Evidence, Ideology, and Politics in the Making of American Criminal Justice Policy*, 42 CRIME & JUST. AM. 1, 4 (2013).

32. See *supra* note 10.

from a largely “evidence-free zone”³³ to one in which there is, increasingly, an evidence-based mandate?³⁴ This Part analyzes this initial paradigm shift, defines its contours, and illustrates how it has been applied.

A. *The Paradigm’s Rise*

Many attribute the rise of mass incarceration to a powerful combination of emotion, anecdote, and reactionary politics.³⁵ A tide of popular punitiveness, fueled in part by rising crime rates and highly publicized and racialized anecdotes of leniency gone awry, encouraged politicians to demonstrate that they were tough on crime.³⁶ The systemic reorientation that emerged from this reformist impulse was heavily informed by sociologist Robert Martinson’s conclusion that prison programming aimed at rehabilitating incarcerated people was ineffective—or that “nothing works” to rehabilitate incarcerated people.³⁷ These factors, in turn, encouraged the adoption of policing, prosecution, and punishment practices that funneled historic numbers of people into the criminal legal system, with many mandated to serve terms of unprecedented length. The culmination of these practices led to a spike in the nation’s jail and prison populations and came at an immense humanitarian and financial cost.

33. Tonry, *supra* note 31, at 1 (noting that criminal justice policy making “has occurred mostly in an evidence-free zone.”). As Tonry points out, there are some exceptions to this general statement. Policing practices, for example, have been heavily influenced by certain social science research. *See id.* at 4.

34. James et al., *supra* note 11, at 824 (“Using research to guide criminal justice decisionmaking [sic] is not a new development in correctional practice . . . What has changed is that states are now using research to drive comprehensive legislative change.”).

35. *See* BARKOW, *supra* note 4, ch. 6 (2019) (describing the rise and impact of “populist politics” in criminal justice reform). *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). For an alternative account of the origins of mass incarceration see NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014) (arguing that the rise of mass incarceration in the federal system began in the 1940s and is rooted in civil-rights liberalism).

36. Rachel E. Barkow, *Criminal Law as Regulation*, 8 NYU J.L. & LIBERTY 316, 329 (2014) (“the criminal law approach is totally driven by stories without any kind of analysis of whether, in fact, the benefits of a particular approach outweigh the costs.”). *See also* Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 919 (2011) (“The power of anecdote stands as a significant impediment to the development of evidence-based law.”). *See generally* BARKOW, *supra* note 4.

37. *See* Martinson, *supra* note 7, at 49 (concluding that the data “give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation”).

A new approach has emerged that seems to address the political and emotional pathologies that facilitated mass incarceration's rise: the application of "evidence-based" principles to target reforms and assess their impact. At the most general level, the goal of this approach is to use what we know to be effective to guide criminal law, policy, and procedure.³⁸

This evidence-based orientation has since become a leading paradigm for reform. And it is clear why. It promises to be smart—rather than tough—on crime, thus curbing the impact of reactionary, emotional impulses.³⁹ In contrast to the politicized approach that routinely resorts to incarceration to satiate popular punitiveness, the evidence-based paradigm purports to provide an apolitical framework that relies on data—rather than anecdote or intuition—to guide decisions around arrest, prosecution, and punishment.⁴⁰ Moreover, it offers an optimistic curative to the defeatist conclusion that "nothing works" to curb recidivism.⁴¹ Instead, the evidence-based paradigm seeks to support only reforms that have been proven effective—or, in the paradigm's parlance, only "what works."⁴²

38. Rachlinski, *supra* note 36, at 910 (explaining that the goal of an evidence-based approach to law is "to create better law—law informed by reality."). See Garrett *supra* note 5, at 1493 (defining "evidence-informed" practices as "a family of approaches that have brought greater use of data and science into the criminal justice system."). James Greiner calls this approach the "new legal empiricism," and describes it as involving "investigations into how the current legal system works, and how to change the world for the better, however 'better' is defined." James Greiner, *The New Legal Empiricism & Its Application to Access-to-Justice Inquiries* 148 DAEDALUS 64, 66 (2018); see also Lawrence W. Sherman, *Evidence-Based Policing*, IDEAS IN AMERICAN POLICING, July 1998, at 4 (defining evidence-based policing as the use of "research to guide practice and evaluate practitioners.").

39. See, e.g., Sam Stanton, *Prop. 47 Victory Shows California Embracing 'Smart on Crime' Approach, Supporters Say*, SACRAMENTO BEE (Nov. 5, 2014) (quoting then Lt. Gov. Gavin Newsom, reflecting on the adoption of Prop. 47, which reclassifies certain felonies as misdemeanors, saying "'There is a growing, rational thinking around moving in a new direction' on how to reduce recidivism and offer treatment to offenders.").

40. See, e.g., Jon Gould & Pamela Metzger, *Evidence-Based Paths Toward Criminal Justice Reform*, THE HILL (Feb. 26, 2021) ("Evidence-based criminal law reform . . . advocates policies driven by the results of research, rather than by anecdote or collective assumptions.").

41. The National Institute of Corrections describes its Evidence Based Decision Making Initiative as "framed by a renewed optimism regarding the potential the justice system has for reducing harm and victimization and making communities safer throughout the nation." NAT'L INST. OF CORR., *supra* note 10, at 6. The evidence-based approach has, the NIC adds, "resulted in a permanent shift in our expectations about what is possible." *Id.* at 2.

42. See Biesta, *supra* note 8, at 7 (noting that the "question of effectiveness, the question of 'what works,'" is "central in the whole discussion about evidence-based practice."); Klingele, *supra* note 8, at 556 ("Advocates of evidence-based correctional practice contrast

Finally, this new paradigm is heralded as a solution to the unchecked, inaccurate, and often racially biased, “gut based” decisions that currently govern decisions throughout the criminal procedure process.⁴³ For example, the Crime and Justice Institute and National Institute of Corrections describe evidence-based practice as “the objective, balanced, and responsible use of current research and the best available data to guide policy and practice decisions.”⁴⁴ Others contrast “traditional” approaches to criminal legal system matters that rely on politics or instinct, with evidence-based approaches.⁴⁵

B. Defining the Paradigm

What I call here the “evidence-based paradigm” is a distinct phenomenon characterized by three core commitments: 1) the collection and analysis of data; 2) through quantitative methods 3) to increase the efficiency of the criminal legal system (as measured by monetary savings and public safety impact).⁴⁶

reliance on such research findings with reliance on hunches, instincts, or best guesses about ‘what works’ in corrections—approaches they suggest have defined criminal justice interventions in the past.”).

43. For example, the Alabama Sentencing Commission celebrated the state’s adopting of a program that seeks to identify “optimal sentences” by “inputting offender characteristics into a rigorous statistical model,” declaring, “[f]or the first time in our state’s history, reliance on anecdotal experience was abandoned for evidence substantiated by data to underscore the impact[s] of sentencing.” Rosenberg & Mark, *supra* note 11, at 5. See also CRIME & JUST. INST. & NAT’L INST. OF CORR., *Implementing Evidence-Based Policy and Practice in Community Corrections*, ix (2nd ed. 2009) (“[E]vidence-based practice focuses on approaches demonstrated to be effective through empirical research rather than through anecdote or professional experience alone.”); Laurin, *supra* note 11, at 325 (“Put most simply, evidence-based practice is a paradigm that aims to tether decision-making to empirical, rather than intuitive or experiential, evaluations of practice or policy options.”).

44. See CRIME & JUST. INST. & NAT’L INST. CORR., *supra* note 43, at ix.

45. See, e.g., Garrett *supra* note 5, at 1491 (describing prosecutors’ “traditional” approach to charging decisions “based on policies and priorities, not based on empirical data.”). CRIME & JUST. INST. & NAT’L INST. CORR., *supra* note 43, at ix (“evidence-based practice focuses on approaches demonstrated to be effective through empirical research rather than through anecdote or professional experience alone.”).

46. The evidence-based paradigm is not the first application of scientific or social scientific principles to guide criminal law and policy. Indeed, the entire field of criminology is dedicated to applying the insights and methods of sociology to the study of criminalized behavior and criminal law. Nor is this the first time that the rhetoric and methodology of science has protected policies and practices that have a biased ideology. See Yeshimabeit Milner and Amy Traub, *Data Capitalism & Algorithmic Racism*, DEMOS 7 (2021), https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf (“Using the pretense of science to rationalize racism is a timeworn

A preliminary contention of evidence-based paradigm proponents is that we simply do not know enough about the operation or impact of the current system. Therefore, under the paradigm, any reform must start with robust data collection and analysis.⁴⁷ For example, Arnold Ventures, a philanthropy company dedicated to investing in “evidence-based solutions that maximize opportunity and minimize injustice,” recently proclaimed that the road to criminal legal reform is “paved by data” and initiated a campaign to modernize criminal legal data.⁴⁸ An article announcing this campaign described the lack of robust data collection practices as “[o]ne of the most notorious process problems with America’s criminal justice system.”⁴⁹ The Brennan Center for Justice recently offered a similar sentiment. It started its Courts-Focused Research Agenda for the Department of Justice with the following proposition: courts are essential to redressing mass incarceration and racial disparities in criminal law enforcement and punishment practices, “but there is much that we don’t know about how they currently function and where reform is most acutely needed.”⁵⁰ Towards that end, the Brennan Center stressed that “research and data are urgently required” to guide the Department of Justice in developing effective interventions.⁵¹

ploy that harkens back to the 19th century, when discredited ideas of phrenology and physiognomy were deployed to claim that ‘innate’ biological differences justified discrimination and the social inequality that resulted.”).

47. See, e.g., JOHN F. PFAFF, LOCKED IN 108 (2017) (“It is impossible to understand what reforms make sense without first understanding what we know—and even more importantly, do not know—about what causes crime to rise and fall.”).

48. See *About*, ARNOLD VENTURES, www.arnoldventures.org/about (last visited Oct. 19, 2022); ARNOLD VENTURES, *supra* note 15; see also *id.* at 4 (“Reform is critically important, but a precondition of effective reform is the foundational data that can guide, fine tune, and measure the success of reforms.”).

49. Stuart Buck, *We Need Criminal Justice Data That Doesn’t Exist. Here’s How the Biden Administration Can Fix It.*, ARNOLD VENTURES (Apr. 15, 2021), <https://www.arnoldventures.org/stories/we-need-criminal-justice-data-that-doesnt-exist-heres-how-the-biden-administration-can-fix-it>.

50. Lauren-Brooke Eisen, Alicia Bannon, Jackie Fielding, Leily Arzy, Alia Nahra, Patrick Berry & Janna Aldestein, *A Courts-Focused Research Agenda for the Department of Justice*, BRENNAN CTR. FOR JUST. (Apr. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/courts-focused-research-agenda-department-justice>.

51. *Id.*

Yet not just any data will do. Rather, the paradigm promotes the use of quantitative empirical methods to target and assess reforms.⁵² Paradigm advocates differ, however, in their beliefs of how closely reformers should hew to the standards for evidence-based medicine to determine efficacy. Some favor a strict, traditional empirical model. These strict empiricists require or encourage the use of randomized controlled trials (RCTs)—the “gold standard” of knowledge within the medical evidence-based paradigm—to test the impact of criminal legal reforms.⁵³ An RCT within the criminal legal system involves randomly assigning similarly situated people within the system to different groups and providing members of one group a new “treatment,” such as paying bail, providing enhanced legal services, or issuing a desk appearance ticket instead of arrest, while withholding the “treatment” from the other group in order to test its impact.⁵⁴ The National Institute of Justice embraces this strict empiricist approach, defining a program as evidence-based only when randomized controlled trials conducted at three different sites have demonstrated its efficacy.⁵⁵

52. Of course, this decision to deem certain methods sufficiently “empirical” or “scientific” is itself a political choice. Cf. Benjamin Levin, *Criminal Justice Expertise*, 90 *FORDHAM L. REV.* 2777 (2022) (arguing that competing conceptualizations of “expertise” in criminal legal reform conversations reflect political and ideological differences).

53. See, e.g., D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession*, 12 *ANN. REV. L. & SOC. SCI.* 295, 296 (2016) (arguing that “no field can claim to be evidence based without a central role for the RCT as a means of accumulating knowledge about what works and what does not”); Jack Karp, *Studying Justice or Hurting It: The Fight Over A2J Research*, *LAW360* (Jan. 24, 2021), <https://www.law360.com/articles/1347474/studying-justice-or-hurting-it-the-fight-over-a2j-research> (“[A]cademics insist [randomized controlled trials] are the only way to know which of the many reforms being made in the criminal justice system actually work”).

54. See Greiner & Matthews, *supra* note 53, at 297–98. RCTs of the impact of criminal justice policies and procedures remain relatively rare, a fact that strict empiricists lament. *Id.* at 300–05 (identifying RCTs in the legal system and discussing why legal professionals are resistant to using RCTs). See also H. Fernandez Lynch, D. J. Greiner & I.G. Cohen, *Overcoming Obstacles to Experiments in Legal Practice*, 367 *SCIENCE* 1078 (2020) (lamenting the lack of a “rigorous evidentiary foundation” for criminal legal practices and encouraging the use of RCTs).

55. *Glossary*, NAT’L INST. OF JUST., <https://www.crimesolutions.gov/Glossary.aspx> (last visited Sept. 28, 2022) (“The National Institute of Justice considers programs to be evidence-based when their effectiveness has been demonstrated by causal evidence obtained through high quality outcome evaluations and that have been replicated and evaluated in at least three sites. NIJ defines high quality outcome evaluations as those using rigorous, randomized controlled trials on programs implemented with fidelity.”).

Others are more flexible in their empirical approach. These flexible empiricists are willing to rely on nonrandomized, “quasi-experimental” methods and data analysis to determine efficacy.⁵⁶ For example, the National Institute of Corrections defines “evidence” for purposes of evidence-based policy and practice as “findings from empirically sound social science research,” without requiring a particular empirical method.⁵⁷

Thus, the evidence-based paradigm promotes a faith in quantitative empiricism to identify the most effective reforms. But efficacy is an instrumental value.⁵⁸ Indeed, while the evidence-based paradigm advances a “what works” ethos, we must ask: “What works for what? For whom? To what end?”⁵⁹

Just as the reforms of the 1970s and 1980s were shaped by fear of rising crime rates and the racist specter of the “superpredator,” this contemporary paradigm has been influenced by a ghost of its own: the financial crisis of 2008.⁶⁰ Indeed, while evidence-based principles have been influencing criminal justice reforms since the late 1990s, the paradigm gained widespread appeal in the wake of the recession with the help of two closely aligned federal funding initiatives: the Evidence-Based Decision Making (EBDM) in State and Local Criminal Justice Systems Initiatives and the Justice Reinvestment Initiative (JRI).⁶¹ The National Institute of Corrections launched EBDM to guide local criminal legal systems in making evidence-based decisions throughout the criminal process, from arrest through disposition.⁶² The JRI, a partnership

56. Quasi-experimental methods include regression modeling and propensity score matching. Kristofer Bret Bucklen, *Conducting Randomized Controlled Trials in State Prisons*, NAT'L INST. OF JUST. 4 (June 2020), <https://www.ojp.gov/pdffiles1/nij/254767.pdf>.

