

CRIMINAL JUSTICE ROUNDTABLE
Vanderbilt University
November 17 & 18, 2017

Friday, November 17

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

1:00-2:00—Morgan Cloud (Emory), *Property is Privacy: Locke and Brandeis in the Twenty-First Century*; Commentator: Chris Slobogin (Vanderbilt).

The central theme of this article is that the decision to abandon the property basis for rights embodied in the Fourth Amendment was unnecessary. In *Katz v. United States* the Supreme Court overruled a narrow concept of property rights first adopted in *Olmstead v. United States*. The theories introduced in *Olmstead* were, in fact, inconsistent with the Fourth Amendment's legal, political, and philosophical origins, as well as more than forty years of Supreme Court decisions using a very different theory of property rights to interpret the Fourth Amendment. Before *Olmstead*, Fourth Amendment rights were tied closely to a broad definition of property articulated by John Locke in the seventeenth century. The broad concept of property can apply to digital information because that theory protects more than tangible things. As understood during the century leading up to the Founding, the broad concept of property included a person's rights, ideas, beliefs, and the creative products of her labor. When the paper turns from Locke to Brandeis, we find that Louis Brandeis' seminal theories about the legal right to privacy shared core values with broad Lockean property theories. Finally, the paper explains how recent Supreme Court opinions regulating searches of both physical property and expressive digital information are consistent with broad property theories. In fact, in each case, property theory may provide a better explanation for the Supreme Court's decisions than does the *Katz* expectation of privacy test.

2:15-3:15—Devon Carbado (UCLA), *Table of Contents, Prologue, Introduction and Chapter One of THE 4TH: FROM STOP-&-FRISK TO SHOOT-&-KILL WITH ONE AMENDMENT*; Commentator: Gabriel Chin (U.C. Davis).

Part of my goal in this book is to articulate the multiple ways in which Fourth Amendment law exposes African Americans to police contact. And, I am trying to situate that police contact problem in the context of a broader theory of police violence. Finally, in all of this, I want to challenge the idea that over-policing, including racial profiling and police violence, is a problem of lawlessness and instead describe the phenomenon as an outgrowth of particular rule of law commitments under Fourth Amendment doctrine.

3:30-4:30—Ryan Scott (Indiana), *New Rules about New Rules: Retroactivity After Montgomery v. Louisiana*; Commentator: Margo Schlanger (Michigan).

The Supreme Court's decision in *Montgomery v. Louisiana* requires retroactive application of new "substantive" rules in cases on collateral review in state court. In doing so, it elevated the first exception to *Teague v. Lane*, which for 30 years has governed the retroactivity of new rules for prisoners seeking *habeas corpus* relief in federal court, from judge-made common law or a gloss on federal habeas statutes to a constitutional command. This Article advances two central claims. First, descriptively, *Montgomery* is best understood as recognizing a violation of substantive constitutional guarantees themselves, not some independent retroactivity requirement anchored in the Supremacy Clause or due process. Conceptually,

Montgomery thus marks an important shift in the Court's retroactivity cases. When collateral-review courts grant relief based on new substantive rules, they redress a current and continuing violation of those substantive guarantees, rather than "retroactively" affording a remedy for the initial imposition of an unlawful judgment. Second, as a consequence, *Montgomery* merely holds that states, having elected to create postconviction proceedings open to federal claims, may not refuse to give effect to controlling constitutional rules. Yet affording constitutional status to the retroactivity of new substantive rules has other important implications, both for AEDPA's limits on federal habeas relief and in state proceedings involving the collateral consequences of criminal convictions.

6:00-9:00: DRINKS AND DINNER AT GIOVANNI'S, 909 20TH AVE. SOUTH (SEE MAP)

Saturday, November 18

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

8:30-9:30—Joseph Hoffmann (Indiana), *Mens Rea, the Model Penal Code, and the Resilience of the Common Law*; Commentator: Janet Hoeffel (Tulane).

