CRIMINAL JUSTICE ROUNDTABLE
Vanderbilt University
November 12 & 13, 2021

Friday, November 12

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

1:00-2:00—Michael Mannheimer (N. Kentucky), *The Fourth Amendment: Original Understandings and Modern Policing* (Ch. 9-10). Commentator: Paul Marcus (Wm. & Mary).

This is Part III (Chapters Nine and Ten) of a book project that explores the original understanding of the Fourth Amendment, in terms of both how it applies to the federal government and how it applies to the States. The first five chapters (Part I) introduce a new model of the Fourth Amendment, the Local Control Model, that posits that the Amendment was primarily a federalism provision intended to preserve state law and policy on searches and seizures. The next three chapters (Part II) explore whether and how this Model can be translated into a constraint on the States via the Fourteenth Amendment, revisiting the incorporation question. It rejects jot-for-jot incorporation, suggesting instead that States should be free to formulate their search-and-seizure law in any number of ways but within the constraints of three principles at the heart of the Fourteenth Amendment: *nondiscrimination*, *legality*, and *nondelegation*. Chapter Nine begins to re-examine Fourth Amendment doctrine based on these three principles. It contends that the Court has correctly imposed a preference for warrants in searching and seizing in order to limit individual-officer discretion. However, it has failed to fully appreciate that detailed legislative and administrative directions can serve the same discretion-narrowing function as warrants, and it has paid too little deference to state legislative judgments about search-and-seizure policy. Chapter Ten highlights several failings of the Court's Fourth Amendment jurisprudence that are most salient for modern policing and that are directly traceable to the Court's failure to appreciate the significance of the Fourteenth Amendment: its refusal to tie the "what is a search" question to legality; its abdication of the responsibility to limit police discretion in the areas of traffic stops, arrests for minor crimes, and stops on less than probable cause to arrest; and its effective preemption of state law governing police use of force.

2:15-3:15—Jamelia Morgan (U.C. Irvine), *Disability's Fourth Amendment*. Commentator: Sara Mayeux (Vanderbilt).

The Supreme Court's Fourth Amendment jurisprudence is under-theorized in terms of issues relating to disability. Across the lower courts, although disability features prominently in excessive force cases, typically involving individuals with psychiatric disabilities, it features less prominently in other areas of Fourth Amendment doctrine. Similarly, scholars have yet to address substantively how the vast scope of police discretion the Fourth Amendment affords renders individuals with disabilities vulnerable to policing and police violence. Although there has been robust engagement with theories of criminalization and social control in critiques of Fourth Amendment doctrine that address race and racism, thus far, only limited engagement with disability and its intersections with other current and historically marginalized subordinated identities has occurred. This Essay centers disability as a lens for analysis in Fourth Amendment jurisprudence. In the Essay, I discuss the ways in which disability mediates interactions with law enforcement and how Fourth Amendment doctrine renders disabled people vulnerable to police intrusions and police violence. More specifically, the focus of my critique is

on the *Terry* doctrine, consensual encounters, consent searches, and the objective reasonableness standard under *Graham*. Applying a disability and critical race lens to each these doctrines, taken together, demonstrates how Fourth Amendment doctrine both fails to adequately protect the constitutional rights of disabled people and reinforces a "normative bodymind" by rendering vulnerable to police surveillance, suspicion, searches, and force those persons whose physical and psychological conditions, abilities, appearances, behaviors, and responses do not conform to the dominant norm. By focusing in on how Fourth Amendment doctrine both erases disability and fails to adequately protect disabled people's privacy and security interests, I suggest how the doctrine itself renders disabled people more vulnerable to policing and police violence.

3:30-4:30—Rob Mikos (Vanderbilt), *Probable Cause and Legal Change*. Commentator: Adam Gershowitz (Wm. & Mary).