57. NAT'L INST. OF CORR., *supra* note 10, at 10.

58. Biesta, *supra* note 8, at 7–8 (“‘[E]ffectiveness’ is an instrumental value: it refers to the quality of processes but does not say anything about what an intervention is supposed to bring about.”).

59. Pasachoff, *supra* note 19, at 1971.

60. James et al., *supra* note 11, at 823–24; *see also* Stevenson, *supra* note 11, at 304 (noting that the movement toward evidence-based criminal justice practices “has broad appeal across the political spectrum and has had a large impact on law and policy, particularly since the budgetary crises of the recent recession.”).

61. The two funding programs are “closely intertwined” and jurisdictions may receive funding under both initiatives. *See* ERIKA PARKS, SAMANTHA HARVELL, LINDSEY CRAMER, ABIGAIL FLYNN, HANNA LOVE & CAROLINE ROSS, URBAN INST., LOCAL JUSTICE REINVESTMENT: STRATEGIES, OUTCOMES, AND KEYS TO SUCCESS 18 (2016).

62. NAT'L INST. OF CORR., *supra* note 10, at 9. *See also* *Public Safety Performance Project: About*, PEW CHARITABLE TRUST, <https://www.pewtrusts.org/en/projects/public-safety->

between governments and prominent research-focused nonprofit organizations helps states “translate [evidence-based practices] into policy, apply EBPs to organizational practice, and consider the use of EBPs when making funding decisions.”⁶³

Proponents of the evidence-based paradigm tout the ability of the paradigm to address resource scarcity and the need to do more with less.⁶⁴ For example, the Pew-MacArthur Results First Initiative promises that evidence-based policy making can focus “limited resources on public services and programs that have been shown to produce positive results,” thereby enabling governments to “expand their investments in more cost-effective options” and “improve the outcomes of services funded by taxpayer dollars.”⁶⁵

But the goal is not simply to spend less money on the criminal legal system. That could be done simply and directly by employing fewer police officers or corrections officers, decriminalizing a range of activities, or heeding calls to defund criminal legal system institutions. Rather, the fiscal savings goal of the evidence-based paradigm is paired with another: to increase (or, at least, not decrease) public safety.⁶⁶ For example, JRI describes itself as a “data-driven approach to criminal justice reform that examines and addresses cost and population drivers and generates cost savings that can be reinvested in high-performing public safety strategies.”⁶⁷ The JRI’s process distills this into a simple, step-by-

performance project/about (last visited Oct. 19, 2022). EBDM seeks to “equip criminal justice policymakers . . . with the information, processes, and tools that will result in measurable outcomes,” including recidivism reductions and increased cost efficiency. NAT’L INST. OF CORR., *supra* note 10, at 9. Its first principle is that the “professional judgment of criminal justice system decision makers is enhanced when informed by evidence-based knowledge.” *Id.* at 32.

63. THE URBAN INSTITUTE, THE JUSTICE REINVESTMENT INITIATIVE: EXPERIENCES FROM THE STATES 2 (2016). Evidence-based practices are a “key component of JRI states’ policy reforms.” *Id.* Partner organizations include Pew Charitable Trusts and the Vera Institute of Justice.

64. See CRIME & JUST. INST. & NAT’L INST. OF CORR., *supra* note 43, at ix; PARKS ET AL., *supra* note 61, at 3 (explaining role of Crime and Justice Institute).

65. *How States Engage in Evidence-Based Policymaking: A National Assessment*, PEW CHARITABLE TRUSTS 1 (Jan. 26, 2017), https://www.pewtrusts.org/~media/assets/2017/01/how_states_engage_in_evidence_based_policymaking.pdf.

66. For example, the National Institute of Corrections speaks of the possibility of research to provide “clear and specific strategies that will reduce crime, ease rising costs, and, most importantly, prevent future victims.” NAT’L INST. OF CORR., *supra* note 10, at 4.

67. PARKS ET AL., *supra* note 61, at 1. See also *About*, COUNCIL OF STATE GOV’TS JUST. CTR., <https://csgjusticecenter.org/projects/justice-reinvestment/about/> (last visited Oct. 19, 2022) (describing the Justice Reinvestment Initiative). While the JRI began as a state

step process: 1) collect and analyze data on factors that drive criminal justice costs; 2) design and implement reforms that “address costs and achieve better outcomes,” and 3) “measure the fiscal and public safety impacts” of those reforms.⁶⁸

Whether a program achieves the paradigm’s twin goals of saving money and maintaining public safety is commonly measured by a single metric: recidivism.⁶⁹ The Pew Center for Charitable Trusts describes policies that target recidivism reductions as “perhaps the ripest opportunities” for reducing costs and crime, it touts the ability of evidence-based practices to achieve these reductions.⁷⁰ Recidivism reduction has become so central to criminal reform efforts that “[a]t the elite legislative level, the movement against mass incarceration has been morphing into a movement against recidivism.”⁷¹

Recidivism reductions are equated with both increased public safety and enhanced cost savings. Perhaps most obviously, crime reduction is said to increase public safety by reducing the number

initiative in the early 2000s, it expanded significantly in 2010 when Congress appropriated funds to the Bureau of Justice Assistance to support state reinvestment initiatives. See JAMES AUSTIN, VANITA GUPTA, ERIC CADORA, MARC MAUER, TODD R. CLEAR, NICOLE PORTER, KARA DANSKY, SUSAN TUCKER, JUDITH GREENE & MALCOLM C. YOUNG, *ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT* 8 (2013).

68. *Justice Reinvestment Initiative: Learn More*, VERA INST. OF JUST., <https://oldwebsite.vera.org/projects/justice-reinvestment-initiative/learn-more> (last visited Oct. 19, 2022).

69. See NAT’L ACAD.’S OF SCI’S, ENG’G, & MED, *THE LIMITS OF RECIDIVISM: MEASURING SUCCESS AFTER PRISON*, at ix (2022) [hereinafter NAT’L ACAD.’S, *LIMITS OF RECIDIVISM*] (“[Recidivism] is the default benchmark for determining the effectiveness of policies and programs to prevent post-release criminal behavior.”); Cecelia Klingele, *Measuring Change: From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY 769, 772 (2019) [hereinafter Klingele, *Measuring Change*] (“Recidivism rates are one of the primary ways that legislators, policymakers, grant funders, media outlets, and criminal justice system actors determine whether specific criminal justice interventions have succeeded or failed.”); see also MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 101 (2015) (describing recidivism reduction as “a leading penal policy goal and indeed the preeminent yardstick by which to judge the success or failure of justice reinvestment and other penal reforms.”).

70. *State of Recidivism: The Revolving Door of America’s Prisons*, PEW CENTER ON THE STATES 25-26 (Apr. 2011), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivism.pdf.

71. Marie Gottschalk, *Did you Really Think Trump Was Going to Help End the Carceral State?*, JACOBIN (Mar. 3, 2019), <https://jacobin.com/2019/03/first-step-act-criminal-justice-reform>.

of future victims.⁷² And reducing crime saves money in a number of obvious ways, such as alleviating the fiscal burden of incarceration and requiring fewer police, prosecution, and court resources.⁷³ Crime reduction is also said to save money in a number of indirect ways, such as reducing the physical, emotional, and property harm to people who would otherwise be victims of crime and even more attenuated costs such as the toll on the averted victim's productivity and quality of life.⁷⁴ In the cost-benefit calculus of the evidence-based paradigm, these nonfiscal "savings" are often monetized.⁷⁵ In short: recidivism reveals the "return on taxpayer's investment" in criminal legal reforms.⁷⁶

C. Applying the Paradigm

The evidence-based paradigm has been invoked to guide reforms across the criminal procedure spectrum, from policing through corrections. And it has taken many forms. While much attention has been paid recently to the use of one evidence-based tool—recidivism risk assessment instruments—the paradigm is not coextensive with predictive algorithms. It has also been used to design and assess new institutions and institutional practices.

This reform model was first applied within the criminal legal system with the advent of "evidence-based policing."⁷⁷ A core premise of evidence-based policing is that police departments can and should use information about where crimes have occurred in the past to guide decisions about where to focus police resources in

72. *But see infra* Section II.B.2 (arguing that this conceptualization of "public safety" is narrow).

73. Harmon, *supra* note 6, at 894–95, 897.

74. *Id.* at 898 (discussing cost-benefit analysis of the Violence Against Women Act).

75. *See id.* at 896; *see also* Christian Henrichson & Joshua Rinaldi, *Cost-Benefit Analysis and Justice Policy Toolkit*, VERA INST. OF JUST. 5 (Dec. 2014), <https://www.vera.org/downloads/publications/cba-justice-policy-toolkit.pdf> (explaining that the "hallmark" of a cost-benefit analysis is "that costs and benefits are expressed in monetary terms so that they can be directly compared.").

76. *See* BENJAMIN, *supra* note 22, at 30; GOTTSCHALK, *supra* note 69, at 101.

77. *See* Lawrence W. Sherman, *Evidence-Based Policing*, in *IDEAS IN AMERICAN POLICING* (1998) (calling for the application of principles of evidence-based medicine to policing). It has also been applied to other areas of practice and policy making, such as education, human rights law, and family law. *See generally* How States Engage in Evidence-Based Policymaking, *supra* note 65 (surveying different evidence-based policy initiatives). The shift to "what works" in early childhood education took hold in the late 1990s (although it started around the 1980s). *See* Biesta, *supra* note 8, at 3.

the future.⁷⁸ The earliest version of predictive policing, CompStat, involved relatively simple data collection and analysis to direct police resources to areas with high reported crime rates.⁷⁹ Predictive policing has since become much more technologically sophisticated with the creation of algorithmic software such as PredPol, which touts the ability to predict where crime is likely to occur within a 500 by 500 square foot area, with some models specifying the type of crime and the time of day it will occur.⁸⁰ The concept of predictive policing has also expanded to include predictions of specific individuals who are likely to commit crimes and target police resources to monitor those people.⁸¹

The evidence-based approach has since moved further along the criminal procedure process, from bail through sentencing and corrections. Like their policing predecessors, many of these other evidence-based practices also use data about what has happened in the past to predict future behavior. They do so through the use of recidivism risk assessment instruments (RAIs).⁸² RAIs are algorithmic actuarial tools that purport to predict a person's recidivism risk (measured by either arrest for or commission of a crime) or failure to appear for a future court appearance.⁸³ Actuarial risk assessment is considered "evidence-based" because studies have found RAIs to be more accurate in their predictions of recidivism or failure to appear than human actors.⁸⁴

While RAIs were originally created to help correctional departments make decisions about housing, classification, and

78. Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1126 (2017) (describing predictive policing models).

79. *Id.* at 1126 ("The idea [of CompStat], simply put, involved a data-analytics command structure that directed police resources to targeted areas of criminal activity. . . . [T]his version of predictive policing was basically computer-augmented hotspot policing.").

80. *See id.* at 1126-37 (discussing the evolution of predictive policing models).

81. *Id.* at 1137-39.

82. RAIs are central to the EBDM initiative. *See* NAT'L INST. OF CORR., EVIDENCE-BASED DECISION MAKING (EBDM) PRIMER 10 (2017).

83. *See* Stevenson, *supra* note 11, at 315 (describing tools). As Jessica Eaglin underscores, risk assessment tool developers are empowered to choose how to define recidivism; some tools define recidivism as a future conviction, others as a future arrest or charge. Eaglin, *supra* note 16, at 75-76.

84. *See* Stevenson, *supra* note 11, at 306 (explaining that RAIs are considered evidence-based because they "have been shown to be predictive of future arrest, and there is research suggesting (although not definitively) that they are better at predicting future arrest than judges are."). Stevenson also casts doubt on whether this practice is, in fact, "evidence-based." *See id.*

programming within prisons,⁸⁵ they have since been integrated into bail and sentencing determinations, where the recidivism risk prediction is used as a proxy for the public safety impact of the decision. In the bail context, for example, judges increasingly use risk assessment tools to help them identify individuals who are a sufficiently low risk of recidivism or flight risk and therefore “safe” to be allowed into the community while they await trial.⁸⁶ Conversely, someone who is considered too “risky” will be indicated for pretrial detention.⁸⁷ Jurisdictions are also beginning to incorporate actuarial risk assessment predictions into sentencing practices.⁸⁸ A primary justification for this post adjudication reform is similar to its pretrial counterpart: to identify individuals who are sufficiently low risk that they will not undermine public safety if released, and to do so in a way that is more accurate and less biased than human, gut-based risk predictions. In the sentencing context, this means less “risky” defendants may be sentenced to a community-based punishment (e.g., probation or intensive supervision) instead of incarceration or to a shorter term of incarceration.⁸⁹

While the use of algorithmic tools is a pillar of many evidence-based reforms, the evidence-based paradigm is not coextensive with the use of predictive technologies. For example, in addition to using actuarial risk tools to determine housing and program assignments, correctional agencies also use evidence-based principles to identify effective “behavior management techniques” within the correctional facilities, such as motivational interviewing and the use of swift sanctions for impermissible behavior.⁹⁰

Problem-solving courts are also widely regarded as an evidence-based practice.⁹¹ These specialized criminal courts strive

85. See Collins, *supra* note 16, at 85–91 (describing and analyzing the “off label” application of risk assessment instruments to sentencing).

86. Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 841 (2016) (“By 2015, approximately ten percent of jurisdictions in the United States had adopted some sort of empirically-based risk assessment tool, and that number continues to rise.”).

87. See *id.* (noting that a “key component” of many bail reform measures “has been the adoption of actuarial-style pretrial risk assessment tools.”).

88. See generally Collins, *supra* note 16 (describing actuarial sentencing).

89. *Id.*

90. See Klingele, *supra* note 8, at 559–60.

91. See, e.g., THE URBAN INSTITUTE, *supra* note 63, at 2 (identifying problem-solving courts as one of JRI’s evidence-based practices); Samantha Harvell, Jeremy Welsh-Loveman

to close the “revolving door” to the criminal legal system by addressing the issues or conditions believed to cause repeated contact with the system, such as substance addiction (drug courts), mental health issues (mental health courts), or the trauma of military service (veterans courts).⁹² Towards that end, problem-solving courts offer defendants a treatment plan aimed at addressing that underlying condition or situation and, if the defendant successfully completes that plan, they will be diverted from incarceration completely or receive a shorter sentence of incarceration. These specialized courts frequently use RAIs to assess whether an individual is eligible for court participation to “significantly increas[e] [their] effectiveness and cost-effectiveness.”⁹³ Problem-solving courts are said to be “evidence-based” because they use empirically tested methods to choose which individuals can participate in the courts and assess the efficacy of treatment methods,⁹⁴ and because some studies show they reduce recidivism rates more effectively than traditional adjudication methods.⁹⁵

As demonstrated above, the evidence-based paradigm has played a prominent role in shaping popular reforms across the criminal procedure spectrum. Its core tenets—the belief that data should drive reforms, a faith in the statistical empirical methods to produce such data, a commitment to efficiency, as measured by recidivism—come together to support a seemingly uncontroversial proposition: the evidence-based paradigm provides an apolitical

& Hanna Love, *Reforming Sentencing and Corrections Policy: The Experience of Justice Reinvestment Initiative States, Executive Summary*, URBAN INSTITUTE (2017), https://www.urban.org/sites/default/files/publication/86691/reforming_sentencing_and_corrections_policy_1.pdf (identifying problem-solving courts as an evidence-based practice); see also Collins, *The Problem of Problem-Solving Courts*, *supra* note 17, at n.7.