This paper presents a new empirical study of state *mens rea* law as applied in reported judicial decisions since 2000. The study reveals that in a surprising number of states — including some previously identified as "Model Penal Code" states — judges continue to use the traditional common law concepts of "general intent," "specific intent," and "malice" to decide individual criminal cases. This surprising resilience of the common law's approach to *mens rea* may be an indication of judicial resistance to the Code's rigidity and insistence on legislative supremacy in defining crimes, effectively producing a new hybrid system of *mens rea*. In this way, the story resembles the way that judges have created a similar hybrid of rules and discretion under the federal sentencing guidelines and in capital sentencing.

9:45-10:45—Thea Johnson, *Fictional Pleas (Maine)*; Commentator: Jenia Turner (SMU).

A fictional plea is one in which the defendant pleads guilty to a crime he has not committed with the knowledge of the defense attorney, prosecutor and judge. Although not a new invention, the fictional plea has found new life in the age of collateral consequences because it allows parties in the criminal system to achieve parallel aims – the prosecutor holds the defendant accountable in the criminal system, while the defendant avoids devastating non-criminal consequences. As the criminal justice system now serves as a gateway to a cascade of civil sanctions, the fictional plea is one option for blocking the gate. Because judges are accustomed to consenting to the agreements reached by the parties and often sympathetic to the plight of defendants facing severe collateral consequences, there has been little push-back by judges against such pleas. As this Article explores, fictional pleas provide particular benefit in three types of cases that often implicate serious collateral consequences – misdemeanors broadly, and drug and sex offense cases, specifically. Misdemeanors may carry a variety of non-criminal sanctions, but provide the flexibility to allow a range of pleas. As a result, the fictional plea can be used in the misdemeanor system as a way to circumvent low-level offenses that carry serious consequences. But even outside of the misdemeanor context, fictional pleas are gaining traction as a resolution in many drug and sex offense cases, since those categories of cases automatically attach a plethora of consequences, including deportation and sex-offender registration.

11:00-12:00—Sara Mayeux (Vanderbilt), “Adolescence” and the Limits of Punishment; Commentator: John Rappaport (Chicago).

In majority opinions written by Justices Kennedy (*Graham, Montgomery*) and Kagan (*Miller*), the Court has applied the “evolving standards of decency” test to find that LWOP categorically violates the Eighth Amendment when imposed upon juveniles for non-homicide crimes, and that mandatory LWOP violates the Eighth Amendment for homicide crimes. In sum, all youthful offenders must be given some individualized consideration at sentencing and/or some meaningful opportunity to petition for release. Justices Scalia, Thomas, and Alito dissented in all three cases (joined in *Miller* by Justice Roberts), citing, among other reasons, originalist qualms about the Warren Court’s whiggish notion of “evolving standards.” Taking the justices at their word, then, the division in these cases might be framed as one more iteration of familiar debates about constitutional interpretation, with a progressive “living constitutionalist” wing happily embracing “evolving standards” and a conservative “originalist” wing insisting upon adhering to the original meaning of the Eighth Amendment as understood in 1791. However, the divide on the Roberts Court exposed by the LWOP canon, I argue, is best understood as reflecting two different inheritances of twentieth-century intellectual and cultural history and in particular the recent history of punishment. The majority of the Court has essentially written into constitutional law the progressive vision of juvenile justice as limited by the twentieth century compromise in American criminal law, which extended more therapeutic forms of punishment to youthful offenders but (and especially after the 1970s retreat from rehabilitation) left traditional modes of punishment intact for adults. The dissenters would read the Eighth Amendment instead to allow or even perhaps affirmatively instantiate the 1980s and ’90s punitive turn, built largely around the fear of an urban, youthful “superpredator” class that needed to be contained and incapacitated through the exercise of state power. To develop this fuller account of the divide on the Court, this article contextualizes the *Miller* line of cases within the history of childhood and youth, a field of study that examines how ideas about the life course are shaped by culture and have changed over time. The juvenile LWOP cases reflect a clash between two competing understandings of adolescence in American culture, one dating to the Progressive Era and the other gaining influence post-World War II. Although the *Miller* majority endorsed the seemingly more optimistic Progressive Era view of human nature, it extended the benefit of that optimism only to juveniles—leaving adults to the mercy of the constitutional punishment without-limits regime. The article concludes by suggesting a more promising path to meaningful constitutional limits on punishment.

12:00-1:00—Lunch (Faculty Lounge, second floor)