CRIMINAL JUSTICE ROUNDTABLE
Vanderbilt University
November 11 & 12, 2016

Friday, November 11

12:00-1:00—Lunch (Bass, Berry Sims Room, second floor)

1:00-2:00—Eric Miller (Loyola, L.A.), *A Fair Cop and a Fair Trial*; Commentator: Chris Slobogin (Vanderbilt)

In the criminal justice system, of the many obstacles to receiving a fair trial, the greatest may be receiving any trial at all. For the most part, fair trial advocates have targeted the plea bargain process to complain about access to trials. But I shall claim that they are missing the woods for the trees: the single biggest obstruction to the trial is the police. I shall argue that the police obstacle to fair trials is not only an empirical feature of most criminal justice systems: it is a normatively significant one as well. From the perspective of the police, trials are unimportant. Trials belong in the due process model of criminal justice that primarily applies inside the courtroom. Inside the station house, a different model dominates, one very loosely captured by Herbert Packer's crime control model. This other model of criminal justice addresses the bottom end of the criminal justice system, where a variety of crime-deterring and public-order-restoring practices resolve low-level street problems as normatively preferable to the formal trial process. Taking this bottom-up approach to criminal justice, the issue is not that trials rarely happen: conceptually, trials do not matter. All the relevant crime control stuff has happened before an offender gets to trial. What that relevant crime control stuff is should inform our understanding of what the police ought to do, and what makes for a fair cop.

2:15-3:15—Mary Fan (Washington University), *Record Me: Big Data Mining for Justice*; Commentator: Andrew Crespo (Harvard):

When the legitimate use of force is disputed, evidence of potential patterns of harm — from rough or rude treatment to injuries, deaths, and property destruction — are most accessible to departments with the least incentive to share it. Now a revolution is unfolding. In lieu of traditional resistance, diverse constituencies are realizing that recording is a potentially protective and empowering strategy. The result is toutveillance – not the top-down of surveillance, nor the bottom-up of sousvillence, but a modern condition where everyone has incentive to record to contest or control the narrative. This project is about how this cultural revolution — and the big data trove and new technologies arising from it — offer fresh approaches to addressing the age-old dilemma of controlling police power without inhibiting effective law enforcement. The project discusses techniques for piercing the traditional opacity of law enforcement discretion such as software to detect faces, voices, words and even the inflection or volume of a voice (useful for detecting rudeness or the escalation of encounters). The current legal and policy quagmire surrounding access to, and disclosure of, body camera video may short-circuit such innovation and the promised benefits of embracing toutveillance. Indeed, software developers are facing challenges even obtaining sufficient body camera video to refine their technology, which utilize machine learning techniques that require processing volumes of data from the field. The project proposes a bounded access model of disclosure to balance legitimate privacy concerns with the strong interest in technology-enhanced improved police regulation.

3:30-4:30—Wesley Oliver (Duquesne), *The Anachronistic Exclusionary Rule*; Commentator: Thomas Clancy (Mississippi, Emeritus)

The exclusionary rule, the primary method of regulating police, fails to address some of the biggest issues in the regulation of modern police forces -- uses of force by officers and investigatory tactics that produce false convictions. How did the Supreme Court come to require states to follow such a rule in 1961, when fears of police brutality were much more in the forefront of society than search and seizure concerns? The Court's decision in *Mapp v. Ohio* . . . observed that a large number of states had adopted the rule and that the recent trend in state courts was toward adoption. The majority of the states to adopt the exclusionary rule, however, had done so during Prohibition when searches for liquor were the primary concern citizens had about police. By choosing the exclusionary rule as the method states were required to use to regulate police, the Court resurrected a remedy, understandably embraced to address the concern of Prohibition, that would fail to address the concerns of the 1960s. Present-day civil libertarians are decrying the Roberts Courts' limits on the exclusionary rule, but the rule's origins reveal that, by design, this rule was meant to address only searches. Alternatives to the exclusionary rule -- liquidated damages and injunctions -- have long been proposed and could address issues beyond illegal searches. Understanding that the origins of the exclusionary rule lie in a time when searches and seizures were a uniquely feared type of police misconduct -- a quirky time in American history -- may allow defenders of the exclusionary rule to abandon it in favor a deterrent mechanism that can address police force, interrogation practices, and identification protocols as well as unlawful searches and seizures.

