

2018

Introduction: "Criminal Justice at a Crossroads" Symposium

Edwin Meese III

Heritage Foundation, Jason.Snead@heritage.org

John Malcolm

Heritage Foundation

Recommended Citation

Edwin Meese III and John Malcolm, *Introduction: "Criminal Justice at a Crossroads" Symposium*, 23 BERKELEY J. CRIM. L. (2018).

Link to publisher version (DOI)

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Criminal Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Introduction: “Criminal Justice at a Crossroads” Symposium

Edwin Meese III and John Malcolm*

Has criminal justice in the United States arrived at a crossroads? In recent years, the criminal justice system has been confronted with an array of new and growing challenges. Public debate has ensued over widely disparate concerns, from race relations and police misconduct to the use of novel technologies that provide criminals with new ways of perpetrating or concealing their crimes and equip law enforcement officials with the means of capturing more extensive details about the lives of citizens. This debate has extended to the U.S. Supreme Court, where the justices have been grappling with issues ranging from procedural fairness in policing practices to overcriminalization.¹ Meanwhile, Congress and numerous state legislatures have introduced criminal justice reform bills, and several states have enacted new criminal law measures.² The fact that these initiatives are often bipartisan reflects the breadth of public interest in setting a course for criminal justice that responsibly addresses its deficiencies, while still enabling law enforcement officials to do their jobs effectively.

DOI: <https://doi.org/10.15779/Z38JS9H787>

Copyright © 2018 Regents of University of California

* Edwin Meese III, the 75th Attorney General of the United States, serves as Ronald Reagan Distinguished Fellow Emeritus at The Heritage Foundation.

* John Malcolm is Heritage’s Vice President for the Institute for Constitutional Government, and Director of the Edwin Meese III Center for Legal and Judicial Studies. The Heritage Foundation is an independent, nonpartisan public policy research and education institution in Washington, D.C.

¹ Sykes v. United States, 564 U.S. 1, 35 (2011) (Scalia, J. dissenting) (stating “[w]e face a Congress that puts forth an ever-increasing volume of . . . [f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation In the field of criminal law, at least, it is time to call a halt.”), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015); Erwin Chemerinsky, *Has the Supreme Court dealt a blow to the Fourth Amendment?*, AM. BAR. J.: DAILY NEWS, Aug. 2, 2016, http://www.abajournal.com/news/article/chemerinsky_has_the_supreme_court_dealt_a_blow_to_the_fourth_amendment.

² See John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249 (2016) (discussing contemporary reform efforts).

With this in mind, on November 3, 2017, the University of California, Berkeley School of Law and The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies co-hosted a symposium entitled "Criminal Justice at a Crossroads." This symposium brought together some of the nation's leading legal and policy minds for a comprehensive look at several major issues confronting our criminal justice system today: police and race relations, the use of technology in the criminal justice system, marijuana legalization, attacks on police officers, and the future of criminal justice reform.³ This introduction will broadly summarize the day's events and preface the excellent articles that several of our participants submitted.

POLICING, RACE RELATIONS, AND VIOLENT CRIME: FINDING A PATH FORWARD

To open our conference, Erwin Chemerinsky, the Dean of Berkeley Law, used his welcoming address to express his opinions about policing in the United States. The Dean gave a first-hand account of his work in redrafting the Los Angeles charter in the late 1990s, an experience which he said led him to the conclusion that the Los Angeles Police Department suffered from a culture problem, one that, in his words, "exalted Dirty Harry but shunned Serpico." The Dean claimed that racially-motivated policies and outcomes permeate the criminal justice system in the United States.

Differing views of policing were expressed by several of the conference participants. It was pointed out that a balanced evaluation of law enforcement must fully take into account the complexity, diversity, and scale of the criminal justice community in the United States, which consists of 18,000 police agencies and 3,300 prosecutorial agencies, spread throughout 51 jurisdictions, in addition to the federal government. Instances of inappropriate use of force or of racially-biased policing attract a disproportionate share of attention in both the media and the public, but they account for only a minuscule fraction of police-citizen interactions and are not representative of the profession of policing as a whole. What is clear is the necessity to address each instance of misconduct in a fair, thorough, and careful manner. A balanced, thoughtful approach to addressing law enforcement challenges today is

³ The Heritage Foundation would like to thank Berkeley Law, particularly Dean Erwin Chemerinsky and Professor John Yoo, for hosting the symposium, as well as all who participated.

needed.

