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SYMPOSIUM INTRODUCTION

The Time Is Now: Criminal Justice Reform in the Wake of George Floyd's Killing
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How Can We Achieve Accountability in Policing? The (Not-So-Secret) Ingredients to Effective Police Reform
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The summer of 2020 was marked by a series of high-profile police killings of citizens, highlighting excessive force as the most pernicious form of racial injustice in American policing. The persistence of the excessive use of force problem over decades raises serious questions regarding what we know about police accountability, and has led some to argue for defunding or even abolishing the police. However, the roadmap to effective police accountability is tangible and known. In this Article, we delineate eight guiding principles and eight strategies that have emerged as reoccurring themes in the pursuit of police accountability and transparency. The principles and strategies of effective police accountability have proven difficult to implement and maintain, and we discuss the primary barriers to positive change. Despite these obstacles, we conclude with a sense of optimism about the potential for real police reform in the immediate to near future.

"I See What Is Right and Approve, but I Do What Is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging
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In this Article, we first consider the relevant differences between antisocial personality disorder (ASPD) and psychopathy. Then, we look at the meager cohort of federal sentencing cases in which the issue of psychopathy is even raised, and consider decision-making in this context from the perspective of implicit racial bias. Next, we present some background on the controversy of "psychopathy" diagnosis; here, we share what we call the "inside baseball" about the debate—on the differences between psychopathy and ASPD—that has rocked the psychology academy. We will also analyze how our current ideas about punishment and recidivism could change by using psychopathy research as a case study, and consider how this new research creates extra responsibilities for both lawyers and expert witnesses in their representation of criminal defendants in such cases. Specifically, we will focus on how the use of these terms has a disproportionately negative impact on persons of color, looking closely at the way the instruments that are used to assess these conditions are subject to significant racial bias. Finally, we unpack these

issues through the lens of therapeutic jurisprudence, a school of thought that considers the extent to which the legal system can be a therapeutic agent.

American Exceptionalism at Its Finest: "Soft on Crime" Now a Vote-Winner in the World's Largest Incarcerator

Mirko Bagaric, Gabrielle Wolf, Daniel McCord, Brienna Bagaric, & Nick Fischer 489

Anyone with even a remote interest in criminal justice was stunned by the "soft on crime" Republican Party advertisement at Super Bowl LIV in 2020, especially during a Presidential election year. The United States of America has pursued an unrelenting, merciless "tough on crime" approach for half a century, resulting in it being the world's largest incarcerator by a massive margin. It was an unshakable political ideology that "tough on crime" was a vote winner. This resulted in incarceration levels increasing fourfold in four decades, with more than two million Americans ultimately behind bars. Legal and criminology scholars had argued intensely—seemingly in vain—for decades that mass incarceration was a flawed policy. They highlighted that it was extremely expensive, caused excessive gratuitous suffering, and did not reduce the incidence of crime. Despite this, lawmakers refused to budge from the populist, harsh approach to dealing with crime and offenders. However, in one of the most striking policy shifts in recent American history, lawmakers have radically changed their approach to dealing with crime. They are now promulgating policies that will result in the release of offenders from prison, rather than sending more of them there. Especially remarkable is that it is the conservative Republican federal government, led by then-President Donald Trump (an advocate for "tough on crime" policies), that was most active and effective in reducing prison numbers. Thus, the United States is now moving towards a period of decarceration. This process has accelerated in response to the COVID-19 pandemic; some prisoners, especially older inmates, have been released early because they are at a heightened risk of COVID-19 infection in the close confines of prison. Particularly notable is that the number of incarcerated African Americans (who are over-represented in prisons) has significantly declined in recent years. This Article explores the catalysts for this social and political phenomenon, which highlight the collective ability of the American community to turn on a dime, shift tack, and embrace intelligent policy. The correction to American criminal justice policy and practice that we are now witnessing is compelling evidence that, while the democratic system in the United States does not always result in sound policy choices, those decisions can change profoundly with time. This Article also identifies challenges that the United States will face as it attempts to craft and implement a less punitive response to crime. Thus, the main purpose of this Article is to establish a roadmap for introducing normatively sound and empirically valid sentencing reforms that can ensure that the current momentum of reducing prison numbers is not reversed.