6:00-9:00: Drinks and Dinner at Giovanni's, 909 20th Ave. South

Saturday, November 12

8:00-8:30: Breakfast (Bass, Berry, Sims room)

8:30-9:30—Fiona Doherty (Yale), *Exacting Leverage: The Role of Probation in Plea Bargaining*; Richard McAdams (Chicago)

The rules of probation play a central role in the dynamics of everyday plea negotiations. The promise of suspended prison time or no time at all persuades many defendants to accept a probation deal today to avoid the immediate prospect of prison. But in avoiding prison today, these defendants make themselves much more vulnerable to aggressive criminal justice outcomes down the road. In awarding the benefit of no prison today, prosecutors gain the advantage of subjecting defendants to the rules of probation going forward. The degree of future influence that a defendant cedes away depends on the nature of the probationary regime that applies in his or her case. This article examines the leverage created through the law of probation: (1) to induce guilty pleas; and (2) to control, overpower, and sanction people who accept the "bargain" of a probationary sentence. I explore this dynamic by examining a host of probationary regimes, grounding my analysis in the everyday experience of Connecticut's courts.

9:45-10:45—Ronald Wright (Wake Forest), *Jury Selection Patterns as a Political Issue*; Commentator: Richard Myers (UNC)

Under the clunky regime of *Batson v. Kentucky*, advocates try to reconstruct the state of mind of a single prosecutor (or a single defense attorney) who removed a prospective juror in a single trial. For familiar reasons, this judicial framework that evaluates one case at a time does not improve jury selection practices across a meaningful range of cases. It is time to see the jury exclusion problem through a wider lens. The most fruitful contribution to more inclusive jury selection practices might come from improved public records laws rather than from revamping the *Batson* standard. If a state's public record laws were to require the clerk of the court in each county to post information about jury selection in a uniform and accessible format, it would open up our view of the problem in two ways. First, juror selection data would broaden the analysis from individual judges and attorneys in a single case to the patterns of juror removal by entire offices across many cases. Second, the data would take the discussion outside the courtroom into the political arena, making it relevant during the election campaigns of prosecutors and judges. In a bid to demonstrate the promise of this idea, we assembled a database of jury selection records from a substantial proportion of felony jury trials in North Carolina during 2011. The records draw on paper records, housed in 100 different courthouses around the state, to depict the work of lawyers and judges in more than 1,300 trials, as they decided whether to remove about 30,000 prospective jurors. We call this collection of public records the "Jury Sunshine Project." By changing the frame of vision from a prosecutor's removal of a single juror in a single case to the practices of many actors, working in different offices, across many different criminal trials, the Project turns jury selection into a comparative question. Comparisons such as these make it possible to hold prosecutors and judges accountable to the public, by spotlighting those actors who select juries in ways that differ notably from their colleagues. Public records that reveal the pattern of outcomes, not the hunt for a litigant's hidden purpose in one case, can bring the full community into the jury box.

11:00-12:00—Aya Gruber (Colorado), *Consent Confusion*; Commentator: Sara Mayeux, Vanderbilt.

The slogans are ubiquitous: "Only 'Yes' Means 'Yes';" "Got Consent?;" "Consent is Hot, Assault is Not!" Clear consent is the rule, but the meaning of sexual consent is far from clear. The current state of confusion is evident in the numerous competing views about what constitutes mental agreement (grudging acceptance or eager desire?) and what comprises performative consent (passive acquiescence or an enthusiastic "yes"?). This paper seeks to clear up the consent confusion. It charts the contours of the sexual consent framework, categorizes different definitions of affirmative consent, and critically describes arguments for and against affirmative consent. Today's widespread uncertainty is partly a product of the affirmative consent reform juggernaut and its rapid legal changes. Confusion is also connected to the nature of consent as a liberal, contract principle. Sexual consent appears a morally self-evident issue of free will, but it actually veils a struggle between various judgments about how sex should happen, its benefits and harms, and the role of criminal law in regulating it. Indeed, proponents and critics of affirmative consent entertain different empirical and normative presumptions and often simply talk past each other. Structurally mapping the consent framework and the affirmative consent debate reveals exactly what is at stake in this new world of reform—a revelation necessary for meaningful dialogue on acceptable sex and acceptable sex regulation.

12:00-1:00: Lunch (faculty lounge)