Former New York City Police Commission Bernard Kerik delivered a keynote address drawing on his lifelong career in law enforcement and his unique perspective as both a former leader of Rikers Island and a former federal inmate.⁴ Kerik stressed that, in his experience, police need leadership and resources if they are to be successful in maintaining order and public safety. He pointed to New York City's use of COMPSTAT⁵ and the notable civic and police leadership, as essential components in the sharp decreases in violent crime and homicides in New York City during the 1990s. Recalling his time in federal prison, Kerik argued strongly for the need to reevaluate the lengths of prison sentences and the crimes for which people are imprisoned, pointing to prisons as a place that more frequently harden, rather than rehabilitate, incarcerated individuals.

The first of the symposium's three panels, "Policing, Race Relations, and the Rise of Violent Crime: What is Path the Forward?" addressed one of the most significant debates confronting law enforcement today.⁶ Members of the panel highlighted the need to substantially improve police training, a process which should be informed by methodologically sound research into policing. Police must work to address hiring and retention difficulties that have emerged in recent years

⁴ The Honorable Tani Gorre Cantil-Sakauye, Chief Justice of the California Supreme Court, delivered the second keynote address. Her remarks focused on federalism, differences between the California and United States constitutions, and how a judge should approach differences in those two charters.

⁵ Short for "Compare Statistics," the Bureau of Justice Statistics describes this tool as "a performance management system that is used to reduce crime and achieve other police department goals." COMPSTAT facilitates improved information sharing, responsibility, accountability, and effectiveness. BUREAU OF JUSTICE ASSISTANCE AND POLICE EXECUTIVE RESEARCH FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES 2 (2013), http://www.policeforum.org/assets/docs/Free_Online_Documents/Compstat/compstat%20-%20its%20origins%20evolution%20and%20future%20in%20law%20enforcement%20agencies%202013.pdf (last visited May 3, 2017).

⁶ Jason Snead, Policy Analyst at The Heritage Foundation, moderated the discussion between the following panelists: Arif Alikhan, Director, Office of Constitutional Policing & Policy, Los Angeles Police Department; Ron Hosko, Former Assistant Director of the Federal Bureau of Investigations and President, Law Enforcement Legal Defense Fund; Franklin Zimring, William G. Simon Professor of Law and Faculty Director, Criminal Justice Studies UC Berkeley School of Law, Boalt Hall; and Jonathan Simon, Adrian A. Kragen Professor of Law and Director, Center for the Study of Law and Society, UC Berkeley School of Law, Boalt Hall.

and develop incentive structures designed to improve police-community relations. The panel noted that, among the 18,000 law enforcement agencies that exist in the United States, few can conduct the research needed to support these changes, prompting some discussion of the value of an expanded research function at the federal level. Ultimately, political leaders must support law enforcement agencies by providing them with the resources that they need to address the specific challenges within their jurisdiction.

The panel also discussed the so-called “Ferguson effect”—the theory that extraordinary public and political scrutiny on police has led to less proactive policing—and expressed disparate views on the subject. Ron Hosko, Former Assistant Director of the Federal Bureau of Investigations, suggested that the phenomenon has prompted police to pull back from communities, resulting in noteworthy spikes in violent crime. It has also contributed to an exodus as experienced officers retire and has discouraged new recruits from joining the force. Meanwhile, Berkeley Law Professor Franklin Zimring sought to counter this theory by pointing to the New York City Police Department as one example of a police force that continues to maintain historically low crime rates while facing consistent, intense scrutiny of their police practices.⁷ Arif Alikhan, Director of Constitutional Policing and Policy at the Los Angeles Police Department, pointed to his own department as an example of positive reform. Following the violence of the 1990s, the department gradually improved its relationship with the community through structural change and incentive structures designed to encourage effective community policing practices. Alikhan, joined by the other panelists, also emphasized the invaluable role of training, technology, and exchanging best practices with other agencies. All of these areas require both time and resources, and in some cases new technologies such as body-worn cameras. They also place additional demands on personnel, thus making it more difficult to effectively respond to crime while building relationships and establishing trust within the community.⁸ Berkeley Law Professor

