Criminal Justice Roundtable, Vanderbilt University Law School
Criminal Justice as an Administrative System
November 6-7, 2020 (All Times Central)

FRIDAY

11:30-12:00: Introductions

12:00-1:00: Lisa Miller (Rutgers Political Science), *Coming Apart at the (Already Frayed) Seams: Crime, Criminal Justice, and the Failure of the American State*. Commentator: Calvin Morrill (Berkeley School of Law)

The pathologies of the U.S. criminal justice system – militarized policing, excessive sentencing, harsh prison conditions, exclusion and ostracization of former inmates – are widely known. But I am not sure we have fully appreciated two unique features of American criminal justice that complicate efforts at administrative reform: the extreme fragmentation of the political and legal institutions that fall under the purview of 'criminal justice systems,' and the high levels of violence which they must address. The first point is generally recognized, even if its scope and consequences are not widely understood. The institutions of American criminal justice are extremely dense, with varying political incentive structures based on different constituencies and goals, even within the same 'system.' Attempts at more centralizing planning run into classic collective action, coordination and cooperation problems, and even legal challenges. The second point—that the U.S. is a high violence society—is generally afforded far less attention in analyses of the criminal legal system. But persistently high violence places a high burden on the administration of justice, even without the context of the violent crime wave that swept the nation between 1965-1995. It is hard to find time to coordinate centralized planning, let alone invent new alternatives to imprisonment, when criminal justice institutions are flooded with new cases. Seen through the lens of high violence and high fragmentation, the pathologies of the U.S. criminal legal system can be seen as part of a larger failure of American state-building to produce security *and* responsive political institutions.

1:15-2:15: Ben Levin (Colorado Law), *Criminal Justice Expertise*. Commentator: Issa Kohler-Hausmann (Yale Law)

For decades, criminal legal literature broadly adopted a story of mass incarceration's rise as caused by "punitive populism." Rising prison populations, expanding criminal codes, and the attendant raced and classed disparities in enforcement are the result of a set of "pathological politics": voters and politicians act in a vicious feedback loop, consistently driving *more* criminal law and punishment. The criminal system's problems are political. But how should society solve these political problems? Scholars often identify two general classes of responses: (1) technocratic approaches that seek to wrest power from irrational and punitive voters and replace criminal electoral politics with agencies, commissions, and evidence-based decisionmaking; and (2) democratic approaches that treat U.S. criminal policy as insufficiently democratic and seek to shift more power to "the people." Put differently, commentators often

suggest that the critical prescriptive disagreement boils down to one about expertise and its role—should experts or non-experts be the most powerful actors in criminal policymaking?

The suggestion that the two approaches are competing and not overlapping misses a point of increasing commonality: a shared appeal to the language of expertise. In this Article, I argue that the key fault line between visions of change is not the one between proponents and opponents of expertise. Rather, competing camps are advancing different visions of expertise. Activists, advocates, and scholars who reject the traditional metrics or markers of "expertise" (*i.e.*, educational credentials, professional experience) have begun to deconstruct the potential elitism and false neutrality of expert-based decisionmaking. While some of these accounts appear to reject expertise altogether, others have sought to reconstruct and reimagine a new version of expertise and a new set of experts—people from marginalized communities who have been harmed by the criminal system. In other words, I argue that we may be witnessing a turn to expertise even among commentators generally perceived as being anti-expert.

In an effort to understand better the landscape and stakes of the turns to expertise, I map out three different conceptions of expertise that are reflected in contemporary scholarly and political debate: (1) expertise based on vocation or on-the-job experience (*e.g.*, the police officer, the judge, or the criminal law practitioner); (2) expertise based on education or elite training (*e.g.*, the criminologist, the law professor, or the data analyst); and (3) expertise based on lived, day-to-day experience (*e.g.*, the incarcerated person, the person frequently stopped by police, or the crime victim). In this Article, I raise a series of questions implicated by the expert turn—whichever approach to expertise one adopts. I argue that any turn to expertise requires a set of shared first principles. The longstanding debate in academic, activist, and policy circles about what values the criminal system is *supposed* to advance makes it unclear how experts should go about addressing contested policy questions. Additionally, I argue that these conceptions of expertise are slipperier than they appear—who actually gets to decide what constitutes expertise and who gets to be an expert? Rather than eliminating politics from the administration of criminal law, a turn to expertise just shifts the location of political decisions to the stage of defining, qualifying, and deferring to experts. Ultimately, I argue that choosing who those experts are and how much weight to give their input are not neutral or apolitical decisions. Unpacking and surfacing those decisions should be an important part of any way forward towards institutional change. By looking more closely at how society understands which voices to privilege and the extent to which those voices should shape policy I contend that we can better appreciate first-principles disagreements about criminal law and governance.

