CRIMINAL JUSTICE ROUNDTABLE
Vanderbilt University
November 3 & 4, 2023

Friday, November 3

12:00-1:00—Lunch (Alexander room, first floor)

1:00-2:00—Kate Weisburd (George Washington), *Criminal Procedure Without Consent*. Commentator: Chris Slobogin (Vanderbilt)

There is growing consensus among scholars and advocates that consent searches by police are pure fiction and should be abolished or significantly reformed. These critiques of consent apply with equal force to what I term "secondary" forms of consent: other criminal procedure doctrines where the law presumes a voluntary choice, such as the free-to-leave test for what constitutes a Fourth Amendment seizure, implied consent for purposes of allowing license revocation for failure to submit to a breathalyzer, the third-party doctrine, waiver of adjudicative rights (such as the right to trial, to counsel, and to jury), and agreements by people charged with or convicted of a crime to be subject to "alternatives" to incarceration (such as ankle monitoring, cellphone surveillance or court supervision). This Essay argues that eliminating consent in these contexts would force police, prosecutors, and judges to articulate an alternative legal basis to deny someone privacy or restrain their liberty. Pragmatically, eliminating consent could result in greater freedom and privacy, as well as less contact between citizens and law enforcement. There is also the risk that eliminating consent removes opportunities for people in the criminal legal system and could allow people engaged in criminal conduct to more easily evade detection. More broadly, this inquiry surfaces questions about what role "choice" should play in various criminal procedure doctrines and if it is ever possible for people to have true choice and autonomy in the criminal legal system.

2:15-3:15—Michael Gentithes (University of Akron), *Grand Jury Discretion in Officer Involved Shootings*. Commentator: Kenneth Nunn (Florida).

When police officers fire their weapons and a civilian is killed, the criminal justice system relies upon grand juries to initially assess the evidence and decide whether to pursue criminal charges. Although grand jurors have the grave responsibility of administering justice under dreadful circumstances, they are systemically hamstrung. Grand jurors have very little control over both the evidence they consider and the conclusions they might reach. This Article argues, first, that grand jurors should receive a wider menu of options that are contrary to prosecutorial wishes in officer-involved shootings, such as calling for further investigation and possible additional charges, recommending changes to substantive criminal law, recommending staffing changes for departments, and referring possible changes to relevant policies and training procedures to internal department experts. Second, grand jurors should be permitted to openly nullify some charging recommendations made by overzealous prosecutors in ordinary cases. Officers may be more likely to accept and internalize the grand jury's decisions and recommendations than those of external legislative and administrative actors. And grand jurors, acting as unelected, individual citizens with minimal political motivations, can reach decisions that reflect the true consensus of the citizenry. The grand jury reforms this Article suggests thus hold real promise to heal communities and break the cycle of violence, heartbreak, and distrust in officer-involved shootings.

3:30-4:30—Barry Friedman (NYU), *Obstacles in the Way of a Too Permeating Police Surveillance*. Commentator: Farhang Heydari (Vanderbilt).

Recent years have seen a rapid accumulation of data by policing agencies. And this collection, retention, and use of the data is almost entirely unregulated in any way. Policing agencies do what they want, how they want, even without much in the way of public transparency. In fact, they do what they can to obscure what is happening. This article considers what to do about this problem. In one sense, the answer is easy. Stop it! At least absent solid grounding in the rule of law. What is happening now is deeply unacceptable and likely unconstitutional. But what lives and breathes underground is not so easily ferreted out and halted. The article thus tackles the problem of what needs to be done more from the perspective of social choice – what are the mechanisms to return the rule of law to this deeply troubling practice. It explores how judicial-legislative dialogue, and pressures from external sources such as European partners—can help bring what is happening under control.

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

Saturday, November 4

8:00-8:30: Breakfast (Alexander room)

8:30-9:30—Maria Ponomarenko (Texas), *Localism and Preemption Through a Criminal Justice Lens*. Commentator: Donald Braman (George Washington).