For decades, the police have been able to establish probable cause by making one simple allegation: they "smelled marijuana" in the area to be searched. Courts routinely upheld searches based on nothing more than this bald assertion, reasoning that if the police smelled marijuana, they would probably find the drug, and if they found marijuana, that would give them ipso facto evidence of a crime. Notwithstanding the proliferation of cannabis law reforms, this "odor alone" doctrine has survived in the vast majority of states. This article provides the first in-depth analysis of the doctrine. It develops two distinct but mutually reinforcing critiques that suggest the odor alone doctrine should be jettisoned in probable cause inquiries (and might never have belonged there in the first instance). First, the human nose cannot reliably predict whether cannabis will be found during a search. Second, the police cannot distinguish between lawful and unlawful cannabis through smell alone because the products emit the same odor. Considered in isolation, each critique raises substantial doubts about the probative value of the odor of cannabis in probable cause inquiries. Together, however, they deal a knockout blow to the odor alone doctrine. Without additional facts to support suspicions of wrongdoing, the police cannot reasonably expect to find evidence of a crime when they (think they) smell cannabis (née marijuana). The article shows that abandoning the odor alone doctrine would have salutatory effects, including helping to alleviate racial disparities in our criminal justice systems and fulfilling the promise of marijuana law reforms. More broadly, the article illuminates the challenge that legal change can pose for Fourth Amendment doctrine. Changes to substantive law, like changes in technology, can have profound effects on Fourth Amendment jurisprudence. Yet while changes to technology have received ample attention in the scholarly literature, the challenges posed by substantive legal change have gone unnoticed. Using marijuana reforms as a timely case study, the article begins to explore the factors that contribute to the courts' struggles to adapt probable cause inquiries to legal change.

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

<u>Saturday, November 13</u>

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

8:30-9:30—Ngozi Okidegbe (Cardozo), *Discredited Data*. Commentator: Chris Slobogin (Vanderbilt).

Jurisdictions are increasingly employing pretrial algorithms as a solution to the racial and socioeconomic inequities in the bail system. But in practice, pretrial algorithms have reproduced the

very inequities they were intended to correct. Scholars have diagnosed this problem as the biased data problem: pretrial algorithms generate racially and socioeconomically biased predictions, because they are constructed and trained with biased data. This Article contends that biased data is not the sole cause of algorithmic discrimination. Another reason pretrial algorithms produce biased results is that they are exclusively built and trained with data from carceral knowledge sources – the police, pretrial services agencies, and the court system. Redressing this problem will require a paradigmatic shift away from carceral knowledge sources toward non-carceral knowledge sources. This Article explores knowledge produced by communities most impacted by the criminal legal system ("community knowledge sources") as one category of non-carceral knowledge sources worth utilizing. Though data derived from community knowledge sources have traditionally been discredited and excluded in the construction of pretrial algorithms, tapping into them offers a path toward developing algorithms that have the potential to produce racially and socioeconomically just outcomes.

9:45-10:45—Carissa Hessick (UNC), *The Prosecutor Lobby*. Commentator: Nancy King (Vanderbilt).

In this article, we aim to provide a nuanced account of prosecutor lobbying in America. Using an original dataset of four years of legislative activity from all 50 states, we analyze how often prosecutors lobbied, the issues on which they lobbied, the positions that they took, and whether they succeeded. The data tell a complicated story, suggesting that prosecutors could serve as an important avenue for legislative reform—an avenue that may look even more promising as the political landscape continues to change.

11:00-12:00—Stephen Henderson (Oklahoma), *The Jury Veto*. Commentator: Alan Michaels (Ohio State).

While the American civic religion is to be distrustful of government, feelings of discontent regarding our systems of criminal investigation and adjudication feel historic. And while those systems are capable of great carnage en route, the endgame is, ultimately, criminal punishment. Yet before it can be imposed, every prosecution—and therefore every defendant—is meant to encounter a potential "circuit breaker": the jury. I propose that we re-inject this democratic voice into our criminal adjudications, but through an entirely novel structure: the defendant (and perhaps the prosecutor) would have the choice of invoking a jury empowered to 'veto' any judicial sentence. By carefully designing the ex-post system, including to discourage over-invocation, we could provide more democratic results in individual cases, hold prosecutors to their charging threats, and obtain a meaningful sense of whether—as many of us believe—our institutions of criminal justice are dangerously out of touch with popular conceptions of what ought to be.

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