CRIMINAL JUSTICE REFORM IN THE COMMONWEALTH—2019 SYMPOSIUM

DOWN HERE ON THE GROUND: PROSECUTORIAL DISCRETION, INTERSECTIONALITY, POLICE TRANSPARENCY, AND UNINTENDED CONSEQUENCES

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Criminal Justice Reform in the Commonwealth is an inspired collaboration between the Coalition for Public Safety and the *University of Louisville Law Review* offering a dynamic, critical assessment of the regional, statewide, and national manifestations of structural inequality in the criminal justice system.[1] Building upon a previous symposium on dismantling structural inequality,[2] this symposium comprehensively illuminates the complexities of structural inequality in the criminal justice system's decision-making and carceral frameworks and offers foundational observations for substantive reform. With the publication of these insightful articles from the Criminal Justice Reform in the Commonwealth symposium, the *University of Louisville Law Review* continues its distinguished scholarly tradition of publishing impactful articles and symposia on structural inequality and the carceral state.

The four articles here skillfully, and oftentimes provocatively, excavate the multi-tiered criminal justice system, its oppressive force and power, and the complicated possibilities for reform. While the emphasis is on the Commonwealth of Kentucky, the articles reference national trends as well. This is an eclectic blend of theory, practice, and implications on the ground. What is compelling is that all of the articles integrate theory, practice, and policy so that there is a focused legitimacy on what happens "Down Here on

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[1] The *University of Louisville Law Review*'s Criminal Justice Reform in the Commonwealth symposium was held at the University of Louisville on September 12–13, 2019. The event was the second installment of the "Future of the Commonwealth" symposium series conceived of by Dean Colin Crawford and the *Law Review*'s Volume Fifty-Seven Board of Editors. *See* Colin Crawford, *Of Commonwealths and Our Commonwealth: An Introduction*, 57 U. LOUISVILLE L. REV. 459 (2019). The *University of Louisville Law Review* would like to thank the Coalition for Public Safety for their help in planning and executing the symposium as well as everyone who attended and participated in the event.

[2] *See* Cedric Merlin Powell & Laura McNeal, *Dismantling Structural Inequality: Lock Ups, Systemic Chokeholds, and Race-Based Policing*, 57 U. LOUISVILLE L. REV. 1 (2018).

the Ground"[3] to criminal defendants, incarcerated women, citizens' privacy interests, and the cost of good intentions.

In *Deterring Prosecutors from Abusive Behavior: A Former Federal Prosecutor's View*, Brett Tolman offers a sophisticated critique of the criminal justice system advanced on a theoretical and practical level.[4] Relying upon actual cases from his broad experience as a federal prosecutor and criminal defense attorney, he highlights three features of the criminal justice system: (i) the dominant systemic myth that prosecutorial misconduct is rare and not a function of punitive vindictiveness that is built into prosecutorial discretion;[5] (ii) how innocence is rarely considered by prosecutors who would rather win than perform their function as officers of the court and ministers of justice;[6] and (iii) how overly aggressive prosecutions undermine the legitimacy of the criminal justice system by distorting normative principles of proportionality and punishment and constitutional rights.[7]

Focusing on four cases of prosecutorial misconduct, ranging from blatant intimidation to actively undermining the confidential and privileged communications of criminal defendants and their counsel,[8] Tolman argues for broad systemic reform. A central feature of the criminal justice system, and its underlying procedural framework, is that it actually insulates prosecutorial misconduct from scrutiny; and, even when such misconduct is uncovered, the remedy is often superficial.[9] The punitive impulse of the criminal justice system targets criminal defendants directly; but egregious prosecutorial misconduct is often privileged by a system designed to tally "wins" in terms of punishment and imprisonment.[10] Tolman's proposal for broad reform removes the shield for prosecutorial misconduct, he argues that (i) absolute immunity should be eliminated so that prosecutors are not insulated from exposure for their misconduct; (ii) the rules of professional responsibility should be interpreted and enforced in a manner so that state and federal prosecutors are subject to discipline from the state bar in which they practice; and (iii) criminal liability should be a real possibility for prosecutors.[11]

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[3] LALO SCHIFRIN, DOWN HERE ON THE GROUND (Dot Records 1968).

[4] Brett L. Tolman, *Deterring Prosecutors from Abusive Behavior: A Former Federal Prosecutor's View*, 58 U. LOUISVILLE L. REV. 415 (2020).

[5] *Id.* at 416–17.

[6] *Id.* at 422.

[7] *Id.* at 432.

[8] *Id.* at 427, 430.

[9] *Id.* at 432.

[10] *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 31 (2017).

[11] Tolman, *supra* note 4, at 432–34.