92. See generally Collins, *Status Courts*, *supra* note 17, at 1485–98 (developing a typology of problem-solving courts).

93. 1 NAT’L ASS’N OF DRUG CT. PRO’S., ADULT DRUG COURT BEST PRACTICE STANDARDS VOL. I, at 6 (text rev. 2018) (making this argument in the context of drug courts).

94. See, e.g., NAT’L DRUG CT. INST., QUALITY IMPROVEMENT FOR DRUG COURTS: EVIDENCE-BASED PRACTICES (Carolyn Hardin & Jeffrey N. Kushner eds., 2008); NAT’L ASS’N OF DRUG CT. PRO’S., *supra* note 93, at 5 (emphasizing the centrality of “evidence-based assessment tools and procedures” to drug courts).

95. See Collins, *The Problem of Problem-Solving Courts*, *supra* note 17, at 1578 (discussing studies). Many other studies, however, have found that drug courts either increase or have no impact on recidivism rates. See *id.*

approach that helps identify effective reforms. The following Part questions this proposition.

II. QUESTIONING THE PARADIGM

That the evidence-based paradigm has gained such widespread support amongst policymakers and academics is neither surprising nor inherently concerning. Indeed, the paradigm's popularity reflects the increasingly unavoidable conclusion that the current criminal legal system results in destructive and unjust outcomes, and the awareness of the role that unchecked discretion, unfounded assumptions, and racialized anecdotes play in shaping this system. In light of this revelation, it makes sense that many would look to data to guide our path forward. Nor is it surprising that fiscal savings have been chosen as a key metric for success; this focus undoubtedly helps explain how this approach has gained support of liberal and conservative reformers alike. From this perspective, embracing data-driven, evidence-based practices seems like a rational approach that will lead to better decision-making.⁹⁶

This Part offers a more critical perspective on the paradigm's rise and offers reasons to question its continued prominence. It suggests that in the rush to replace a system guided by discretion and intuition with one based in data, we have overlooked important perspectives and key insights about the source and structure of systemic dysfunction. In short, the paradigm is an overcorrection. As a result, the evidence-based paradigm reinforces—inadvertently, in many instances—many of the same dynamics and biases many of its proponents strive to avoid.

Specifically, this Part focuses on identifying—and then critiquing—the values this paradigm advances. It contends that what the paradigm chooses to measure and how it seeks to do so are neither objective nor neutral, but are instead biased in favor of

96. BARKOW, *supra* note 4, at 165 (“[W]e could be doing a better job with criminal justice policy-making if we made better use of empirical studies and if we looked at our existing policies carefully and objectively instead of reacting quickly and emotionally to adopt policies without much thought to their details.”). *See generally* Kathleen Nolan, *Neoliberal Common Sense and Race-Neutral Discourses: A Critique of “Evidence-Based” Policy Making in School Policing*, 36 DISCOURSE: STUD. CULTURAL POL. EDUC. 894, 894 (2015) (discussing the connection between “common sense discourses around crime and safety” and evidence-based policy in the context of school policing programs).

existing power structures. It considers the influence of those who set the paradigm's research agenda, the data upon which the paradigm relies, and the methods it employs to reveal the paradigm's biases. Thus, it contends, the current paradigm reifies many of the structural biases, particularly the deeply embedded biases against BIPOC, that pervade the contemporary system.⁹⁷

A. Framing the Questions

Research questions do not simply exist; they are chosen by those empowered to set the research agenda.⁹⁸ A researcher's normative commitments—their assumptions about how the world does and should work—influence the research process, from the identification of the research question to the formation of a hypothesis and the gathering of data.⁹⁹ This is not a novel claim; this insight has been well developed by critical and social theorists,¹⁰⁰ and applied to the evidence-based

97. David Gillborn, Paul Warmington & Sean Demack, *QuantCrit: Education, Policy, 'Big Data' and Principles for a Critical Race Theory of Statistics*, 21 RACE ETHNICITY & EDUC. 158, 169 (2018) (applying first tenet of QuantCrit, the centrality of racism).

98. Critics of evidence-based approaches to medicine and education have made similar observations. See, e.g., Sarah Wall, *A Critique of Evidence-Based Practice in Nursing: Challenging the Assumptions*, 6 SOC. THEORY & HEALTH 37, 49 (2008) ("A philosophical approach to understanding the goals of science reveals that the choice of research questions, the funding of research, and the consequences (uses) of research are deeply structured by the interests and values of powerful groups, including the professions. What passes for objective research is a search for what elites want knowledge about."); Aaron Michael Cohen, P. Zoe Stavri & William R. Hersh, *A Categorization and Analysis of the Criticisms of Evidence-Based Medicine*, 73 INT'L J. MED. INFORMATICS 35, 38 (2004) (arguing, in a critique of the evidence-based paradigm in medicine, that the researcher's world view "defines and limits what questions can be asked, as well as which information is deemed important and which is deemed noise").

99. Lily Hu, *Race, Policing, and the Limits of Social Science*, BOSTON REV. (May 6, 2021), <https://bostonreview.net/articles/race-policing-and-the-limits-of-social-science/> ("If, as the first step to embarking on any statistical analysis, the quantitative social scientist must adopt a set of assumptions about how the social world works, she introduces substantive theoretical commitments as *inputs* into her inquiry. This initial dose of normativity thus runs through the entire analysis: there is simply no escaping it. Whether any subsequent statistical move is apt will depend, in however complex ways, on one's initial substantive views about the social world.").

100. See Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. LAW SOC. SCI. 149, 155–56 (2014) (summarizing the critical theory critique of objectivity). See generally Vandenbroeck et al., *supra* note 19, at 548 (noting that theorists including Foucault, Bourdieu, and Freire have "addressed that research is inherently entangled in reciprocal relationships between knowledge and power since the historical, social and political environment in which it takes place, inevitably influences research, just as research also influences this environment.").

paradigm in different domains, including medicine,¹⁰¹ nursing,¹⁰² and education.¹⁰³ Critical Race Theory (CRT) scholars have similarly demonstrated that the frameworks we use to address legal issues are neither neutral nor inevitable.¹⁰⁴ Rather, they are chosen, and the choices reflect the ideological biases and political interests of those empowered to create such frameworks.¹⁰⁵ And as CRT theorists underscore, these choices often advance white supremacy, but are veiled by a sheen of objectivity and neutrality.¹⁰⁶

And the “emerging methodology” of QuantCrit uses the analytical tools and commitments of Critical Race Theory to scrutinize the use of quantitative data in legal development and reform.¹⁰⁷ QuantCrit “centers and extends the commitments of

101. See, e.g., Miles Little, ‘Better Than Numbers...’ *A Gentle Critique of Evidence-Based Medicine*, 73 ANZ J. SURGERY 177 (2003).

102. Wall, *supra* note 98, at 49.

103. Pasachoff, *supra* note 19; Biesta, *supra* note 8; Vandenbroeck et al., *supra* note 19, at 549.

104. Carbado & Roithmayr, *supra* note 100, at 159 (“Perceiving the researcher to be detached and neutral is potentially at odds with a crucial starting point of CRT: the idea that knowledge production is contingent on the combined effects of the researcher, the social and political context in which she is situated, and the inquiries and frameworks she employs.”).

105. *Id.* at 156 (“Several core intellectual commitments of CRT build on this original [critical theory] critique of objectivity . . .”); see also *id.* at 159 (“Perceiving the researcher to be detached and neutral is potentially at odds with a crucial starting point of CRT: the idea that knowledge production is contingent on the combined effects of the researcher, the social and political context in which she is situated, and the inquiries and frameworks she employs.”).

106. “For example, the social sciences’ implicit claims of ‘objectivity’ and embrace of ‘neutrality’ in knowledge production stand in contrast to CRT’s contention that these claims mask hierarchies of power that often cleave along racial lines.” Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953, 2956 (2015). A similar insight is offered from other critical theories. See Lindsay Pérez Huber, Verónica N. Vélez & Daniel Solórzano, *More Than ‘Papelitos’: A QuantCrit Counterstory to Critique Latina/o Degree Value and Occupational Prestige*, 21 RACE ETHNICITY & EDUC. 208, 211 (2018) (describing Chicana Feminist Epistemology as rejecting “the claimed neutrality of the research process”).

107. Huber et al., *supra* note 106, at 209. QuantCrit is not a new theory, but rather a new framework that is “guided by CRT.” Gillborn et al., *supra* note 97, at 169. It is a “toolkit that embodies the need to apply CRT understandings and insights whenever quantitative data is used . . .” *Id.* There are many other bodies of scholarship that offer related critical insights and resonate with the core claims of QuantCrit and CRT more generally. See, e.g., Akbar, Ashar & Simonson, *supra* note 29 (identifying various forms of “outsider jurisprudence” and providing citations); Okidegbe, *supra* note 23 (applying insights from Black Feminist Epistemology to critique the use of data in the criminal legal system). However, given the ways that the evidence-based paradigm has been influenced by the historical and contemporary structures of racism, the choice of QuantCrit as a critical framework is appropriate.

critical race scholarship to (re)imagine quantitative approaches and analyses in research, particularly when studying People of Color.”¹⁰⁸

Despite these well-developed insights into the way power, privilege, and bias inhere in the selection of metrics and methodologies, the evidence-based paradigm has established dominance while remaining largely unscathed by these critiques.¹⁰⁹ The following sections draws on these critical theories to provide this much-needed scrutiny.

B. Questioning the Objectives

The evidence-based paradigm is an inherently managerial approach to reform that values interventions that lead to tangible, measurable impacts. Indeed, in developing its *Framework for Evidence-Based Decision-Making in State and Local Criminal Justice Systems*, the National Institute of Corrections draws directly on guiding principles of results-based management, including exhortations that “What gets measured gets done” and “If results are not measured, successes cannot be distinguished from failures.”¹¹⁰ Because measurement is a cornerstone of the paradigm, it necessarily privileges goals that can be defined concretely and measured discretely. From the outset, then, this reform paradigm sidelines goals and values that seem to resist quantification or measurement, such as increased justice or decreased racism.¹¹¹ Moreover, what we measure not only determines what “gets done,” but also signals what we value.¹¹² This section

108. Huber et al., *supra* note 106, at 209.

109. As will be discussed below, scholars have applied these insights to one tool of the evidence-based paradigm: predictive algorithms. *See infra* Section II.D.

110. NAT'L INST. OF CORR., *supra* note 10, at 38.

111. As Monica Bell suggests in the context of policing research, “It may be that some norms of ‘evidence-based policymaking,’ which base normative decisions about good policy on clear, countable results, are in some ways out of step with creative efforts to ‘reimagine’ public safety.” Monica Bell, *Next Generation Policing Research: Three Propositions*, 35 J. ECON. PERSPECTIVES 29, 41 (Fall 2021). *See also* Gillborn et al., *supra* note 97, at 169 (“QuantCrit recognizes that racism is a complex, fluid and changing characteristic of a society that is neither automatically nor obviously amenable to statistical inquiry.”).

112. Nevertheless, one proponent of the evidence-based paradigm has claimed that the research questions that guide the paradigm are value-neutral. *See* Greiner, *supra* note 38, at 69 (“The new legal empiricism means beginning with a specific set of questions. The questions to be investigated are not value judgments masquerading as factual inquiries; they are empirical. The investigation proceeds with an impartial investigator’s deployment of established techniques chosen to fit the nature of the research questions. The investigator

scrutinizes the paradigm's choice of objectives and identifies some consequences of those choices. It contends that these goals are neither objective nor universally beneficial. Rather, they advance a vision of the criminal legal system that, in many key ways, affirms the status quo and perpetuates, rather than challenges, structures of bias and inequality.¹¹³

1. Fiscal Savings

As discussed in Part I, the evidence-based paradigm rose to prominence in the wake of the financial crisis of 2008. And much of its appeal lies in its promise that it can help jurisdictions ration scarce resources—to help institutional actors make effective and impactful choices when the demands on their services do not match their budgets. For example, evidence-based policing—or the “science of controlling crime and disorder”—is touted for its ability to help localities “balanc[e] the need to combat crime with the cost of policing” in the face of budget cuts.¹¹⁴ And scholars have proposed a “data-driven, systems-based” approach to public-defense that connects the actions a public defender takes in a case (e.g., investigation, filing motions, different forms of advocacy) to case outcomes (e.g., convictions, acquittals, sentences).¹¹⁵ The data will help the defender make “hard choices about how to deploy her limited time and scarce resources.”¹¹⁶ For example, should she file a motion for one client or another? Or prepare a witness for a third client's trial instead?¹¹⁷ In a similar spirit, another scholar is working on a randomized controlled trial to assess the impact of providing victims of domestic violence with varying levels of legal assistance.¹¹⁸

implements these techniques in a manner that protects the integrity of the investigation and her own neutrality.”).

113. See, e.g., GOTTSCHALK, *supra* note 69, at 15 (arguing that “The dogged pursuit” of reentry, justice reinvestment, and reducing the recidivism rate “may actually be coming at the cost of fortifying both the carceral state and the sharp right turn in American politics over the long term.”).

114. Jim Bueermann, *Being Smart on Crime with Evidence-based Policing*, NAT'L INST. OF JUST., 1 (Mar. 25, 2012).

115. Metzger & Ferguson, *supra* note 12, at 1057.

116. *Id.* at 1066.

117. *Id.* at 1066–67.

118. See Karp, *supra* note 53 (discussing research of Christopher Griffin Jr., Director of Empirical and Policy Research at the University of Arizona College of Law). Harvard Law

This scarcity mindset sends a message about who bears responsibility for budget shortfalls. It places on the individual actor – the public defender, for example – the burden of grappling with resource constraints that result from structural and institutional funding decisions.¹¹⁹ The evidence-based paradigm does not problematize these funding constraints; rather, it aims to help make efficient decisions within these constraints. The primary problem, under an evidence-based paradigm, is the lack of data about how a public defender should spend their time – not the lack of sufficient funding for public defense.¹²⁰

This endless search for data to guide us towards optimal performance deflects structural questions and criticisms.¹²¹ Unsurprisingly, then, the solutions the paradigm advances are not structural. Instead of insisting on a world in which public defenders are funded fully enough to robustly and zealously represent *all* of their clients, the paradigm encourages the defenders to crunch numbers to decide which client should get which services. Instead of asking why certain sectors of the government seem to have many of their financial needs met while others do not, the paradigm often holds constant current funding levels and asks all to simply make due. From this perspective, the problem is not the system, it is inefficient performance. The solution, then, is to gather more data to maximize the impact.