In recent years, advocates and scholars have raised growing alarm over a new form of "criminal justice preemption"—state laws (in red states) designed to undo various blue city reforms. These include laws prohibiting localities from slashing police budgets and declaring themselves immigrant "sanctuary" jurisdictions, as well as bills targeting so-called "progressive" prosecutors who have announced plans to deprioritize or stop enforcing entirely certain offenses. The leading response to the "new preemption," both in the criminal justice space and in the local government literature more broadly, has been to double-down on local control and to call for stronger "home rule" protections against state interference in local affairs. My paper argues that those who are concerned about mass incarceration and criminal justice reform should not be so quick to embrace the localist turn. And that they should be especially wary of proposals to *constitutionalize* localism through a revitalized principle of home rule. It also underscores the challenges of articulating neutral principles with respect to the proper role of states and localities in the criminal justice space. And it suggests a narrower set of critiques for why at least some of the red state proposals may be problematic from a governance perspective in ways that do not require resorting to broader arguments about state intrusion on local control.

9:45-10:45—Lisa Griffin (Duke), The Limits of Lie Detection: Honesty Without Accuracy in the Criminal Justice Process (book chapters 4 and 6). Commentator: Lauren Sudeall (Vanderbilt).

Lie detection has long preoccupied American law enforcement and inspired many rules of criminal procedure. Those rules, however, focus so narrowly on deception that they can limit engagement with witnesses. And they can contribute to mistakes in criminal adjudication. Tainted eyewitness identifications, false confessions, and flawed forensic testimony, for example, are all honest

statements but not accurate ones. The core insight of this book is that a witness "not lying" and a witness "telling the truth" will not necessarily be the same thing. By setting forth a new theory about the distinction between honesty and truth, this book suggests new thinking about how procedural rules could address the disinformation that comes from honest mistakes. Chapter Four contains the prescriptive heart of the book because it clearly reveals the costs of binary thinking about liars and truthtellers. This chapter dismantles the "liar" label that precludes defendant testimony. Past convictions do not necessarily signal knowing violations of legal norms or predict lying under oath. Nor do they equip jurors with needed tools to assess testimony. Chapter Six continues the argument that perceived honesty—in this case narrative authenticity—can mislead. It explains how expectations about categories, chronology, coherence, and closure lead to unwarranted confidence in verdicts. Witnesses then struggle to recant statements, prosecutors rarely correct the record, and reviewing courts cannot reach errors. As a matter of trial procedure, this chapter proposes some adjustments to instructions and the application of Rule 403 that could enlarge truth-seeking. Changing systems starts with challenging concepts, however. And contemporary stories about criminal justice perhaps hold more promise for disrupting the familiar tropes that cause error. The chapter concludes with a discussion of the "untrue crime" genre of podcasts and documentaries and the impact of these new narratives of procedural irregularities and factual uncertainty.

11:00-12:00—Jenny Carroll (Alabama), *The Hazards of Civil Death*. Commentator: Ben Grunwald (Duke).

Convicted individuals are disenfranchised and excluded from juries as a component of their sentence in some states, but more often, incarcerated or convicted individuals are denied access to the ballot and jury service because they are deemed unworthy or because the logistical obstacles of realizing these rights is deemed insurmountable. Like much in criminal legal systems, this treatment of voting and jury rights carries racial, gender, and class-based implications about citizenship identity. Disenfranchisement and exclusion from jury service of incarcerated or convicted individuals disproportionally impacts marginalized populations who themselves are disproportionally impacted by criminal legal systems. Beyond this, State interference with such rights severs critical community ties, isolating incarcerated or convicted individuals from their community and the community from those who are subject to criminal legal systems. This paper argues that by excluding access to the ballot and jury boxes for incarcerated or convicted people, the State undermines the democratic function of both rights. It therefore pushes back against a construction of voting and jury rights that speaks more about who gets to stay in power than about community inclusion. It argues that each right ought to extend to and be facilitated by the State for incarcerated or convicted people. These steps would promote a robust civic life and enhance the democratic function of the rights at stake.

12:00-1:00—Lunch (Alexander room)