While Tolman focuses his theory for broad reform on the prosecutor's discretionary power, Lindsey Linder conceptualizes the unique systemic disparities that impact women in the criminal justice system in *Expanding the Definition of Dignity: The Case for Broad Criminal Justice Reform That Accounts for Gender Disparities*.[12] Squarely situating intersectionality[13] at the heart of her analysis, Linder, Senior Policy Attorney at the Texas Criminal Justice Coalition, offers a compelling critique of how gender disparities have been under-theorized in scholarship advocating for structural reform of the criminal justice system. The rising rate of incarcerated females is a clear indication of how race and gender intersect in communities that are disproportionately impacted by every aspect of structural inequality.[14]

Theorizing mass incarceration as a women's issue, Linder conceptualizes dignity as a means to eradicate the unique and disparate impacts on women in the criminal justice system. Tracing the history of the explosion of mass incarceration due to the ill-conceived War on Drugs, Linder locates the inherent inequality and disproportionate impact of punitive policies designed to deter crime but ultimately led to the institutionalized carceral state.[15] Linder notes that the continuous expansion of the carceral state has slowed as "[e]volving views on criminal justice have led to more evidence-based, common-sense approaches to public safety, resulting in pragmatic policy changes."[16]

After comprehensively canvassing state and federal legislative approaches to codifying dignity as a normative principle in prison policy, Linder posits a powerful argument for expanding the definition of dignity.[17] This would mean moving beyond the four traditionally conceptualized categories of dignity—care for pregnant incarcerated women; enhancing and preserving family unity for incarcerated mothers; improving substantive access to feminine hygiene products and all health care services for incarcerated women; and trauma-informed care for incarcerated women—to a structural understanding of dignity in such systemic components as bail reform, drug policy, education reform, racial disparities, and victim's

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[12] Lindsey Linder, *Expanding the Definition of Dignity: The Case for Broad Criminal Justice Reform That Accounts for Gender Disparities*, 58 U. LOUISVILLE L. REV. 435 (2020).

[13] *See* KHIARA BRIDGES, CRITICAL RACE THEORY: A PRIMER (CONCEPTS AND INSIGHTS) 233–49, 235 (2019) ("Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.").

[14] Linder, *supra* note 12, at 436.

[15] *See id.* at 436–38.

[16] *Id.* at 437.

[17] *Id.* at 454–64.

rights.[18] Linder argues that the concept of dignity must be broadened to address the disparate impact that is uniquely visited upon women in the criminal justice system.

In contrast to Tolman and Linder's broad conceptualizations of reform, Professor Luke Milligan, in *Police Transparency and the Exclusionary Rule*, offers a critical and provocative assessment of transparency in policing, given the advent of technology and pervasive surveillance, and its implications for the doctrinal viability of the Fourth Amendment's exclusionary rule as a deterrent for police misconduct.[19] Milligan's conceptualization of reform is decidedly narrower than the proposals in the preceding articles, as he focuses on how the status quo operates and how it can be refined, with an emphasis on the practical and doctrinal viability of the Fourth Amendment.

After exploring the Court's Fourth Amendment jurisprudence; specifically, its deterrent purpose and the categorical exceptions that the Court has created to protect privacy while according deference to police investigatory power when the exclusionary rule does not "pay its way,"[20] Milligan concludes that there may come a day when the exclusionary rule is rendered constitutionally obsolete due to the ubiquity of the surveillance state.[21] But he ultimately concludes that, rather than adopt this extreme doctrinal position, "the Court will settle somewhere in the middle"—between the latter extreme embracing the rule's obsolescence and re-conceptualizing the exclusionary rule to serve some goal other than deterrence, like preserving the integrity of the courts or fairness to the victim.[22] This middle position, he suggests, should be the creation of a new categorical exception to the exclusionary rule premised on whether the police officer's misconduct was recorded by a body-worn camera or, in a more expansive version of the exception, whether the officer belongs to a police department that mandates the use of such cameras.[23]

As Milligan concedes, this may invite the risk of exploitation by police officers intent on misconduct, but he notes that this will be mitigated by the likelihood of internal administrative discipline and civil lawsuits.[24] Milligan's proposal for a transparency exception to the exclusionary rule is interesting in its practical implications; but, it is open to criticism for its

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[18] *Id.*

[19] Luke M. Milligan, *Police Transparency and the Exclusionary Rule*, 58 U. LOUISVILLE L. REV. 467 (2020).

[20] *Id.* at 480.

[21] *Id.* at 482–83.

[22] *Id.*

[23] *Id.* at 483.

[24] *Id.*

potential to insulate police misconduct, further dilute the deterrence rationale underlying the Fourth Amendment, and the absence of any acknowledgement of how structuralism might inevitably shape how the Court would interpret a transparency exception. In other words, Milligan's analysis does not squarely address state power and how it impacts people of color in the state of surveillance.[25] The transparency exception, then, could be yet another exception that further dilutes the Fourth Amendment;[26] or, it could aid in re-envisioning the practical and doctrinal implications of police transparency.