This individualization of responsibility and focus on fiscal responsibility is part and parcel of the neoliberal mindset.¹²² It “helps

School’s Access to Justice Lab conducts similar randomized controlled trials. *Current Projects*, A2JLAB, <https://a2jlab.org/current-projects/> (last visited Oct. 19, 2022).

119. Harvard Law’s Houston Institute for Race and Justice has suggested, on Twitter, that the randomized controlled trial methodology also advances a scarcity mindset, arguing “RCTs do not just make an existing random distribution of a scar[c]e resource more explicit.” Rather, “The resource is only scarce [because] of mutable public policy.” Houston Institute (@houstoninst), TWITTER (Mar. 19, 2019, 4:06 PM), <https://twitter.com/houstoninst/status/1108097309554941954>.

120. The American Psychological Association Task Force expressed similar concerns about evidence-based psychology – that “the dissemination of health care funds, not always to the benefit of the patient” and that evidence-based practice initiatives may be “misused as a justification for inappropriately restricting access to care and choice of treatments.” Vandenbroeck et al., *supra* note 19, at 539.

121. See GOTTSCHALK, *supra* note 69, at 15 (“Individual explanations that stress personal responsibility have continued to trump structural ones in discussions of crime, punishment, and penal reform, thus reinforcing the neoliberal slant in penal policy.”).

122. *Id.* at 79 (Arguing that mainstream criminal justice reform “is infused with the core tenets of neoliberalism. It rests on creating DIY social policies that stress individual solutions

reinforce the premise that eliminating government deficits and government debt should be the top national priority.”¹²³ Moreover, it provides a short-sighted vision that emphasizes immediate monetary savings to taxpayers and values people, programs, and reforms instrumentally as a way to save money. It prioritizes investing in people and communities if doing so provides a “return on investment” (i.e. leads to provable, causal outcomes that save money).¹²⁴ It does not value or encourage changes that are necessary because they are the right thing to do—even if they cost more money, or if they cannot be measured.¹²⁵ It also fails to account for the non-financial impacts of criminal legal programs.¹²⁶ Meanwhile, by focusing on short term financial savings, the paradigm can overlook or devalue “investments” in programs or people that may be more beneficial in the long term. Tellingly, some of the most prominent advocates for this fiscally-focused reform are conservative reformers and organizations who also support reductions in government spending on public education and public welfare benefits.¹²⁷

2. Public Safety

The second primary goal—maintaining public safety—is also fraught. For the paradigm defines and measures public safety in a way that is both reductive and exclusionary. Recall that the evidence-based paradigm measures the public safety impact of a particular program through recidivism, which generally connotes future criminal behavior by a person who has already been arrested

and personal responsibility while slighting the responsibilities that the state and the society have to the country’s most disadvantaged citizens.”).

123. *Id.* at 21.

124. *Id.* at 100.

125. See Klingele, *supra* note 8, at 553 (discussing how early proponents of evidence-based corrections began emphasizing the connection between rehabilitation and public safety as a way to persuade “safety- and accountability-conscious decisionmakers of the value of rehabilitation.”).

126. For example, Rachel Harmon has demonstrated how federal policing grants assess the “cost” of a policing program in crude financial terms and ignore the “nonbudgetary costs of policing,” such as the ways policing practices cause fear, suffering, and injury to individuals and communities. Harmon, *supra* note 6, at 870.

127. See GOTTSCHALK, *supra* note 69, at 87, 112–13. See generally BENJAMIN, *supra* note 22, at 30 (arguing that the New Jim Code is “part of a broader push toward privatization where efforts to cut costs and maximize profits, often at the expense of other human needs, is a guiding rationale for public and private sectors alike.”).

for or convicted of a crime. The concept of recidivism is itself contested. Scholars have recently highlighted how the definition of recidivism is overbroad, inaccurate, and biased.¹²⁸ For example, it is often measured by whether or not a person is re-arrested within a certain timeframe; while the fact of arrest tells us that the police suspected someone of criminal activity, it does not tell us whether the person in fact committed a crime.¹²⁹ Moreover, given the disproportionate policing of urban communities of color, arrest rates provide a skewed and incomplete picture of recidivism, labeling certain people as “risky” because they live in a neighborhood that has historically been subject to police surveillance.¹³⁰ Finally recidivism is not a nuanced concept: it is a binary measure that indicates only whether someone has committed or been arrested for a crime.¹³¹ Most measures of recidivism do not convey anything about the severity of the subsequent offense, and none reveal whether the individual’s behavior is changing in severity over time.¹³²

But the conflation of public safety with criminal activity is troubling not only because recidivism is a flawed metric. It is problematic also because it reifies a narrow and exclusionary understanding of what safety means and whose safety matters. The traditional criminal procedure process presumes “the public” or “the people” are a body distinct from, and with interests that run counter to, those who are accused of committing a crime.¹³³ As Jocelyn Simonson argues, this dichotomy is both inaccurate and

128. See, e.g., Klingele, *Measuring Change*, *supra* note 69, at 774 (arguing that recidivism is flawed because it is a binary measure that “is not sensitive to reductions in the severity or frequency of offending.”); Eaglin, *Constructing Recidivism Risk*, *supra* note 16, at 75–78 (describing how the definition of recidivism used in algorithmic risk prediction tools is the product of a series of normative choices by the tool designers).

129. See Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019) (developing this critique).

130. GOTTSCHALK, *supra* note 69, at 102 (noting that recidivism often includes arrest, which measures “police activity, not necessarily of criminal behavior”).

131. See Klingele, *Measuring Change*, *supra* note 69.

132. For this reason, Cecelia Klingele has suggested that measuring desistance—the process through which an individual moves from a life that is crime involved to one that is not—is preferable to recidivism. See generally Klingele, *Measuring Change*, *supra* note 69 (developing this claim). See also Jeffrey A. Butts and Vincent Schiraldi, *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections*, Papers from the Executive Session on Community Corrections, HARVARD KENNEDY SCH. (Mar. 2018) (recounting shortcomings of using recidivism to measure the effectiveness of reforms).

133. See Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COL. L. REV. 249, 250–51 (2019) (describing the people/defendant dichotomy).

problematic, for it overlooks the ways in which members of the public actively intervene on behalf of criminal defendants and limits the potential of these interventions.¹³⁴

Using recidivism to measure public safety supports this flawed dichotomy. Juxtaposing decreases in recidivism with public safety gains presumes the primary threats to the safety of “the public” come from people who commit crimes—or, more specifically, those who are arrested for and/or charged with committing crimes.¹³⁵ For example, recidivism risk assessment instruments are used to identify individuals whose risk score is too high—and therefore who pose too great a threat to public safety—to be released pending trial or to serve their sentence in the community instead of an institution. The unrelenting spate of murders of Black Americans by police officers—and the routine refusal by or inability of prosecutors to hold them accountable for these deaths—shows that this presumption that safety is threatened exclusively by civilian crime is often false. As the widespread uprisings and protests over these killings underscores, the recidivism-centered definition of public safety misses the ways in which the policies and actions of system actors themselves directly threaten the wellbeing of many people, particularly members of BIPOC communities.¹³⁶

The shortcomings of the paradigm’s definition of public safety has been laid bare by the continuing COVID-19 pandemic. Health officials warned early on that prisons are prime sites for the spread of this deadly virus and stressed the need for drastic measures to protect public health and safety by protecting incarcerated people from the virus.¹³⁷ And yet, *citing concerns for*

134. *Id.* at 256.

135. See Harmon, *supra* note 6, at 905 (“In calculating effects for criminal justice policies, scholars and policymakers largely focus on how much programs decrease offending.”).

136. The effectiveness framework for evaluating policing—the idea that the value of policing should be measured by its impact on crime reduction—is itself a relatively recent development. It emerged in the 1990s to replace the then-predominant notion that the goal of policing was to identify and arrest lawbreakers, regardless of whether doing so impacted crime rates. See Tracey Meares, *Synthesizing Narratives of Policing and Making a Case for Policing as a Public Good*, 63 ST. LOUIS U. L. J. 553, 555–56 (2019).

137. See, e.g., Stuart A. Kinner, Jesse T. Young, Kathryn Snow, Louise Southalan, Daniel Lopez-Acuña, Carina Ferriera-Borges & Éamonn O’Moore, *Prisons and Custodial Settings are Part of a Comprehensive Response to COVID-19*, 5 THE LANCET e188 (Mar. 17, 2020); Meagan Flynn, *Top Doctor at Rikers Island Calls the Jail a ‘Public Health Disaster Unfolding Before Our Eyes,’* WASH. POST (Mar. 31, 2020, 7:00 AM), <https://www.washingtonpost.com/nation/2020/03/31/rikers-island-coronavirus-spread/>.

public safety, jurisdictions across the country failed to implement robust release plans.¹³⁸ Federal prison wardens denied more than 98% of compassionate release requests between March and May 2020, including one from a fifty-six-year-old woman with stage four cancer who later died in prison from COVID-19.¹³⁹ And then-Attorney General Barr specified that consideration for the other mechanism for release from federal prison—home confinement—would be restricted to those who had no more than a “minimum” recidivism risk score as calculated by a risk assessment instrument.¹⁴⁰ In other words, he contrasted the safety of “the public” with the safety of incarcerated people. He made this point even more clearly in a follow-up memorandum in which he claimed that releasing incarcerated people “en masse” would “pose profound risks to the public from released prisoners engaging in additional criminal activity.”¹⁴¹ By December 2020, one in five incarcerated people in the United States had tested positive for COVID-19—a rate more than four times higher than the general population.¹⁴² By the end of June 2021, more than 2,700 incarcerated

138. Terri Parker, *State Attorney Working to Release Low-Level Offenders from Jail During COVID-19 Threat*, 25 WPBF NEWS (Apr. 3, 2020, 7:16 PM), <https://www.wpbf.com/article/state-attorney-working-to-release-low-level-offenders-from-jail-during-covid-19-threat/32037816#> (citing a Florida Sheriff with “no plan to release inmates” despite positive tests among correctional staff and a Florida State Attorney who was concerned with balancing “public health and public safety” and seeking a way to “keep our community safe” while responding to COVID-19).

139. Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Release as Covid-19 Spread. Nearly All Were Denied*, NBC NEWS (Oct. 7, 2020, 4:00 AM), <https://www.nbcnews.com/news/us-news/thousands-sick-federal-prisoners-sought-release-covid-19-spread-nearly-n1242193>.

140. Memorandum from the Attorney General to the Director of Bureau of Prisons regarding Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf. A coalition of more than 200 civil rights organizations urged AG Barr to rescind this use of the PATTERN risk scores for home confinement release, citing concerns about the racially biased and unfair outcomes that risk assessment instruments support. See Letter from the Leadership Conference on Civil and Human Rights to Attorney General Barr Regarding the Use of the PATTERN Risk Assessment in Prioritizing Release in Response to the COVID-19 Pandemic (Apr. 3, 2020), <https://www.aclu.org/letter/coalition-letter-use-pattern-risk-assessment-prioritizing-release-response-covid-19-pandemic>.

141. Memorandum from the Attorney General to the Director of Bureau of Prisons regarding Increasing the Use of Home Confinement at Institutions Most Affected by COVID-19 (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download>.

142. Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the US Has Had COVID-19, 1,700 Have Died*, ABC NEWS (Dec. 18, 2020, 5:51 PM), <https://abcnews.go.com/Health/wireStory/prisoners-us-covid-19-1700-died-74797059>.

people had died of COVID-19-related causes¹⁴³—or almost twice as many people that have been subjected to capital punishment in the last thirty years.¹⁴⁴

Thus, this definition of public safety is incomplete: it excludes the safety risk posed by institutional actors and policies and excludes the people who are incarcerated from the “public” whose safety matters. Moreover, it falsely presumes that the conduct categorized as “criminal” is coextensive with conduct that is unsafe or harmful. As abolitionist scholar and activist Mariame Kaba explains, “crime and harm are not synonymous. All that is criminalized isn’t harmful, and all harm isn’t necessarily criminalized. For example, wage theft by employers isn’t generally criminalized, but it is definitely harmful.”¹⁴⁵

The preceding analysis does not seek to prove that financial concerns or reducing crime have no place in conversations about criminal system reform. Rather, it underscores that the answer to our question of “what works” in the criminal legal system is limited by the terms of that inquiry. Measuring and prioritizing financial savings and a narrowly and conventionally defined “public safety” is not inevitable or objective. It is a choice, and that choice sends a clear message about whose interests matter, whose safety matters, and whose do not.

C. Questioning the Methodology

The evidence-based paradigm is presented as an uncontroversial and straightforward matter of applying a method developed and used successfully in one profession—medicine—to another—law.¹⁴⁶ Proponents claim that this methodology helped the medical field transform from a profession that relied heavily on intuition and

143. THE MARSHALL PROJECT, *A State-by-State Look at 15 Months of Coronavirus in Prisons* (updated July 1, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

144. See Douglas A. Berman, *The New Death Penalty: COVID Has Now Killed More US Prisoners Than Capital Punishment Over Last Three Decades*, SENT’G L. & POL’Y (Nov. 13, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/11/the-new-death-penalty-covid-has-now-killed-more-us-prisoners-than-capital-punishment-over-last-three.html.

145. MARIAME KABA, *WE DO THIS ‘TIL WE FREE US*, 3 (Tamara K. Nopper ed., 2021).

146. It is, to use a medical term, an “off label” application of this empirical approach. See Collins, *supra* note 16, at 86–91 (describing and analyzing the “off label” application of risk assessment instruments to sentencing).

gut-instinct to one that was guided instead by science and rationality.¹⁴⁷ It follows, they explain, that this same method can help increase the accuracy and efficacy of criminal legal decisions and curb the distorting influence of bias.¹⁴⁸

Evidence-based practice is based on a “causal model of professional action,” or the idea that the actions (or inactions) of professionals bring about a particular effect.¹⁴⁹ An intervention is deemed effective if and when there is a “secure relation between the intervention (as cause) and its outcomes or results (as effects).”¹⁵⁰ Surprisingly, there has been little pushback to the foundational assumption that we can apply this cause-and-effect analysis to criminal law and policy. But efficacy is a malleable and value-laden term.¹⁵¹ And the questions posed by criminal law and policy are inherently moral questions and there are ample opportunities for value judgements to influence the “testing” process.

Consider, for example, the many questions that arise around drug courts—a reform that has been widely celebrated as a successful evidence-based reform and subject to robust empirical scrutiny.¹⁵² These specialized criminal courts purport to close the “revolving door” to court involvement by providing drug treatment instead of (or in addition to) traditional punishment.¹⁵³

147. Proponents tend to overlook that the evidence-based approach to medicine itself has been subject to criticism. See Cohen et al., *supra* note 98 (summarizing critiques).