2:30-3:30: Mark Fondacaro (John Jay Psychology), *Toward Administrative Justice: Social Ecology and Preventive Intervention in the Transformation of Juvenile and Adult Criminal Justice Systems*. Commentator: Stephanos Bibas (Third Circuit Court of Appeals)

This paper will present the outline of an administrative model of criminal justice that provides a conceptual framework and empirical justification for transforming our system from a backward-looking, adjudicative model grounded in principles of retribution toward a forward- looking model grounded in consequentialist principles aimed at crime prevention and recidivism

reduction. The historical roots and justifications for our current system will be reviewed along with recent advances in the behavioral, social and biological sciences that inform with empirical evidence why and how it fails to deliver justice and fuels injustice. The concept of social ecology will be introduced as an organizing framework for 1) understanding why individuals do and do not obey the law, 2) identifying and evaluating what works in preventing crime and reducing recidivism, and 3) informing the transformation of criminal law substance and procedures into a comprehensive system of administrative justice that spans the juvenile and adult criminal justice systems.

SATURDAY

<u>10:00-11:00</u>: Irene Joe (UC Davis Law), *Responding to Exonerations*. Commentator: Christopher Slobogin (Vanderbilt Law)

Since the death penalty was reinstituted in 1976, there have been 18 people proven innocent by DNA testing and exonerated from death row. Each of these cases represents a story of the failure of the legal processes built into the criminal justice system to provide barriers against wrongful convictions. The cases are evidence of failure by the institutions tasked with ensuring a just process. These institutions range from indigent defense systems tasked with providing effective assistance of counsel that fall short of their constitutional responsibility to prosecutorial offices charged with operating as the ministers of justice failing to do so.
This article explores how the criminal justice system responds to evidence that it has failed at such an extreme level. It isolates how indigent defense systems have reacted to client convictions that were proven wrongful by scientific evidence. It looks further to examine how prosecutor offices respond to such proof of innocence after they have pursued and obtained a death sentence upon a person. The descriptive portion of this article concludes by examining how state ethics and professional organizations reviewed the actions of those attorneys who were directly involved in the trials that eventually resulted in overturned convictions.

After fully examining these 18 cases, this paper proposes a formal scheme for responding to such alarming failures in the administration of criminal justice. This scheme requires more involvement by the trial attorneys in appellate work and a closer review by disciplinary boards of appellate reversals. Although the findings in this paper and its resulting proposals for reform are focused on cases that involve the death penalty, it also provides important insight into the questions that system leaders should have about service review in cases at all levels of the criminal justice system. Indeed, if death is truly different, with carefully measured steps taken to prevent significant error, how much confidence can be laid in the system's response to criminal justice failures that have led to other deprivations of property, liberty, and life.

<u>11:15-12:15</u>: John Pfaff (Fordham Law), *A (Partial) Defense of Our Chaotic Criminal Justice System*. Commentator: Sara Mayeux (Vanderbilt Law)

The very way we talk and think about the criminal justice system starts with a lie: it is not a system (singular) at all. It is a complex, chaotic, often incoherent web of systems (plural), each with different constituencies and incentives, which regularly struggle to operate in any sort of coherent fashion. The result can often be infuriating, as the lack of centralization creates problems ranging from figurative buck-passing (every agency is responsible for a drop in crime, but none takes the blame for any rise) to literal buck-passing (the budgetary implications of this fracturing can be headspinning). It is easy to think that imposing some sort of administrative coherence here could be useful, but here I want to argue that for all its flaws, there is some fundamental good that comes from this ill-planned disorganized system we currently have. To be clear, I am *not* arguing that these good outcomes were intentional or planned; my priors are that very little of how the current set of systems operate and interact was consciously thought through in a coherent manner. But especially in our current time, with the politics of crimes shifting far more rapidly in cities and denser urban counties than elsewhere in the US, there is much to be said for decentralization. No doubt there are some flaws with decentralization we should try to fix, but as a general matter it also seems likely that we should resist broad efforts to centralize the administration of criminal justice in any significant way.

<u>12:30-1:30</u>: Malcolm Feeley (Berkeley Law) & Ed Rubin (Vanderbilt Law), *Administering Criminal Justice*. Commentator: Jed Rakoff (Senior Judge, District Court for the Southern District of New York)

Criminal law has generally been conceived in normative terms, as a means of enforcing societal values by condemning particular behaviors. In practice, it has more often been concerned with pragmatic effort to deter crime. Because it developed prior to the modern regulatory state, however, its normative structure has remained in place and its regulatory features treated as ad hoc modifications. The result is a confused, dysfunctional system (if it is a system at all), with a multiplicity of separate institutions – police, jails, prosecutors, public defenders, courts, and prisons -- each with its own leadership, staff, budget and ideology. There is little coordination and virtually no comprehensive research and development. It is time, in this regulatory era, to reconceive criminal justice as an administrative program designed to reduce crime. It should be under the control of a single agency, hierarchically structured and operationally integrated, directed toward the purpose of reducing crime rather than assigning blame.