Concluding this symposium collection is Assistant Public Defender Ellison Berryhill's *Unintended Consequences: An Analysis of Six Proposals to Reform the U.S. Criminal Justice System*, a comprehensive examination of six proposals to reform the criminal justice system that sound promising but may have underlying negative implications for the very communities that should be benefitted by these reforms.[27] This is a peculiar strain of disproportionality where an intended beneficial reform is transformed into a systemic burden, a true manifestation of structural inequality.

Following an extensive discussion of mass incarceration and the scholarship on criminal justice reform, Berryhill analyzes six ostensibly appealing policy proposals, all of which have been central to systemic reform debates, and their unintended consequences:

(i) Community policing may lead to increased incarceration and expansion of the surveillance state rather than a collaborative relationship between community members and the police;[28]

(ii) "Banning the box"[29] to promote rehabilitation, through gainful employment and eradicating recidivism, may have unintended employment consequences for Black men as interview call back rates are actually *lower*

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[25] *See, e.g.*, Devon Carbado, *From Stopping Black People to Killing Black People*, 105 CALIF. L. REV. 125 (2017); Devon Carbado, *Blue-on-Black Violence: A Provisional Model for Some of the Causes*, 104 GEO. L.J. 1479 (2016); *but see* I. Bennett Capers, *Techno-Policing*, 15 OHIO ST. J. CRIM. L. 495, 499 (2018) (acknowledging the risks of new technologies, but arguing for the use of technology to make policing "more transparent and egalitarian" by harnessing the power of Big Data to de-racialize and de-bias policing); I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 46–48 (2019).

[26] *See* Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 430 (2017) ("The state of Fourth Amendment jurisprudence confirms [the failure of its regulatory mandate to deter police misconduct] for it is inconsistent, rife with exceptions, and the Supreme Court has whittled away the exclusionary rule, the only practical redress available for most Fourth Amendment violations.").

[27] Ellison Berryhill, *Unintended Consequences: An Analysis of Six Proposals to Reform the U.S. Criminal Justice System*, 58 U. LOUISVILLE L. REV. 485 (2020).

[28] *Id.* at 481–96.

[29] This policy prevents potential employers from conducting a criminal background check until late in the interview process, so that formerly incarcerated individuals at least have a chance during the preliminary screening process of interviewing. *See id.* at 498–99.

in ban-the-box jurisdictions because employers "would rather call back a white applicant with a known criminal record than [an African American] applicant whose criminal record was unknown";[30]

(iii) Removing subjectivity and replacing police and judicial discretion with objective standards sounds appealing because it could lead to uniform outcomes and the elimination of disproportionately discriminatory results; however, the unintended consequence is that this could lead to more punitive outcomes for people of color;[31]

(iv) Abolition of the death penalty is compelling as a reform objective, both as a constitutional imperative, eliminating cruel and unusual punishment, and as a humane society, but the unintended consequence could be that life without the possibility of parole is transformed into a new mandatory death sentence unto itself;[32]

(v) No new prisons with budget cuts to existing prisons is a logical proposal to reduce the expansion of mass incarceration and the carceral state, but here the unintended consequence is harm to inmates due to reductions in services, increases in prison density, and lack of qualified personnel; so, a truly structural reform would be the abolition of prisons, but this potential reform is fraught politically;[33]

And, finally, (vi) non-violent offender reform is especially appealing as there is an emerging consensus that "current punishments for non-violent drug or property offenders are too high,"[34] yet this reform initiative sets up a hierarchy of offenders who deserve leniency and those who do not, thereby reinforcing the punitive impulse of the criminal justice system.[35] As Berryhill eloquently concludes, "[i]t is not acceptable to set aside a group that deserves leniency against a group that deserves the harshness of the punishment."[36] If proportionality, under the Criminal Law, means anything, it must mean that a legitimate system acknowledges, "most criminal defendants do not deserve the harsh sentences that the government imposes."[37]

This volume brings together a distinguished group of practitioners and policymakers, advocates, and legal scholars who offer an array of trans-disciplinary approaches to *Criminal Justice Reform in the Commonwealth* and beyond. Their focus has been on the ground where theory and practice

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[30] *Id.* at 499.
[31] *Id.* at 499–505.
[32] *Id.* at 505–07.
[33] *Id.* at 507–10.
[34] *Id.* at 511.
[35] *Id.* at 511–12.
[36] *Id.* at 512.
[37] *Id.*

meet to impact people of color. The unifying themes connecting all of these analytically powerful articles are the scope and limits of systemic discretionary power, the impact on oppressed communities of color at the intersection of race and gender, the constitutional viability of the Fourth Amendment as a prophylactic tool to preserve the privacy interests of citizens in the state of surveillance, and the unintended consequences of structural reform of the criminal justice system. The reform debate will be advanced and refined by the diverse perspectives presented here; it is our hope that these articles will help to lay some of the essential groundwork for criminal justice reform.