148. For example, James Greiner, Director of Harvard Law School’s Access to Justice (A2J) Lab, calls on legal reformers to “follow medicine’s example” and use robust empirical methods to identify and prioritize reforms. See Greiner, *supra* note 38, at 65; see also William J. Bratton, *Cops Count, Police Matter: Preventing Crime and Disorder in the 21st Century*, HERITAGE FOUND. LECTURE, 10 (Mar. 2018) (“We do not expect a doctor or a physician to apply chemo or radiation out of proportion to the cancer that he’s treating—that would be medical malpractice—or deny treatment when it is essential. Why is that expected in the 21st century of American police?”); Jack Karp, *Studying Justice or Hurting It: The Fight Over A2J Research*, LAW360 (Jan. 24, 2021) <https://www.law360.com/articles/1347474/studying-justice-or-hurting-it-the-fight-over-a2j-research> (quoting the Director of the Pew Charitable Trusts’ Civil Legal System Modernization Project, “The legal field is where the medical field was 100 years ago—we decide what works based on the opinion of experts, without really looking at the data to understand empirically: what works?”).

149. Biesta, *supra* note 8, at 7–8.

150. *Id.*

151. See Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018).

152. See NAT’L ASS’N DRUG CT. PRO’S., *Adult Drug Court Best Practice Standards*, vi (2013) (“In the 24 years since the first Drug Court was founded in Miami/Dade County, Florida, more research has been published on the effects of Drug Court than on virtually all other criminal justice programs combined.”).

153. Collins, *supra* note 17, at 1505.

Even if we are to accept the proposition that the primary metric of this intervention's success should be whether court participation reduces recidivism—which is itself a value-laden choice amongst other alternatives¹⁵⁴—the question remains whether this can be accurately measured through the scientific process. Those who empirically study drug courts must begin by choosing how to define recidivism. Does it mean re-arrest? A new charge? A new conviction? And once that term is defined, the challenge remains as to how to test the proposition that drug courts reduce recidivism. In addition to the many ethical issues presented by randomly assigning individuals to drug court or traditional court process,¹⁵⁵ there are practical challenges as well, including the difficulty in identifying appropriate comparison groups.¹⁵⁶ For one, people cannot be mandated to participate in drug courts, which makes it difficult if not impossible to conduct a truly randomized controlled study.¹⁵⁷ And even if quasi-experimental studies find that the recidivism rates of drug court participants are lower than those who go through the traditional court process, the question remains: can we say with any certainty that it was drug court—and not other circumstances in the individual's life, or changing police or prosecutorial policies about drug crimes—that caused the recidivism rates to drop?

The point here is not to prove whether drug courts are effective or normatively sound,¹⁵⁸ but rather to illustrate the complexity of assessing the efficacy of criminal legal reforms and to show there is ample opportunity for value judgments to influence the decision-making points at each step of the assessment process.

154. Some have suggested alternative metrics for success, including eliminating drug use, completing treatment, or securing employment.

155. See Karp, *supra* note 53 (discussing ethical objections to conducting randomized trials in the criminal legal system).

156. See U.S. SENT'G. COMM'N, *Federal Alternative-to-Incarceration Court Programs*, 12 (2017), (summarizing methodological flaws in empirical studies of drug courts and providing citations).

157. See, e.g., Stevenson, *supra* note 11. Despite these concerns, Harvard Law School's Access to Justice Lab is developing a randomized controlled study of drug courts. See *In Development*, A2J LAB, <https://a2jlab.org/current-projects/in-development/> (last visited Oct. 20, 2022).

158. For examination of these questions, see Erin Collins, *The Problem of Problem-Solving Courts*, *supra* note 17; Collins, *Status Courts*, *supra* note 17, at 1516; Eaglin, *The Drug Court Paradigm*, *supra* note 10; Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417 (2009).

These illustrations raise a fundamental question about the foundational premise of the evidence-based paradigm: can this empirical model be applied to criminal law and policy? And even if we *can* apply the evidence-based methodology to measure the impact of legal reforms—a question that is worthy of much more careful consideration for those who promote this model—*should* we? The following analysis highlights normative concerns that inhere in the epistemology of the evidence-based paradigm.

D. Questioning the Epistemology

The evidence-based paradigm establishes a baseline skepticism of knowledge emanating from personal experience; it explicitly excludes it from its definition of “evidence.”¹⁵⁹ And this is, in fact, the point of the paradigm: to replace intuitive, anecdotal, biased responses *by institutional actors* with scientifically generated knowledge. But this privileging of this type of empiricism brings with it its own costs.

First, it devalues the experiences and insights of non-scientists, including many of those most impacted by the system itself. For, as Critical Race Theorists have revealed, “privileging numbers necessarily refutes the power of narrative.”¹⁶⁰ For example, truth claims about the deleterious or dehumanizing impact of policing that originate from lived experience are not “evidence” that provides a basis for reform unless and until a researcher methodically gathers, quantifies, and tests these claims. In this way, the evidence-based paradigm advances a form of epistemic injustice, a concept identified by philosopher Miranda Fricker to describe instances in which the “subordination of social groups leads to excluding those groups from producing and sharing knowledge.”¹⁶¹ More specifically, it is a form of epistemic injustice that Fricker calls testimonial injustice, which arises due to

159. See Orchowsky, *supra* note 10, at 8 (“In particular, opinions, testimonials, and anecdotes are not evidence of effectiveness in and of themselves.”). For example, the National Institute of Justice defines evidence, for purposes of evidence-based programming, as “[i]nformation about a question that is generated through systematic data collection, research, or program evaluation using accepted scientific methods that are documented and replicable.” NAT’L INST. OF JUST., *Glossary*, <https://www.crimesolutions.gov/Glossary.aspx>.

160. Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1488 (2004).

161. M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1190-91 (2020) (describing Fricker’s work).

“prejudice in the economy of credibility.”¹⁶² Certain kinds of knowledge—most concerningly, here, first-hand knowledge coming from those who are most impacted by criminal legal policies—do not register within the empirical discourse of the evidence-based paradigm.

The evidence-based paradigm is, thus, intrinsically undemocratic.¹⁶³ By narrowly limiting what counts as evidence, it centers reform on the findings of researchers and limits the participation by and undermines the credibility of those whose knowledge emanates from experience and observation. As a result, the people and communities most impacted by the criminal legal system are “the frequent object of study but never the author of policy.”¹⁶⁴

This dynamic is most apparent in the strict empirical model of the evidence-based paradigm, which holds out randomized controlled trials conducted by qualified experts as the best way to establish efficacy. But it also pervades the more flexible approach as well. For example, as part of its Courts-Focused Research Agenda for the Department of Justice, the Brennan Center for Justice offers advice on how President Biden can follow through on his campaign promise to “end the practice of incarcerating people for their inability to pay court debt.”¹⁶⁵ The Center starts not with a suggestion that the Administration immediately encourage jurisdictions to stop imposing fees and fines on people who have been convicted, cease driver’s license revocation practices for those who cannot pay court-ordered fees, or adopt provisions that take into account an individual’s ability to pay fees and fines. Instead, it starts from the premise that “we still know very little about how these and other predatory court practices function across the country.”¹⁶⁶ Thus, it suggests that the Administration conduct more research to evaluate fees and fines on a number of metrics,

162. MIRANDA FRICKER, *EPISTEMIC INJUSTICE*, 1 (2007) (describing testimonial injustice as occurring when “prejudice causes a hearer to give a deflated level of credibility to a speaker’s word.”). “We might say that testimonial injustice is caused by prejudice in the economy of credibility; and that hermeneutical injustice is caused by structural prejudice in the economy of collective hermeneutical resources.” *Id.*

163. See Biesta, *supra* note 8, Vandenbroeck et al., *supra* note 19.

164. HOUSTON INSTITUTE (@houstoninst), TWITTER (Mar. 19, 2019, 4:06 PM) <https://twitter.com/houstoninst/status/1108097304626642950>.

165. Lauren-Brooke Eisen et al., *supra* note 50.

166. *Id.*

including whether ability-to-pay provisions impact the amount of fees and fines judges impose, the “changes in defendants’ lives due to reduced fines and fees” in ability-to-pay jurisdictions and “how license reinstatement impacted people’s lives.”¹⁶⁷ But we actually do already know a lot about the effect of fees and fines—because those who have suffered from their deleterious impact have told us. And *that* data source provides all we need to know in order to stop the practice. Yet, the evidence-based paradigm devalues this first-hand knowledge in search of more traditional empirical data sources.

One scholar has argued that the progressive reform goals of reducing imprisonment or improving prison conditions “are the stuff of experts and bureaucrats. And they are best justified using social science evidence.”¹⁶⁸ And another has suggested that

experts are especially valuable if the goal in using criminal law is to improve public safety, maximize limited public resources, and make sure policies are not being arbitrarily and discriminatorily applied. The average American citizen is not on equal footing with an expert who studies the data in achieving these goals.¹⁶⁹

While these scholars do not advocate for the wholesale exclusion of community participation in knowledge-production and reform agenda-setting—the space they leave for such participation is decentered, restricted, and perhaps subject to empirical validation.¹⁷⁰

Ultimately, this fetishization of empirics functions to amplify power structures and disqualify what Foucault called the “subjugated knowledges”—those knowledges that have been “disqualified as inadequate to their task or insufficiently elaborated,” knowledges that are “located low down on the hierarchy, beneath the required level of cognition or scientificity.”¹⁷¹ This dynamic—

167. *Id.*

168. John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 811 (2020).

169. BARKOW, *supra* note 4, at 168.

170. Rappaport, *supra* note 168, at 812 (“An evidence-based approach, to be clear, is not necessarily antagonistic toward lay participation or community-based solutions. Its posture is contingent and skeptical, in a scientific sense. If reliable evidence shows these solutions to work, great—run with them.”).

171. Wall, *supra* note 98, at 48-49; *See, e.g., id.* at 41 (“Knowledge, and how it is legitimated and used, is closely associated with the use of power.”); *see also* Little, *supra* note 100, at 177

whereby the elevation of empiricism reifies power structures and disqualifies other forms of knowledge—has been noted in scholarship assessing the application of the evidence-based paradigm to other areas.¹⁷² And it is a dynamic that Critical Race Theorists have confronted for decades. For example, Critical Race Theory “has been criticized because of the lack of empirical support for the existence of a distinct voice of color.”¹⁷³ And yet, to date, the evidence-based paradigm in criminal legal reform has remained largely immune from these criticisms.¹⁷⁴

This privileging of empirical knowledge has another effect that has been overlooked: it creates a new burden of proof on proponents of change. It requires, in essence, that proponents prove that their desired reform leads to results that are “better” than the current approach before a reform is widely adopted.¹⁷⁵ For example, evidence-based reform proponent James Greiner suggests this approach requires that we research and prove things that many assume are “too obvious to require research.”¹⁷⁶ He claims, for example, that we cannot know whether providing full legal services to low-income people in civil proceedings is more effective than alternatives, such as self-representation, because it has not

(noting that EBP in medicine “privileges a certain kind of evidence over other kinds that may reflect more accurately the experience of illness and the preferences of the ill.”).

172. See, e.g., Wall, *supra* note 98, at 41 (arguing that the evidence-based paradigm in nursing reflected the assumption that “scientific knowing is superior to other knowledge forms” and as a result “science has become a weapon of economic rationalization and traditional professional power, which, . . . is not intended to serve the interests of a female-dominated occupation such as nursing.”); see also Biesta, *supra* note 8; Vandenbroeck et al., *supra* note 19.

173. Brown, *supra* note 160, at 1489; see also Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443, 444-45 (2016) (arguing that CRT is commonly critiqued for using narrative because personal stories are “neither verifiable nor necessarily typical,” and not advancing “so-called objective and neutral truths.”).

174. One essay has made this observation. See Carolyn Boyes-Watson & Kay Pranis, *Science Cannot Fix This: The Limitations of Evidence-Based Practice*, 15 CONTEMP. JUST. REV. 265, 269 (2012) (arguing that evidence-based correctional practices privilege scientific knowledge, “giving it more status and legitimacy than other kinds of knowing.”).

175. Rappaport’s reform vision allows space for solutions to criminal justice problems that are generated by communities most impacted by the system—subject to empirical validation. Rappaport, *supra* note 168, at 812.

176. Greiner, *supra* note 38, at 71.

been studied.¹⁷⁷ He contrasts this empirical uncertainty to things we actually “know,” such as whether parachutes work to save lives when an airplane is crashing.¹⁷⁸ Separately Greiner, writing with co-authors, asserts that refusing to subject “unproven approaches” to empirical rigor is not only “logically incoherent,” but also violative of the legal profession’s “fiduciary obligation to provide the best care or services.”¹⁷⁹

The implication of this empirical mindset is clear: we cannot know whether something is true unless it has been proven scientifically – and preferably through quantitative, not qualitative, research. It embodies the dynamic Ruha Benjamain labels the “*datafication of injustice* . . . in which the hunt for more and more data is a barrier to acting on what we already know.”¹⁸⁰

In sum, the evidence-based paradigm disqualifies wide swaths of knowledge as a basis for reform or intervention, including observational, community, and experience-based knowledge.¹⁸¹ The paradigm thus imposes a burden that is impossible for many to satisfy: it requires proof that a particular reform is effective before it is widely implemented, and narrowly limits the types of knowledge that count as “evidence.”

E. Questioning the Data

But what of the “evidence” we do have—the data that are deemed sufficiently rigorous to fuel these reforms? Data collection in the interest of “criminal justice” is not new – rather, it has a deep and troubled history. As historian Khalil Gibran Muhammad powerfully demonstrates, the statistical questions we ask, the data we gather, and the conclusions we draw in the criminal legal arena have a history rooted in white supremacy.¹⁸² The practice of measuring crime through statistics, he shows, began as a “eugenics

177. RJ Vogt, *Getting Random with Harvard A2J Lab's Greiner*, LAW360 (May 12, 2019, 8:02 PM), <https://www.law360.com/articles/1155387/getting-random-with-harvard-a2j-lab-s-greiner>.

178. *See id.*

179. Lynch et al., *supra* note 54, at 1078.

180. BENJAMIN, *supra* note 22, at 116.

181. GOTTSCHALK, *supra* note 69, at 261 (arguing that the evidence-based paradigm “contributes to a denigration of other kinds of knowing and evidence that are not the result of controlled experiments, including policy studies and qualitative work.”).

182. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* (2019).

project” in the Reconstruction Era, an “intentional way of sorting humanity not by an objective standard but by a convenient tool that simplified reality, justified racism, and redistributed political and economic power from black to white.”¹⁸³

Muhammad also demonstrates that crime data do not and cannot speak for themselves—rather, data are interpreted with an agenda, an ideology. He does so by contrasting the responses to crime rates in communities of European immigrants and poor white Americans in the early Twentieth Century with that in Black communities beginning in the Reconstruction Era. The former was interpreted as a sign that the country had systemically failed poor white and immigrant communities and was met with calls to enhance the social safety net to address the root causes of crime. The latter was interpreted as evidence of innate criminality and personal failure within Black communities and led to a response that was—and continues to be—characterized by punitive impulses and calls for incarceration.¹⁸⁴ This history, Muhammad concludes

shows that crime data was never objective in any meaningful political sense. Crime statistics have never been just about behavior no matter how obvious it may seem that numbers speak for themselves. They are proxies for beliefs, a way of defining reality and seeing things. Whatever truth they represent in counting actual arrests or real prisoners is itself a reflection of intense social and political struggles.¹⁸⁵

And yet, proponents of the evidence-based paradigm hold out data as a neutral, objective way to right the wrongs of the criminal legal system, including the historical legacy of racism and its attendant entrenched racial biases—without grappling with and acknowledging the ways that the data themselves continue this history. Drawing on the emerging body of scholarship called QuantCrit, the remainder of this section provides that analysis.¹⁸⁶

183. *Id.* at xvii.

