

Criminal Justice Roundtable, Vanderbilt University Law School

Bass Berry & Sims Room, November 6-7

FRIDAY

1:00-2:00 Jeffrey Bellin (Wm. & Mary), *The Silence Penalty*

The American criminal justice system is plagued by silence. Roughly half of all criminal defendants in felony trials decline to take the witness stand. Declining to testify shields defendants from questioning by the prosecuting attorney and generally precludes the introduction of a defendant's prior crimes. Consequently, defense attorneys often view not testifying as a shrewd tactic. But silence comes at a price. Jurors penalize defendants who fail to testify by inferring guilt from silence. This Article explores that "silence penalty," focusing on empirical evidence from mock juror experiments – including the results of a new 400-person mock juror simulation conducted for this Article – and data from real trials. It concludes that the silence penalty is substantial and widely underestimated, rivaling the damage done to a defendant's prospects by the introduction of a criminal record. The data also present a powerful indictment of the system itself. The evidence as a whole suggests that: the legal rules designed to protect silent defendants and narrowly channel consideration of past crimes are ineffective; the artificial evidentiary connection between defendant testimony and the introduction of the accused's criminal record undermines the accuracy of jury fact-finding; and the vaunted constitutional right to testify harms more defendants than it helps.

Commentator: Christopher Slobogin, Vanderbilt Law School

2:15-3:15 Song Richardson (UC Irvine Law School), *The Racial Anxiety Paradigm: A New Model of Racial Profiling and Violence*

The recent rash of police killing unarmed Black men has brought national attention to the persistent problem of policing and racial violence. Many accounts attempt to explain these instances of racial violence at the hands of the police, ranging from arguments that the police acted justifiably to arguments likening these killings to Jim Crow lynchings. Recently, however, lessons from social psychology have revealed that racial animus is not a necessary prerequisite for racial harms. For instance, as a result of unconscious racial biases linking blacks with criminality, even consciously egalitarian officers can engage in behaviors that produce significant and unjustified racial disparities. This article introduces the racial anxiety paradigm as a new and additional lens for understanding racial disparities in police suspicion and violence. The paradigm switches the perspective from the stereotype of black criminality made salient by discussions of unconscious racial bias, to the stereotype of police racism. It focuses on how this stereotype can influence both officers and black citizens in ways that result in disproportionate racial consequences.

Commentator: David Harris, Pittsburgh Law School

3:30-4:30 Elizabeth Joh (UC Davis Law School), *The New Surveillance Discretion: Automated Suspicion, Big Data and Policing*

New technologies have altered surveillance discretion by lowering its costs and increasing the capabilities of the police to identify suspicious persons. Furthermore, soon it will be feasible and affordable for the government to record, store and analyze nearly everything we do. This new expansion of surveillance discretion by big data presents an underappreciated challenge to our usual thinking about police regulation. How the police will use big data tools, particularly in future-oriented ways, is as pressing an issue of police accountability as individual officer bias, excessive force, and other pressing issues currently the topic of public debate. Unlike a police brutality case captured on a cellphone video, however, expanded police power by means of big data is difficult for most of the public to see and understand. Such secrecy and opacity calls for new tools of accountability.

Commentator: Jane Bambauer, Arizona Law School

SATURDAY

8:30-9:30 Pamela Metzger (Tulane Law School), *Confrontation as a Rule of Production*

Since 2004, the Supreme Court claims to have rejected a cost-centric jurisprudence. *Crawford v. Washington* held that “[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Crawford* claimed to have restored Confrontation as a rule of production: “The Confrontation Clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” However, Confrontation’s costs still preoccupy the Court; the Court simply sells that old, cost-conscious wine in new, *Crawford*-approved bottles. The result has been a withered Confrontation jurisprudence that undermines the Confrontation Clause and the core structural premises of constitutional criminal procedure.

Commentator: Robert Mosteller, University of North Carolina Law School

9:45-10:45 Shima Baradaran Baughman (Utah Law School), *Subconstitutional Checks*

Constitutional checks are an important part of the American justice system. The Constitution demands structural checks where it provides commensurate power. The Constitution provides several explicit checks in criminal law. Criminal defendants have the right to counsel, indictment by grand jury, trial by jury, the public or executive elects or appoints prosecutors, legislatures limit actions of police and prosecutors, and courts enforce individual constitutional rights and stop executive misconduct. However, these checks today no longer function as intended by the Constitution and criminal law has failed to create what I call “subconstitutional checks” to adapt to the changes of the modern criminal state. In the modern criminal state, plea agreements have virtually replaced jury trials, discipline and electoral competition between prosecutors is rare, separation of powers does not serve its purpose because the interests of all branches are

often aligned, and individual constitutional rights have little real power to protect defendants from the state. As a result, the lack of structural constitutional checks in criminal law has led to constitutional dysfunction. Though never recognized as such, constitutional dysfunction in criminal law is evidenced by mass incarceration, wrongful convictions, overly harsh legislation, and an inability to stop prosecutor and police misconduct. This essay sheds light on the lack of constitutional checks by performing an external constitutional critique of the criminal justice system to explore this structural gap in the three branches and concludes that creating sub-constitutional checks has the potential of creating a more balanced criminal justice system.

Commentator: Andrew Ferguson, University of the District of Columbia Law School

11:00-12:00 Russell Covey (Georgia State Law School), *Rules, Standards, Sentencing and the Nature of Law*

In Part I, the article briefly describes the standard model of federal sentencing prior to reform, the reform movement, and the criticisms that followed in reform's wake. This history constitutes what is, in essence, a debate between those who favor a discretionary sentencing system guided by a handful of loose standards, and those who favor one that is rule-based. Part II describes the classic rules vs. standards debate, defining terms and noting the various conventional arguments that rule proponents and standard proponents use in defending their preferred form of legal directive. It then notes some significant complications to the familiar debate, including the fact that many of the supposed virtues and vices of rules and standards morph into their opposite when viewed from different perspectives, and that rules and standards in any event tend in practice to converge. Part III then uses Justice Breyer's description of the problems the Sentencing Commission encountered in attempting to craft a set of sentencing rules as a case study in what the article refers to as the "rules/standards paradox," that is, the stubborn resistance of legal form to resolve substantive indeterminacy. The sources of indeterminacy are manifold and well-recognized: rules are "open-textured," internally and externally incoherent, over- and under-inclusive, complex and subject to exception. As a result, the promise that uniformity and proportionality in sentencing, or any legal endeavor, might be advanced through reliance on rules is ultimately doomed to failure. Part IV then takes stock of our dilemma, and suggests that uniformity and proportionality, in sentencing practice and in law generally, should be—and can only be—understood by virtue of the process that individuals receive, not by the outcomes that the legal system produces.

Commentator: Richard Frase, Minnesota Law School