Inconspicuous Victims

Itay Ravid 529

Recent debates on racial inequalities in the criminal justice system focus on offenders, while neglecting the other side of the criminal equation—victims of crime. Such scholarly oversight is surprising given the similarly deep racial disparities in the treatment of victims, manifested in different stages of the criminal justice system. Delving into the underexplored territory of racialized victimization, this project bridges that gap and exposes the roots of the disparate treatment of Black victims in the American criminal justice system. These unprecedented times of the COVID-19 pandemic and racial tensions bring to the fore questions about governmental allocation of resources and

emphasize, maybe more than ever, the importance of going back to the roots of such a systematic institutional neglect. Through the ideal victim framework, I argue that from the early days of the victims' right movement to the present, Black victims have been considered non-ideal victims and, as such, unworthy of institutional and legal recognition. I further claim that the media has had an important role in such a social construction of the ideal white victim. I utilize a novel dataset spanning ten years of media coverage on homicide cases contrasted with federal and state level crime statistics from Virginia, Washington, D.C., and Maryland to offer empirical support for this claim. I find first, local news stories about white homicide victims are indeed more salient than stories about Black homicide victims, and second, that Black victims are systematically underrepresented while white victims are overrepresented compared to true victimization rates. This Article thus exposes yet another dimension through which Black homicide victims are excised from the public's consciousness as equal participants in the criminal process. More broadly, this Article calls for a discussion of the tight connections between the patterns through which we think about race and crime and offers directions to advance conversations on how to allow counter-narratives to enter the social discourse.

NOTES & COMMENTS

Avoiding the Second Assault: A Guidebook for Trauma-Informed Prosecutors
Eric M. Werner 573

Many victims in the criminal justice system have already survived at least one traumatic experience, but too often the process of prosecuting their case exacerbates that trauma instead of healing it. This Article discusses how trauma may impact a victim of crime on a behavioral and neurobiological level, and how prosecutors can re-orient their interactions with victims in a way that helps victims regain their voice, choice, and sense of community.

Section I describes the necessity for prosecutors to be trauma-informed and what that means in the context of the criminal justice system. Section II seeks to inform prosecutors and those working in the criminal justice system of the neurobiological impact that surviving trauma can have on a victim's brain. Section III applies the science of trauma to the criminal justice system and describes societal myths that surround trauma and how those myths persist in many phases of the prosecutorial process. Section IV provides a non-exhaustive list of suggestions for best practices at each stage of a prosecutor's involvement in a case, centered on the principles of choice, transparency, privacy, and connection. Finally, Section V describes how prosecutors receive secondary trauma by the nature of their line of work, and what they can do to mitigate the negative impact of secondary trauma on their lives and careers.

Mess Rea
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The disarray of the law on criminal mental state is in need of clarification and reform. Mens rea requires that culpability attach to each element of an offense before a defendant can be punished. This requirement has deep common law roots stretching back to medieval times. However, judicial and prosecutorial subjectivity has tainted the doctrine with a quagmire of unclarity. The Model Penal Code attempted to organize this messy doctrine, but it was never adopted by the federal government. In frustration with the labyrinth of federal mens rea law, which can contain conflicting definitions or none at all, the Supreme Court frequently turns to the MPC for guidance. This

Note compares the MPC approach to English and American common law precedents and determines that the MPC departed from the historical common law insofar as it relaxed mens rea protections. Due to the disorganized nature of federal mens rea law, the Supreme Court is likely to continue relying on the MPC. If this practice indeed continues, then the Court should use the MPC mental state of knowingly to separate culpable from non-culpable conduct because knowingly best represents the common law concept of mens rea and provides principled clarity to courts, prosecutors, and defendants.

The Execution of Lezmond Mitchell: An Analysis of Federal Indian Law, Criminal Jurisdiction, and the Death Penalty as Applied to Native Americans

Mary Margaret L. Kirchner 649

Capital punishment is controversial in American society. It is the junction where moral standards and punishment for the most severe crimes crash together head on. As society has evolved, so have the expectations, requirements, and norms for capital punishment. In the history of the United States, capital punishment, commonly referred to as the death penalty, has been plagued with continuous inequalities. Based on the evolving standards of decency that shift as society matures, certain practices affiliated with the death penalty have now been invalidated as cruel and unusual. One of the most concerning flaws surrounding the death penalty is its unequal and disproportionate application to people of color. The inequalities of the death penalty have resurfaced in society's discussion of the criminal justice system in the wake of the racial justice reckoning that exploded after the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery. The morality of the death penalty has also been called into question in response to Attorney General William Barr's announcement in July 2019 that the federal government would restart federal executions. Between Barr's announcement and President Joseph Biden's inauguration, the federal government executed 13 people. In Attorney General Barr's initial announcement, five inmates were named to be executed. Lezmond Mitchell was one of the five initially named defendants. He was the only Native American on federal death row. Lezmond Mitchell was executed on August 26, 2020, by lethal injection. His sentencing and execution raise attention to the tumultuous, historically oppressive, and tarnished relationship between the federal government and the Native American Tribes. His execution stands as a symbol for the disregard the federal government has continuously practiced regarding tribal sovereignty and the related promises that it has made to the tribes. Mitchell's execution also elucidates the crossing point between unequal racial practices within the criminal justice system, criminal jurisdiction, and criminal justice under Federal Indian Law, and the loopholes the federal government has implemented in order to strip tribes of their sovereignty.