184. *See generally id.* at xxiii–xxv.

185. *Id.* at xxv.

186. *See* Nichole M. Garcia, Nancy Lopez & Veronica N. Velez, *QuantCrit: Rectifying Quantitative Methods Through Critical Race Theory*, 21 RACE ETHNICITY & EDUC. 149, 150 (2018) (defining “QuantCrit” as a “quantitative methodological approach anchored in CRT.”); *see also* Carbado & Roithmayr, *supra* note 100, at 150 (noting the “relative newness” of scholarship that examines the intersection of Critical Race Theory and social science).

One of the first principles of QuantCrit is that “numbers are not neutral.”¹⁸⁷ Rather, “[n]umbers’ authoritative façade often hides a series of assumptions and practices which mean, more often than not, that statistics will embody the dominant assumptions that shape inequity in society.”¹⁸⁸ In the context of the evidence-based paradigm, the robust scholarly debate surrounding predictive algorithms illustrates this key insight of QuantCrit regarding the non-neutrality of numbers and the way that data can be employed to advance an agenda. As discussed in Part I, algorithms that predict recidivism are a pillar of many popular evidence-based reforms. The data upon which such algorithms are based is historical; it is information about the characteristics of people who have, in the past, come into contact with the criminal legal system through arrest or conviction.

Historically (and still), however, the criminal legal system has not divided its attention equally across the population. Policing itself functions as a “data creation practice.”¹⁸⁹ Arrest and crime data provide a snapshot of where police have been. But, as historians and legal scholars have emphasized, law enforcement has disproportionately surveilled, policed, prosecuted, and punished people of color, specifically Black and Latinx people.¹⁹⁰ Thus, data emanating from biased policing practices “reflects the practices, policies, biases, and political and financial accounting needs of a given department.”¹⁹¹

These biases are inextricably interwoven into the data that is then used to fuel “evidence-based” algorithms.¹⁹² The predictive

187. Gillborn et al., *supra* note 97, at 169. (The first principles of QuantCrit: “1. [T]he centrality of racism; 2. [N]umbers are not neutral; 3. [C]ategories are neither ‘natural’ nor given: for ‘race’ read ‘racism’; 4. [V]oice and insight: data cannot ‘speak for itself’; 5. [U]sing numbers for social justice”); see also Brown, *supra* note 160, at 1488 (The notion that “numbers are neutral and objective” is “fundamentally inconsistent with CRT.”).

188. Gillborn et al., *supra* note 97, at 175; see also *id.* at 163.

189. Rashida Richardson, Jason Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. ONLINE 192, 194 (2019).

190. See, e.g., Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977, 998-1000 (2017) (identifying biases that are embedded in policing). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

191. Richardson et al., *supra* note 189, at 194; see also BENJAMIN, *supra* note 22 (arguing that policing algorithms create crime).

192. BENJAMIN, *supra* note 22, at 59 (“To the extent that machine learning relies on large, ‘naturally occurring’ datasets that are rife with racial (and economic and gendered) biases,

policing program PredPol is illustrative. The PredPol algorithm for predicting the location of future criminal activity is based on a model used to predict the location of earthquake aftershocks.¹⁹³ PredPol assumes that, just as aftershocks are likely to occur near the site of the earthquake, future criminal activity is likely to occur in close geographical proximity to past crimes.¹⁹⁴ Thus, its algorithm is trained to identify likely crime “hot spots” based on areas where crime is known or suspected to have occurred in the past. But there is a fundamental flaw in this analogy—seismographs, which are used to identify earthquakes, are “everywhere—wherever an earthquake happens, you’ll find it.”¹⁹⁵ The information about where crime has occurred is only a snapshot of actual criminal activity. It shows what has occurred—or has been suspected of occurring—where police surveil or respond. But it does not follow that where police have been or what police have reported accurately reflects instances and severity of crime.¹⁹⁶ This leads to “runaway feedback loops” whereby the crime predicting algorithms direct police to the same neighborhoods in which they have historically made multiple arrests, regardless of the actual crime rate of that neighborhood.¹⁹⁷

Thus, the predictions that emanate from such algorithms reproduce and reify the very structural and historical biases of the system itself. They demonstrate the insight of QuantCrit that unless we engage in a “critical race-conscious perspective, quantitative analyses will tend to remake and legitimate existing race inequities.”¹⁹⁸ When an algorithm predicts the likelihood that an

the raw data that robots are using to learn and make decisions about the world reflect deeply ingrained cultural prejudices and structural hierarchies.”).

193. Aziz J. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1070 (2019).

194. *Id.*

195. Caroline Haskins, *Academics Confirm Major Predictive Policing Algorithm is Fundamentally Flawed*, VICE (Feb. 14, 2019, 10:57 AM) <https://www.vice.com/en/article/xwbag4/academics-confirm-major-predictive-policing-algorithm-is-fundamentally-flawed> (quoting Suresh Venkatasubramanian, a professor of computing at the University of Utah).

196. Richardson et al., *supra* note 189, at 194 (“It is a common fallacy that police data is objective and reflects actual criminal behavior, patterns, or other indicators of concern to public safety in a given jurisdiction.”).

197. Danielle Ensign, Sorelle A. Friedler, Scott Neville, Carlos Scheidegger & Suresh Venkatasubramanian, *Runaway Feedback Loops in Predictive Policing*, 81 PROC.’S MACH. LEARNING RSCH. 1, 1 (2018). What’s more, some of the data upon which predictive policing algorithms are built were collected during times that police departments were under investigation for systematic civil rights violations. See Richardson et al., *supra* note 189, at 194.

198. Gillborn et al., *supra* note 97, at 169-70.

individual will be arrested or convicted, it indicates how similar that person is to people who have been targets of the criminal legal system in the past.¹⁹⁹ In response to concerns that algorithms provide a “scientific veneer for racism,” more than 1400 researchers signed a letter calling for mathematicians to stop collaborating with police departments in programs like PredPol.²⁰⁰

Defenders of predictive algorithms are often quick to point out that the tools do not use race as a factor for prediction. While it is true that the widely-used algorithms do not explicitly consider the individual’s race, many predictive tools *do* consider factors such as employment history, age at first arrest, education history, and the severity of the current charge. These seemingly race neutral factors are themselves “structured by racial domination – from job market discrimination to ghettoization.”²⁰¹ Racial discrimination operates on both the individual and structural levels to shape the landscape of opportunity and access to quality education and steady employment.²⁰² For example, as the Pretrial Justice Institute highlights, considering a “race neutral” factor such as employment contributes to racially biased recidivism risk predictions because unemployment rates for Black Americans have been nearly twice that of white Americans since the Bureau of Labor Statistics began tracking employment data in 1954.²⁰³

Removing these considerations and limiting the risk assessment to consider *only* factors concerning a particular individual’s past interactions with the criminal legal system, as does the Arnold

199. Mayson, *supra* note 16, at 2251 (“[W]hat prediction does is identify patterns in past data and offer them as projections about future events.”).

200. Davide Castelvecchi, *Mathematicians Urge Colleagues to Boycott Police Work in Wake of Killings*, NATURE (June 19, 2020), <https://www.nature.com/articles/d41586-020-01874-9>; Tarik Aougab, Frederico Ardila, Jayadev Athreya, Edray Goins, Christopher Hoffman, Autumn Kent, Lily Khadjavi, Cathy O’Neil, Priyam Patel & Katrin Wehrheim, Letter to the Editor, *Boycott Collaboration with Police*, NOTICES AM. MATHEMATICAL SOC’Y, Oct. 2020, at 1293, <https://www.ams.org/journals/notices/202009/ntoti-p1293.pdf>.

201. BENJAMIN, *supra* note 22, at 82.

202. Gillborn et al., *supra* note 97, at 173 (“A vital problem lies in the failure of many analysts to realize that racism does not operate separately to factors such as prior attainment, income, and maternal education. Racism operates *through* and *between* many of these factors simultaneously. In a society that is structured by racial domination, the impact of racism will be reflected across many different indicators simultaneously.”).

203. PRETRIAL JUST. INST., *The Case Against Pretrial Risk Assessment Instruments*, 5 (Nov. 2020).

Ventures' popular Public Safety Assessment,²⁰⁴ does not rectify the discriminatory impact of these risk prediction instruments. Indicators of past criminal legal system involvement tell us that law enforcement has targeted this particular person in the past – but not whether this person is necessarily more “risky” than people whose movements have not been similarly surveilled.²⁰⁵ As Human Rights Watch summarizes, “the prediction is based on a profile. Because that data comes mostly from criminal history information, which we all know is highly skewed racially, in large part due to historical and on-going racial bias in policing, the profile itself is to a large extent racially determined.”²⁰⁶ For these reasons, many civil rights and racial justice advocacy organizations and scholars have advocated against the continued use of risk assessment instruments.²⁰⁷

Thus, while risk assessment instruments purport to measure an individual's risk of recidivism, it is perhaps more accurate to say that they measure “the extent to which an individual's life chances have been impacted by racism,” even if the tool does not inquire about the individual's race.²⁰⁸ Ruha Benjamin powerfully names this phenomenon – the employment of new technologies to curb bias and discrimination but that actually amplify and reify such biases – “The New Jim Code.”²⁰⁹

The people who design these algorithms do not necessarily intend to replicate and amplify racial biases. Indeed, it is the very promise of an unbiased approach that leads many to invest so

204. See *Risk Factors and Formula*, PUB. SAFETY ASSESSMENT, <https://www.psapretial.org/about/factors>.

205. As Sandra Mayson succinctly summarizes, “if the thing that we undertake to predict – say arrest – happened more frequently to black people than to white people in the past data, then a predictive analysis will project it to happen more frequently to black people than to white people in the future.” Mayson, *supra* note 16, at 2224.

206. John Raphling, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform*, HUM. RTS. WATCH (July 17, 2017, 12:00 AM) <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform>; see also Anupam Chander, *The Racist Algorithm*, 115 MICH. L. REV. 1036-37 (2017); Huq, *supra* note 193, at 1099 (explaining how algorithms can identify proxies for impermissible traits).

207. See, e.g., *The Use of Pretrial “Risk Assessment” Instruments: A Shared Statement of Civil Rights Concerns*, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> (signed by 119 advocacy organizations).

208. BENJAMIN, *supra* note 22, at 82.

209. *Id.* at 5-6.

deeply and hopefully in these technologies. Nevertheless, lack of intent to discriminate on the part of the tool creators does not neutralize the deeply entrenched biases of the data themselves, nor redress concerns about how they reproduce a racially disparate impact.²¹⁰ And, in fact, the veneer of objectivity enhances the bias by making it harder to identify and, therefore, address.²¹¹

* * *

The preceding analysis contends that, despite its promises to the contrary, the evidence-based paradigm is neither neutral nor objective—rather, it is the product of a series of normative choices about what the goals of the criminal legal system should be and how we should achieve those goals. And the choices are not universally beneficial.

But once we acknowledge that this system is a choice, and is not dictated by science or data or rationality, we are then empowered to make different choices and chart a different path forward. This is a point Khalil Gibran Muhammad underscores in concluding his historical account of how crime statistics created the notion of black criminality:

By illuminating the idea of black criminality in the making of modern urban America, it becomes clear that there are options in how we choose to use and interpret crime statistics. They may tell us something about the world we live in and about the people we label as ‘criminals.’ But they cannot speak for themselves. They never have. They have always been interpreted, and made meaningful, in a broader political, economic, and social context in which race mattered The invisible layers of racial ideology packed into the statistics, sociological theories, and the everyday stories we continue to tell about crime in modern urban America are a legacy of the past. The choice about which narratives we attach to the data in the future, however, is ours to make²¹²

210. *Id.* at 7. As Benjamin argues, “when bias and inequity come to light, ‘lack of intention’ to harm is not a viable alibi.” *Id.* at 76.

211. Gillborn et al., *supra* note 97, at 159 (“not only can computer-generated quantitative analyses embody human biases, such as racism, they also represent the *added* danger that their assumed objectivity can give the biases enhanced respectability and persuasiveness.”).

212. MUHAMMAD, *supra* note 182, at 277; see also Jessica Eaglin, *Population-Based Sentencing*, 106 CORNELL L. REV. 353, at 406 (2021) (arguing that the expansion of actuarial risk assessment and similar population-based technological “solutions” to criminal law problems is not inevitable, despite the popularity of these reforms).

Drawing inspiration from Muhammad's invitation to imagine a new path forward, the next Part identifies different choices we can make as we grapple with the role of data and empiricism in the future of the criminal legal system.

III. THE PARADIGM'S FUTURE

We are at a crucial inflection point in the future of our criminal legal system. There is widespread support for changing the system, and the evidence-based paradigm provides the primary discourse for articulating a vision of change that is audible to decision makers. However, this paradigm has an agenda, one that favors the interests of those in power and reifies existing structures of inequality. But enthusiasm for a data-centered, evidence-based orientation for reform is unlikely to fade, especially as we struggle to recover from a presidential administration that championed "alternative facts" and eschewed expertise.²¹³ Moreover, a system that is guided exclusively by decision-makers' intuition has not served us well in the past. Thus, the wholesale rejection of data, evidence, and empiricism in criminal legal reform is neither practical nor desirable. So where do we go from here?

A. Reforming the Paradigm?

Can we address the concerns highlighted in Part II while maintaining the paradigm's key features—its dedication to quantitative empirical methods and its search for cost-efficient, effective reforms? In other words, can we reform the paradigm?

One option is to redefine the terms of the reform equation to more accurately and holistically assess a reform's impact. We could assess the financial costs of our criminal legal practices in a different way—by measuring, for example, the cost of running a prison in terms of staffing costs instead of costs per incarcerated person.²¹⁴

213. See Eric Bradner, *Conway: Trump White House offered 'alternative facts' about crowd size*, CNN (Jan. 22, 2017, 12:38 PM), <https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html>.

214. See John Pfaff, *The Incalculable Costs of Mass Incarceration*, THE APPEAL (Sept. 20, 2018), <https://theappeal.org/the-incalculable-costs-of-mass-incarceration/> ("When talking about the fiscal cost of prisons, we frame it inaccurately as cost per prisoner. It's really more cost per staff member. Putting it that way not only emphasizes where cost savings come from more accurately, but help center correctional officers as among the largest stakeholders in the system—and thus highlights their significant incentive to fight against reform.").