⁷ William J. Bratton, former Commissioner of the Police for New York City from 1994 to 1996, also gave a related lecture at The Heritage Foundation, entitled “Policing in America,” on Aug. 21, 2017, that is available at <https://www.c-span.org/video/?434373-1/william-bratton-discusses-policing-america>.

⁸ Several law enforcement professionals also recently discussed the issue of establishing community trust in Edwin Meese III & John Malcolm, POLICING IN AMERICA: LESSONS FROM THE PAST, OPPORTUNITIES FOR THE FUTURE, Heritage Foundation Special Report No. 194 (Sept. 18, 2017), <http://www.heritage.org/sites/default/files/2017-09/SR194.pdf>.

Jonathan Simon suggested more fundamental reforms of policing, including abandoning the modern structure of policing derived from Sir Robert Peel's Metropolitan London Police.⁹ Simon spoke at length of America's undeniable history of racism in law enforcement and argued that substantial new training, incentives, and technologies are needed to ensure the profession moves away from this history.

WHERE TECHNOLOGY MEETS CRIMINAL JUSTICE

The second panel, "The Intersection of Technology and Criminal Justice," focused on the changes that new and rapidly-advancing technologies are bringing to the field.¹⁰ Facial recognition, devices like the "stingray" and GPS trackers, and bulk data collection are revolutionizing and expanding evidence gathering and surveillance capabilities. The panel spoke at length of the new and significant Fourth Amendment and privacy concerns these capabilities are raising, as well as the challenges confronting law enforcement agencies that stem from privacy-focused technologies like encryption. Professor Barry Friedman of the New York University School of Law made the case for bringing front-end accountability to law enforcement as agencies move to take advantage of new technologies like drones and facial recognition. Friedman believes that securing public buy-in for the use of new technologies, including through the solicitation of public input and a commitment to transparency, can avoid a public backlash and enable the successful implementation of new technologies. Professor Susan Freiwald of San Francisco School of Law presented an overview of California's efforts to update the state's electronic communications privacy laws to bring them into line with the public's expectations of privacy in the 21st century. Freiwald noted that CalECPA imposed

⁹ For concise discussions of Peel's legacy in policing, see William J. Bratton, *The Practice of Policing: Evolution in the Police Profession*, CityLand (Feb. 2, 2017), <http://www.citylandnyc.org/copmissioner-bratton-policing-evolution/>; National Organization of Black Law Enforcement Executives, *National Organization of Black Law Enforcement Executives (NOBLE): Recommendations & Potential Solutions*, in POLICING IN AMERICA: LESSONS FROM THE PAST, OPPORTUNITIES FOR THE FUTURE, Heritage Foundation Special Report No. 194, 20 (Sept. 18, 2017).

¹⁰ George Horvath, Darling Foundation Fellow in Public Law, UC Berkeley School of Law, moderated a panel consisting of Susan Freiwald, Associate Dean for Academic Affairs and Professor for Law, University of San Francisco School of Law; Barry Friedman, Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics, New York University School of Law; and Marcus Thomas, Chief Technology Officer, Subsentio, Inc.

expanded warrant requirements, including their use for accessing location data and communications metadata, and eliminated the third-party doctrine.¹¹ Marcus Thomas, former Assistant Director of the FBI's Operational Technology Division, closed out the discussion with an overview of recent conflicts between law enforcement officials and private companies over encryption, including the case of the San Bernardino shooter's locked iPhone. Looking ahead, Thomas noted that the difficulties and resource requirements associated with breaking encryption may result in a trend towards the federalization of criminal law and a greater reliance by state and local agencies on federal authorities to gain access to encrypted data.

