VANDERBILT Law School

CRIMINAL JUSTICE ROUNDTABLE
Vanderbilt University
November 8 & 9, 2019

Friday, November 8

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

1:00-2:00—Ric Simmons (Ohio State), *Race and Reasonable Suspicion*; Commentator: Chris Slobogin (Vanderbilt).

This article will examine and critique how courts have historically analyzed the question of race in the context of determining reasonable suspicion or probable cause. Under the Fourth Amendment, police can only use race as a factor if it is relevant to the likelihood that the suspect is engaged in criminal activity. In theory, race could be a relevant factor, but in practice courts have an extremely poor track record in analyzing this factor appropriately. Since the relationship between race and criminal activity is an empirically verifiable number in any given case, this article argues that the burden should be placed on the prosecutor to prove the existence and the strength of the correlation through actual data rather than the subjective experiences of the arresting officer. Under the Equal Protection Clause, police can only use race as a factor if their use of race is narrowly tailored to serve a compelling state interest. This article argues that courts should be more exacting when applying the strict scrutiny test to the use of race in criminal investigations.

2:15-3:15—Jocelyn Simonson (Brooklyn), *Police Reform Through a Power Lens*; Commentator: Kay Levine (Emory).

Underlying the contemporary push for community control is a central critique of two leading ways of thinking about police reform: first, an instrumental focus on particular outcomes (e.g., a reduction in police use of unconstitutional excessive force); and second, a focus on building trust between the police and communities so as to enhance the legitimacy of the police. In contrast to the instrumentalist approach or the legitimacy approach, the community control perspective adds a different idea about what it means to effectively regulate the police, an idea that centers the specific role that policing plays in denying people in highly policed neighborhoods their democratic standing and their collective political impact. The focus, in other words, is on power. I suggest three possible justifications for adopting a power lens on police reform. First, a power-shifting approach might be *reparative*, in the sense that it shifts power downward toward populations who have been denied political power directly as a result of the history of policing policies and practices in their neighborhoods. Second, power-shifting might be a means of promoting *antisubordination*, based on the principle that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups. And third, a power lens on police reform promotes a particular view of *contestatory* democracy, one in which democratic policing has as its objective the facilitation of countervailing power for those subject to the domination of the state. After laying out various conceptions of the power lens, this Article hopes to demonstrate what an analysis of a specific police reform proposal looks like when power-shifting is added to the mix by returning to the example of community control of the police. My argument is not that community control is the answer to the problem of policing. Rather, community control provides an example of how an analysis of a specific police reform proposal starts to shift if one adds the lens of power.

3:30-4:30—Seth Stoughton (South Carolina), *Fourth Amendment Flaws and the Regulation of Police Violence*; Commentator: Chuck Weisselberg (Berkeley)

Within policing, few legal principles are more widely known or highly esteemed than the "objective reasonableness" standard that regulates police uses of force. Over the last thirty years, *Graham v. Connor* has not only been quoted and cited thousands of times in litigation and judicial opinions, it has also featured prominently in police training and police-oriented publications. Part I summarizes the constitutional framework for evaluating the constitutionality of police uses of force under the Fourth Amendment. Part II identifies a series of flaws in that framework, adding to other scholars' criticisms to demonstrate that the Fourth Amendment's seizure jurisprudence is ill-suited to regulate police uses of force. Part III illustrates the problem of constitutional spillage into state law and police agency policy. Part IV explores the potential for detaching state law and, to a lesser but appreciable extent, police agency policy from a faulty Fourth Amendment framework.

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

Saturday, November 9

8:00-8:30: Breakfast (Alexander room, first floor)

8:30-9:30—Eisha Jain (UNC), *Policing Immigration Status*; Commentator: Susan Klein (Texas)

This Article explains the legal mechanism that permits citizens to be targeted by immigration enforcement, and it offers a framework for reform. It disaggregates two threshold stages in immigration policing: first, the initial stop by an immigration officer, and second, verification of immigration status. Courts and legal scholars have focused on the first stage, and they have neglected the second. In spite of the public's focus on raids and street stops, the vast majority of interior immigration policing does not take place in the street; it takes place behind prison walls. Yet there are no federal statutes that govern immigration verification. Nor do the constraints of criminal procedure apply. This Article explains how verification failures lead citizens to be apprehended by ICE. In addition, it offers a normative framework for reform, one that centers on accuracy and procedural fairness. To date, the principal reform movement has focused not on improving the enforcement process, but rather, on dismantling it altogether – think of the movement to "Abolish ICE." This Article argues for a different approach, one that focuses on adherence to basic principles of legality and procedural fairness. As a simple matter, ICE has no jurisdiction over citizens. A reform movement that takes this principle seriously could lead to a fundamental reformulation of immigration enforcement in the interior of the United States.

9:45-10:45—Jessica Eaglin (Indiana), *Beyond the Equality Paradox: Procedural Limits to Risk Technologies at Sentencing*; Commentator: Sandy Mason (Georgia).

This Article examines the debates around the legality of actuarial risk assessment tools meant to guide judicial sentencing discretion. Controversially, these tools rely on factors like gender and socioeconomic status to assess a defendant's likely future behavior with improved technical accuracy. Critics and advocates of this reform divide on whether such tools undermine constitutional equal protection guarantees. While this Article agrees that these tools are problematic, it posits that critics should consider a different line of constitutional inquiry through the framework of individual liberty inspired by the Supreme Court's Sixth Amendment jury trial right jurisprudence. Because actuarial risk

tools include factors that violate some state-level sentencing statutes, their use undermines existing political checks on state government. Though this procedural route suffers from flaws, it may be strategically compelling for those committed to challenging the socio-historical phenomenon of mass incarceration. It expands the scope of debate about risk tools as sentencing reform beyond equality. It also calls for reflection on the rhetoric of security as a means to expand the carceral state.

11:00-12:00—Hadar Aviram (Hastings), *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*; Commentator: Ed Rubin (Vanderbilt)

This essay examines the emergence of an academic and popular discourse that advocates turning the cannons of the punitive machine against the powerful. I identify this discourse as "progressive punitivism": a logic that wields the classic weapons of punitive law — shaming, stigmatization, harsh punishment, and denial of rehabilitation — in the service of promoting social equality. In this paper I attempt to sketch the main features, origins, and consequences, of the progressive punitive perspective. I start with an overview of the main characteristics of progressive punitivism: turning the existing punitive machine on the powerful, focusing on identity and group politics as an epistemological resource for identifying perpetrators, the concept of "ratcheting up" punishment, the preoccupation with victim voices, and the idea of punishment as a catalyst for social change. I then review the three key areas in which ideas of progressive punitivism have gained visible popularity in recent times: police abuse of force, sexual assault (carceral feminism and the #metoo movement) and hate crimes. I also engage in a brief discussion of the interplay between the call for formal consequences for lawbreaking and the engagement in intense punitive expressions of informal social control, particularly via shaming campaigns on social media. I then expand the theoretical framework by interrogating the intellectual and cultural sources of progressive punitivism, examining radical and critical criminology, second-wave feminism, and Communist China as a surprising intellectual parallel. I conclude that the most plausible source of progressive punitivism is conservative punitivism; Americans of all political stripes, I explain, have been steeped for decades in a framework that sees criminal justice as the quintessential solution for moral problems and victims of crime as the premier moral interlocutors. The essay ends with a discussion of the discontents of progressive punitivism and the dangers of cottoning to it as a viable strategy for social justice reform.

12:00-1:00—Lunch (Alexander room)