And/or we could expand our assessment of the “costs” of criminal legal practices beyond the financial investment they require to include the intangible harms – the social costs – that they impose.²¹⁵ We could also change or supplement our existing metrics to include more or different markers of efficacy, such as desistance—an individual’s progress toward moving “from a life that is crime-involved to one that is not”—instead of recidivism.²¹⁶ Such changes would undoubtedly provide a more nuanced view of a reform’s impact. But they ultimately support, rather than challenge, the notion that economic efficiency should be the primary metric of success.²¹⁷

Another strategy is to focus on debiasing the data on which the paradigm relies. Scholarly debates over predictive algorithms have produced a range of suggestions about how to revise recidivism algorithms to correct for racial bias,²¹⁸ omit certain factors that raise equity concerns,²¹⁹ and increase the fairness of their outputs.²²⁰ But even if the algorithms can be reformed to produce more fair and equitable outputs—a challenging task, made even more difficult by the lack of agreement about what fairness means in the algorithmic prediction context²²¹—a robust debiasing effort could actually end

215. Rachel Harmon has developed this suggestion in the context of policing. See Harmon, *supra* note 6. And John Pfaff has developed this argument in terms of the costs of prisons. See also Pfaff, *supra* note 214.

216. See Cecelia Klingele, *Measuring Change: From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY 769 (2019) (developing this proposal); see also NAT’L ACAD.’S, LIMITS OF RECIDIVISM, *supra*, note 69 (same) (proposing a move away from “exclusive reliance on recidivism” to evaluate the success of a program and drawing “more heavily on desistance as a measure of post-release outcomes in the criminal legal system”).

217. Professor Harmon herself recognizes this limitation but argues that the cost-benefit framework nevertheless is important to assessing policing policy. See Harmon, *supra* note 6, at 873-74 (“Efficiency is not the only measure of good policing . . . Nevertheless, cost-benefit considerations are important to policing policy.”).

218. See, e.g., Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 346-50, 357-71 (2020) (developing and testing two ways to advance race neutrality in predictive algorithms).

219. Starr, *supra* note 16, at 806 (arguing that algorithms’ use of gender and socioeconomic variables raises equal protection concerns).

220. See, e.g., Ion Meyn, *Race-Based Remedies in Criminal Law*, 63 WM. & MARY L. REV. 219, 247 (2021) (proposing a “Racial Disparity Cap” that “seeks to achieve racial parity in the use of risk assessment tools.”); Huq, *supra* note 193, at 1049 (developing a race-informed approach to address algorithmic unfairness).

221. See Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811 (2020) (summarizing two competing conceptualizations of fairness in the scholarly debates about

up intensifying some of the flaws in the evidence-based paradigm. For an emphasis on bias necessarily suggests a problem with the motivations of individual actors and directs our attention to individual-level solutions and distracts from a focus on the structural origins of inequity and unfairness.²²²

There are undoubtedly other ways the paradigm could be reformed. And such reforms, like those identified above, could possibly reduce or redress some of the problems with the paradigm. But any change that stays within the paradigm will not shed itself of the methodological and epistemological hierarchies that privilege the researcher over the researched. Indeed, the paradigm not only defines itself by the privileging of quantitative scientific methods over other ways of knowing, but also draws much legitimacy from this hierarchy by promoting the superiority of expertise over experience. Moreover, reforming the paradigm will inevitably result in an approach that remains backwards-looking, using the status quo as a reference point for assessment. Instead of asking whether a reform moves us towards the future we want, the paradigm will always ask whether it is an improvement from where we have been.²²³

Thus, any iteration of the evidence-based paradigm—in its current or reformed versions—will produce “reformist reforms”: changes that tinker at the edges of the existing system and fail to target the structural origins of inequality and injustice.²²⁴ Perhaps an incremental, reform-minded approach is the most pragmatic

predictive algorithms); Melissa Hamilton, *Debating Algorithmic Fairness*, 52 U.C. DAVIS L. REV. ONLINE 261, 268–69 (2019) (discussing different measures of algorithmic fairness).

222. As Whitlock and Heitzeg point out, a focus on individual-level solutions is a key feature of a neoliberal orientation. Neoliberalism “speaks of ‘bias’ instead of structural racism, failing to address the raced, classed, gendered and ableist violence of the policing that initially sweeps people into the system. It’s an approach that blurs ideological chasms, creating a focused neoliberal political project that brings together actors from libertarian/right to liberal/progressive sectors in a narrowly defined common cause.” Kay Whitlock & Nancy A. Heitzeg, *Billionaire-Funded Criminal Justice Reform Actually Expands Carceral System*, TRUTHOUT (Nov. 21, 2019), <https://truthout.org/articles/billionaire-funded-criminal-justice-reform-actually-expands-carceral-system/>.

223. As Monica Bell aptly observes, “Evidence-based policymaking, at least as currently conceived, is often backward-looking and timid. Reimagination is forward-looking and definitionally bold.” Bell, *supra* note 111, at 41.

224. See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) (“Efforts to improve the fairness of carceral systems and to increase their efficiency or legitimacy only strengthen those systems and divert attention from eradicating them.”).

option and one that will appeal to many readers.²²⁵ But for those who strive for transformation instead of reform, who want a new and different course for the future, the evidence-based paradigm must be abolished.

B. Abolishing the Paradigm

As prison abolitionist activists and scholars remind us, abolitionism is not simply a matter of deconstructing what exists. It also requires a reconstruction, a re-envisioning of the future and positive steps towards reaching that future.²²⁶ It requires enacting and supporting non-reformist reforms, “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization[.]”²²⁷ In other words, it requires a true paradigm shift in how we define, analyze, and use data and empirical knowledge in charting the course for the criminal legal system and assessing its impact.²²⁸

Paradigm shifts enable us to both “adopt new instruments and look in new places” and “see new and different things when looking with familiar instruments in places they have looked before.”²²⁹ This Part identifies new places to look and different

225. See Josh Bowers, *What if Nothing Works? On Crime Licenses, Recidivism, and Quality of Life*, 107 VA. L. REV. 959, 1057 (2021) (proposing a “radical pragmatist[.]” approach to reform that offers a “continuous regimen of piecemeal reinvention,” the “means to pursue small-but-meaningful experiments in an effort to cultivate small-but-meaningful changes.”).

226. Mariame Kaba describes abolitionism as “a practice of creating new structures that will allow people to feel safe, have their needs met, on our way toward an abolitionist end.” It requires us to ask “[h]ow we create the conditions for a world without prisons, policing and surveillance while at the same time eradicating interpersonal violence.” See JOSHUA DUBLER & VINCENT W. LLOYD, *BREAK EVERY YOKE: RELIGION, JUSTICE, AND THE ABOLITION OF PRISONS* 52 (2020) (quoting Kaba).

227. RUTH WILSON GILMORE, *GOLDEN GULAG* 242 (2007); see also Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration> (describing “non-reformist reforms” as “those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates”). See generally Akbar, *supra* note 20, at 100–01 (discussing history and current use of the term).

228. The concept of shifting paradigms is itself borrowed from a scientific discipline, specifically Thomas Kuhn’s *The Structure of Scientific Revolutions*. KUHN, *supra* note 30. Kuhn contrasted two types of scientific change: the gradual, incremental development of “normal” science, and scientific revolutions—paradigm shifts—that interrupt such periods of stable development. See Tania Lombrozo, *What is a Paradigm Shift, Anyway?* NPR (July 18, 2016, 2:29 PM), <https://www.npr.org/sections/13.7/2016/07/18/486487713/what-is-a-paradigm-shift-anyway> (describing Kuhn’s theory).

229. KUHN, *supra* note 30, at 111.

ways to use what we already know as we move forward. It does not attempt to propose a distinct set of policy prescriptions.²³⁰ Rather, it seeks to amplify conversations and inspire imaginations about the future of the criminal legal system and in particular the role and definition of data in achieving that new future.

Given the ways that the evidence-based paradigm reifies the power structures, privileges, and injustices of the existing system, a paradigm shift must start with a shift in whose voices, insights, and needs are centered in determining the objectives of reform and the methods used to reach those goals. In other words, we must shift power over who sets the reform agenda.

The demand for power-shifting emanates from grassroots movements for social, racial, and economic justice and has recently been amplified by legal scholars.²³¹ It is a call to reimagine how we govern and to center such reimagining in the communities that have been the most harmed by traditional governance structures.²³² For example, a core demand of the Movement for Black Lives is “a world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us[.]”²³³ The power-shifting model is distinct from a participatory reform model, which promotes expanded inclusion of marginalized communities in existing structures and processes to counteract historical power

230. As Amna Akbar explains, “non-reformist reforms are about the dialectic between radical ideation and power building. Non-reformist reforms come from contestatory exercises of popular power. They attempt to expand organized collective power to build pathways for transformation. As such, they are not in themselves about finding an answer to a policy problem: They are centrally about an exercise of power by people over the conditions of their own lives.” Akbar, *supra* note 20, at 106.

231. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L. J. 778, 782 (2021); see also K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679, 680 (2020) (developing a “framework for analyzing how local governance institutions might shift power and attempt to redress inequality.”); Okidegbe, *supra* note 16 (drawing on principles of power shifting in developing a framework for democratizing predictive algorithms).

232. See Simonson, *supra* note 231, at 781–83 (defining power-shifting).

233. *Community Control*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/community-control/>; see also *Building Care: Portland Communities Respond to the Violence of Policing*, CARE NOT COPS 1 (Winter 2019) [hereinafter *Portland Communities Respond*], https://static1.squarespace.com/static/5a06663f0abd0473f4bc9610/t/5c61af4aeb393107fe18c440/1549905764664/CNC_BuildingCare_CommunityReport_Volume1_Winter2019.pdf (“We believe that communities most impacted by policing, lack of access to public resources, and systemic violence should be at the forefront of efforts and conversations about the most appropriate solutions.”).

imbalances and biases.²³⁴ In contrast, the power-shifting model looks to those who have been most harmed by such structures and processes for insight on how to move forward—*before* the path has been set.²³⁵ This approach thus requires us to shift power over who determines the research objectives, what evidence “counts,” how data are gathered, and who controls the data.

A crucial task in shifting the paradigm is to reconceptualize the objectives of reform—both by redefining the current goals and identifying new ones. The suggestion here, particularly for those already empowered to influence the reform agenda, is quite simple: listen more—particularly to the people who have been historically targeted by the criminal legal system and suffer its effects—and assume less. This notion is not radical; in fact, it resonates with the original vision for the evidence-based paradigm in medicine, which embraced a “bottom up approach” that integrated empirical evidence with the clinical experience of the health care provider *and the needs and choices of the patient who was receiving treatment*.²³⁶ Quickly, however, the definition of “evidence” became synonymous with information gleaned from randomized controlled trials.²³⁷ Congresswoman Ayanna Pressley’s People’s Justice Guarantee demonstrates that this concept can be translated into legislation. This proposed legislation called for the government to “support and commit to a participatory people’s process that recognizes directly impacted people as experts on transforming the justice system, who speak from experience about the devastation of criminalization and incarceration[.]”²³⁸

There is an established research method that can help advance this goal of redefining the goals of reform while centering the needs and desires of those most impacted by the criminal legal system:

234. See Okidegbe, *supra* note 16, at 34–35.

235. In calling for power-shifting, this Article aligns itself with the burgeoning scholarship in movement law, which studies “how movements build and shift power—beyond courts and the Constitution—and prefigure the economic, social, and political relationships of the world they are working to build.” Akbar, Ashar & Simonson, *supra* note 29, at 852. Movement law scholarship “shows a care and a concern for the unique contributions of social movements not simply in representing subordinated peoples, but as a locus for experiments, processes, and imaginations for transformational change.” *Id.* at 853.

236. David L. Sackett, William M.C. Rosenberg, J.A. Muir Gray, R. Brian Haynes & W. Scott Richardson, *Evidence Based Medicine: What It Is and What It Isn’t*, 312 BRIT. MED. J. 71, 72 (1996).

237. See Vandenbroeck et al., *supra* note 19, at 539 (recounting the history).

238. H.R. Res. 702, 116th Cong. (2019).

community-based participatory research. This form of research centers knowledge production in historically marginalized communities, positions members of these communities as agents, not subjects, of research, and emphasizes the value of qualitative methods and data. Participatory research is “concerned with systematic cocreation of new knowledge by equitable partnerships between researchers and those affected by the issue under study, or those who will benefit from or act on its results.”²³⁹ Crucially, it is not participation *in* research by community members, which occurs when researchers engage communities after already setting the research questions and methods.²⁴⁰ Rather, it is research that is produced as a partnership between community members and researchers and involves robust and coequal participation of community members throughout the research process, beginning with the generation of indicators of success.²⁴¹ This research model is similar to the practice of “groundtruthing,” which QuantCrit scholars describe as a research practice that “requires that we insist each step of the research process is driven by community expertise, particularly when the research is attempting to understand[] phenomena connected to race [or] racism.”²⁴²

The results of such a community-centered process would not necessarily lead to universal agreement on what the research process should look like or what it should aim to achieve.²⁴³

239. Neil Andersson, *Participatory Research – A Modernizing Science for Primary Health Care*, 19 J. GEN. FAM. MED. 154, 155 (2018) (footnote omitted).

240. *Id.* at 154. For example, researchers who solicit community input through questionnaires or focus groups with pre-designed questions and objectives are not engaging in participatory research. *Id.*

241. See, e.g., Alice J. Hausman, Courtney N. Baker, Eugene Komaroff, Nicole Thomas, Terry Guerra, Bernadette C. Hohl & Stephen S. Leff, *Developing Measures of Community-Relevant Outcomes for Violence Prevention Programs: A Community-Based Participatory Research Approach to Measurement*, 52 AM. J. CMTY. PSYCH. 249 (2013) (describing the process of defining community-defined indicators of program success for violence prevention programs); see also Lauren Johnson, Cinnamon Pelly, Ebony L. Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. 191, 194 (footnote omitted) (identifying the priorities of participatory research as “respecting community-generated research questions, agendas, and expertise, and building sustainable co-learning partnerships between community members and academically trained researchers that generate actionable results.”).

242. Huber et al., *supra* note 106, at 212.

243. See Simonson, *supra* note 231, at 789 (footnote omitted) (“Indeed, there is no guarantee that a power-shifting arrangement in policing would on its own lead to any

The interests, needs, and desires of communities most impacted by criminal legal polices are diverse and multidimensional.²⁴⁴ But one recent community-based participatory research study in a metropolitan community in Cincinnati, Ohio, illumines some possible outcomes.²⁴⁵ This study posed two questions: what is the definition of safety? And how can safety be made accessible to all?²⁴⁶ A primary theme that emerged from community members was that safety was a “multidimensional” concept that embraced both bodily and mental safety, centered on “being free from harm or the threat of harm,” and was associated with close, “caring, supportive relationships.”²⁴⁷ Participants identified racism and poverty as barriers to safety and strengthening community networks and enhancing community resources as pathways to increasing safety.²⁴⁸ Overall, participants expressed “ambivalence” about the role of police in promoting safety; some viewed them as a “necessary part of a safe community,” and others expressed that police made them feel less safe.²⁴⁹

These research findings echo many of the themes emanating from community-led organizations and allied advocacy groups that have offered well-developed visions for reform and transformation, with many more coming into focus in the wake of the uprisings against police violence in the summer of 2020. And many of these roadmaps for reform include a definition of public safety. A common theme in these definitions is the notion of public safety as freedom from harm, which resonates with the traditional

particular outcomes. Communities, however defined, are not monolithic, a reality that has become especially salient as communities of color have disagreed internally over the summer of 2020 about calls to defund the police.”); Benjamin Levin, *Criminal Justice Expertise*, 90 *FORDHAM L. REV.* 2777, 2827 (2022) (arguing that “giving more power to ‘the people’ needn’t yield less punitive approaches to criminal law.”); cf. Trevor Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law* 130 *YALE L.J.F.* 798, 806-07 (arguing that shifting crime policymaking to the community level could produce greater inequity in policy outcomes due to “punitive populism within marginalized communities and dysfunction in the democratic process.”).

244. For example, James Forman has demonstrated how African American leaders in major city centers played a role in advancing the tough on crime policies that had devastating effects on many poor Black neighborhoods. JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

245. See generally Johnson et al., *supra* note 241.

246. See *id.* at 198.

247. *Id.* at 209.

248. *Id.* at 210-12.

249. *Id.* at 216.

definition of public safety. Crucially, however, these community-generated definitions tend to focus not exclusively on harm caused by civilians, but on harm inflicted by law enforcement and resulting from systemic racism and other historical inequities.²⁵⁰

But these alternative definitions of public safety are not limited to the absence of police violence or prejudice; they also offer positive visions of what safety looks like. For example, the Durham Beyond Policing Coalition—a grassroots coalition of organizations and community members in Durham, North Carolina—defines public safety as follows:

'Public safety' conjures vivid imagery for us. An abundance of resources. An end to vast inequality and power imbalances. Freedom to live our lives. Demilitarization. Our communities participating in collective decision making. How we are with each other when the music is playing and after it stops. Children growing into adults without harm. An ability to express joy without fear of being hindered. Building relationships. Communities resolving our own problems with all the support we need. Assessing our needs and meeting each other where we're at. Sharing resources. Nourishment. Feeling at ease. Celebrating each other.²⁵¹

The themes offered in this vision—of safety as thriving, safety as connection, safety as economic and physical security—are common in definitions offered by other community-centered groups.²⁵² Moreover, such a project requires a reorientation towards

250. See, e.g., *Portland Communities Respond*, *supra* note 233 (“[P]olicing endangers the health and well-being of communities.”). See generally Bell, *supra* note 111, at 32–33 (discussing research showing how policing undermines the public safety and health of criminalized communities).

251. *Proposal for a Community-Led Safety and Wellness Task Force*, DURHAM BEYOND POLICING COAL. 5, <https://durhambeyondpolicing.org/wp-content/uploads/2019/07/Durham-Beyond-Policing-Budget-Proposal-2019-2020.pdf>. The DBPC is “a grassroots coalition to divest from policing and prisons and reinvest municipal resources into supporting the health and wellbeing of Black & Brown communities, benefiting all community members in Durham, NC.” *Id.* at 41.

252. See, e.g., *Vision for Justice 2020 and Beyond: A New Paradigm for Public Safety*, LEADERSHIP CONF. & C.R. CORPS 7 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Vision-For-Justice-2020-SHORT.pdf> (“A new paradigm for public safety emphasizes noncarceral interventions and programs, not jails and prisons, to keep communities safe.”). And these alternative metrics of safety are not necessarily unmeasurable. For example, an emerging body of scholarship is focused on using social science methods to measure community flourishing and well-being through consideration of domains including happiness or satisfaction, mental and physical health, and financial

the role of funding in achieving safety and security. It could require *more* spending—albeit not in law enforcement or departments of corrections or surveillance apparatuses, but rather in supportive social, educational, and recreational services—in the name of justice.²⁵³ In this more expansive vision of public safety, safety is enhanced when communities have the resources needed to thrive. These observations are summed up succinctly in the common refrain that the safest communities are those with the most resources, not the most police.²⁵⁴

This call to invest in supportive services and divest from policing budgets—or to “defund the police”—has been dismissed by some as unrealistic or even dangerous.²⁵⁵ However, it actually resonates with the original vision of the Justice Reinvestment Initiative. The Justice Reinvestment Initiative was created to find ways to save money so that it could be reinvested *in communities that are the most impacted by mass incarceration*.²⁵⁶ Over the years, however, it morphed into an effort to reduce spending and reinvest savings back into the criminal legal apparatus. Again, Congresswoman Pressley’s People’s Justice Guarantee shows this alternative, expansive vision for public safety can be distilled into legislation. It embraces a “community-led platform of justice, freedom, and safety, which shifts resources away from criminalization

stability. See Bell, *supra* note 111, at 32–33 (discussing the Human Flourishing Program at Harvard University’s Institute for Quantitative Social Science).

253. See, e.g., Kate Hamaji, Kumar Rao, Marbre Stahly-Butts, Janaé Bonsu, Charlene Carruthers, Roselyn Berry & Denzel McCampbell, *Freedom to Thrive: Reimagining Safety & Security in Our Communities*, CTR. FOR POPULAR DEMOCRACY 1 (July 4, 2017) (describing the invest/divest framework).

254. See, e.g., *id.* at 80 (quoting Executive Director of Missourians Organizing for Reform and Empowerment: “More license plate readers and more cameras on our corners don’t increase safety, they just increase the amount of data that is cataloged without transparency. If a decrease in crime is the actual goal, invest in people solutions that are proven to work.”).

255. See, e.g., Bradford Betz, ‘Defund the Police’ Aftermath Created ‘Ripple Effect’ That Endangers Everyone, *Law Enforcement Source Says*, FOX NEWS (Sept. 19, 2022), <https://www.foxnews.com/us/defund-police-aftermath-created-ripple-effect-endangers-everyone-law-enforcement-source-says>; see also, *Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery*, THE WHITE HOUSE (Mar. 01, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/>.

256. See GOTTSCHALK, *supra* note 69, at 98.

and incarceration and toward policies and investments that fairly and equitably ensure that all people can thrive.”²⁵⁷

If we shift and expand the goals of criminal legal reform, we will inevitably identify goals that are not susceptible to measurement. If we want to value these goals, we will need to let go of the mandate to test and measure, and make space for prioritizing reforms that are the right and just thing to do—because they advance the dignity, safety, and thriving of those who have historically suffered at the hands of the criminal legal system.²⁵⁸

This does not mean we should or must abandon data collection and analysis altogether. But we must redefine what evidence means—what data “count.”²⁵⁹ An obvious first step is to stop privileging quantitative methodologies and to value other kinds of research and other kinds of expertise.²⁶⁰ We must value the insights of people who are most impacted by criminal legal policies *as evidence of the policies’ impact*—regardless of whether their observations and experiences have been “validated” by a controlled trial or quasi-experimental study.²⁶¹ Such an approach may mean rejecting traditional empirical conclusions that do not square with these lived experiences. As applied mathematician and philosopher Lily Hu argues, “A commitment to getting the social world

257. H.R. Res. 702, 116th Cong. (2019). Many state and local legislators are considering legislation that would reduce reliance on law enforcement as the primary response to instances of people who are experiencing mental health crises. See Meg O’Connor, *State Lawmakers are Pushing New Bills to Reduce Reliance on Police*, THE APPEAL (Feb. 2, 2021), <https://theappeal.org/politicalreport/state-lawmakers-are-pushing-new-bills-to-reduce-reliance-on-police/> (discussing legislation).

258. See, e.g., GOTTSCHALK, *supra* note 69, at 95 (arguing that we should reclaim rehabilitation and reentry “as worthy goals in their own right and not as means to an end defined largely by reducing recidivism.”). Rachel Barkow, who proposes the robust collection and use of data in criminal justice reform, has acknowledged this limitation of a data-driven approach. BARKOW, *supra* note 4, at 177 (“Some policies might be the humane and just thing to do, even if they cannot be supported by data and studies . . . There are limits to what the expertise model can accomplish.”).

259. See Okidegbe, *supra* note 23.

260. In response to criticisms of the evidence-based methodology in psychology, the American Psychological Association has recommended that randomized controlled studies should be “regarded as just one sort of evidence” and that there should be “no hierarchy in validity . . . between RCT and case studies, clinical observations, qualitative studies, ethnographic research, process-outcome studies, and the like.” Vandenbroeck et al., *supra* note 19, at 539–40.

261. Critical Race Theory has developed a rich literature on the power and insight of narrative and storytelling. See generally Garcia et al., *supra* note 186, at 152 (discussing the role of counter-storytelling in CRT).

right does not require deference to results simply because the approved statistical machinery has been cranked. Indeed in some cases, it may even require that we reject findings, no matter the prestige or sophistication of the social scientific apparatus on which they are built.”²⁶² And to the extent that more robust data sets are helpful, qualitative research methods, especially those that dismantle the hierarchy between the researcher and the researched, should play a more prominent role in policymaking and assessment.²⁶³

But what of quantitative methods? Do those who want to shift the paradigm engage with existing statistical data and statistical methodologies—despite the methodological shortcomings and epistemological limitations—or reject them outright? Perhaps the best course, at this juncture, is to adopt the orientation of QuantCrit scholars David Gillborn, Paul Warmington, and Sean Demack and take a “position of principled ambivalence, neither rejecting numbers out of hand nor falling into the trap of imagining that numeric data have any kind of enhanced status, value, or neutrality.”²⁶⁴ We should be aware of “how science unfolds in the trenches of knowledge production.”²⁶⁵ In other words, we need not categorically reject statistical data—but to the extent we engage with them, we should do so aware of how data represent the product of a series of choices by those empowered to set the research agenda and conduct the studies—and on how those choices impact the outcome.

This approach of principled ambivalence resembles that adopted by Data for Black Lives (D4BL), an activist organization “committed to the mission of using data to create concrete and measurable change in the lives of Black people.”²⁶⁶ The organization’s call to action is telling: “Data as protest. Data as accountability. Data as collective action.”²⁶⁷ D4BL works with an explicit awareness of the way data have been “wielded as an

262. Hu, *supra* note 99.

263. Gillborn et al., *supra* note 97, at 175 (arguing that qualitative data “exploring people’s complex and multifaceted experiences and perspectives, may be inherently better suited to exposing and opposing racist social processes” than quantitative data).

264. *Id.* at 174.

265. Hu, *supra* note 99.

266. *About Us*, DATA FOR BLACK LIVES, <https://d4bl.org/about.html> (last visited Oct. 20, 2022).

267. *Data for Black Lives Blog*, DATA FOR BLACK LIVES, <https://blog.d4bl.org> (last visited Oct. 20, 2022).

instrument of oppression” and used to advance inequality and injustice—yet holds fast to the transformative potential of data systems as powerful tools in the movement for justice.²⁶⁸ It calls for the abolition of Big Data—including algorithms²⁶⁹—while simultaneously acknowledging the potential for data—when placed “in the right hands,” specifically communities of color—to help in “fighting bias, building progressive movements, and promoting civic engagement.”²⁷⁰ In February 2021, D4BL launched a campaign calling for the end of the use of “Data Weapons,” which it defines as “any technological tool used to surveil, police and criminalize Black and Brown communities[,]” including predictive policing software, risk assessment instruments, gang databases, and social media monitoring.²⁷¹

And those who want to use quantitative methods and data should do so in ways that temper the (re)production of the biases and inequalities inherent in the evidence-based paradigm. One such approach is to use traditionally collected data to illumine issues that may destabilize existing institutions and/or decenter carceral responses.²⁷² And another is for empiricists to partner with interested community-based, anti-carceral organizations to help them evaluate their processes and procedures. For example, Monica Bell suggests that quantitative social scientists shift their focus from efforts to refine and perfect policing practices and towards programs that seek to enhance safety and well-being without the police.²⁷³ Crucially, however, the purpose of such empirical inquiry should not be to prove that alternative approaches are “better” than traditional approaches—indeed, such an orientation continues to center traditional criminal legal

268. *About Us*, *supra* note 266.

269. *Abolish Big Data*, DATA FOR BLACK LIVES, <https://www.filepicker.io/api/file/NXWKntc7SB6eCcrUGhxx> (last visited Oct. 20, 2022).

270. *What is Data for Black Lives?*, DATA FOR BLACK LIVES, <https://d4bl.org/videos/55-what-is-data-for-black-lives> (last visited Oct. 20, 2022).

271. *Introducing #NoMoreDataWeapons*, DATA FOR BLACK LIVES (Feb. 26, 2021), <https://blog.d4bl.org/introducing-nomoredataweapons/>.

272. For example, researchers have used police-generated crime data to study the police themselves—specifically the institutional and cultural factors that contribute to police misconduct. See Bell, *supra* note 111, at 40–41 (discussing research).

273. See *id.* at 34–36.

processes as the default option. And as Bell reminds us, “[s]tatistical failure may not mean that the project is fundamentally valueless.”²⁷⁴

As we expand the meaning of data and the methods used to gather such data, we must also be intentional and explicit about the role that data do and should play in decision-making. Data are simply one of many tools that may help us understand the current world and work towards a radically different future.²⁷⁵ Data cannot, as QuantCrit scholars remind us, speak for themselves.²⁷⁶ Because data cannot speak, data cannot provide answers to the questions we ask. Data can help describe the impact of a law, policy, or procedure, but they do not prescribe the path forward.²⁷⁷ We choose both the meaning we draw from data and what we do with that message.

CONCLUSION

This Article is a warning that if we continue to follow the evidence-based paradigm for criminal legal reform, we are bound to replicate many of the dysfunctions and inequities we seek to escape, this time under the veneer of empirical objectivity. But this Article is also an invitation to envision a different path, one that involves a true paradigm shift in what we expect from criminal legal reform, how we assess our progress, and whose voices we choose to value. Crucially, paradigm shifts do not, in and of themselves, change the world – but they do change how we see and understand the world around us.²⁷⁸ Ultimately, this Article is a call to work both with and against empiricism and data,²⁷⁹ keeping a critical eye on the knowledge produced through evidence-based methods while valuing new ways of knowing and generating new solutions.

274. *Id.* at 41.

275. *See, e.g., id.* at 42 (“Social scientists should approach evaluative research with awareness that, while quantitative research is a valuable tool, it should never be an exclusive tool in moral and political debates over public safety.”).

276. *See, e.g.,* Gillborn et al., *supra* note 97, at 173.

277. *Cf. Carbado & Roithmayr, supra* note 100, at 163 (noting that social science can supply a “descriptive method—a mode of knowledge production—that helps to theorize the connection among racial inequality, individual agency, and collective action, to uncover the way in which processes that appear to be race neutral in fact reproduce racial subordination.”).

278. KUHNS, *supra* note 30, at 111.

279. *See* Gillborn et al., *supra* note 97, at 174.