THE FUTURE OF CRIMINAL JUSTICE REFORM

The final panel, "Where is Criminal Justice Reform Going?" looked to the future.¹² Berkeley Law Professor Charles Weisselberg reminded attendees that states and localities are responsible for the vast majority of American criminal law enforcement and singled out the need for states to experiment with police interrogation techniques. Susan Herman, President of the American Civil Liberties Union and professor at Brooklyn Law School, laid out the ACLU's broad priorities for criminal justice reform, including reforming *mens rea* requirements, civil asset forfeiture laws, and the nation's bail system. Herman also spoke about the need for criminal sentencing reform, pointing to the "swift and certain" model of punishment as a viable and more effective alternative to simply increasing the length of criminal sentences. John Pfaff, professor of law at Fordham University, supported this notion, asserting that efficient and effective policing has a greater deterrent value than lengthy sentences, particularly among young offenders. Pfaff argued that reformers tend not to focus on the real drivers of extensive incarceration, noting that too much attention is paid to the federal system when the states house 80 percent of all prisoners. He observed that state prison populations may be partially driven by the economic factors associated with county district

¹¹ California Electronic Communications Privacy Act, CAL. PENAL CODE § 1546 (WEST 2015).

¹² John Malcolm, Vice President, Institute for Constitutional Government, The Heritage Foundation, moderated the discussion between Susan Herman, President, American Civil Liberties Union and Centennial Professor of Law, Brooklyn Law School; Joseph Russoniello, Special Counsel, Browne George Ross LLP and former U.S. Attorney for the Northern District of California; John Pfaff, Professor of Law, Fordham University School of Law; Charles D. Weisselberg, Shannon C. Turner Professor of Law, UC Berkeley School of Law.

attorneys sending convicted felons to state prisons, where incarceration is, from the perspective of the county, free. He also noted that criminal sentences for even severe offenses must be reevaluated if reducing prison populations is a serious goal and that investing any resulting savings in the police will likely result in improved public-safety outcomes. Joseph Russoniello, former U.S. Attorney for the Northern District of California, described how prosecutors' priorities in the 20th century slid from asking "what is the most serious offense for which we can obtain a conviction?" to "what is the cheapest way to obtain a plea bargain?" Russoniello also addressed civil asset forfeiture, noting that the practice has value in disrupting and deterring organized criminal activity, but the tool was never intended to be a substitute for arrest and is now used in ways that were not originally intended.

THE MARIJUANA DEBATE

The symposium included a debate on marijuana policy which posed the question, "Legalize, Decriminalize, or Leave the Status Quo in Place?"¹³ Kevin Sabet, Director of the Drug Policy Institute, argued against marijuana legalization, while Tamar Todd, Legal Affairs Director for the Drug Policy Alliance, argued for its legalization and regulation. Sabet pointed to the sharp rise in potency seen in marijuana products and the apparent targeting of children through advertising for "edibles" that appear almost indistinguishable from commonplace food and candy. He argued that lawmakers should take into account the modern scientific understanding of brain development, which raises concerns about the long-term health consequences of early marijuana use. Sabet also pointed to the possibility of sharply increased enforcement costs following legalization, as general use increases and the harms—such as driving under the influence of marijuana—proliferate.

Todd argued that marijuana use in the United State is already widespread and that enforcement may undermine faith in the legitimacy of government as well as have a racially-disparate impact. Todd pointed to the role of the black market in driving the increase in marijuana potency and argued that regulation was necessary to counteract this trend,

¹³ The debate was moderated by Paul Larkin, Senior Legal Research Fellow at The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. Kevin Sabet serves as the director of the Drug Policy Institute, as Assistant Professor, University of Florida College of Medicine, Division of Addiction Medicine, Department of Psychiatry, and President, Policy Solutions Group, Inc. Tamar Todd is Legal Affairs Director and Acting Managing Director for Policy at the Drug Policy Alliance.

including regulating the sale of marijuana concentrates. She also pointed to the environmental hazards associated with illegal growing operations, as compared to legal industries which are subject to state and federal environmental laws. Finally, Todd argued that legal marijuana presents states with an opportunity for increased tax revenues and tourism dollars as the present illegal market for marijuana transitions into a lucrative, legal one.

All who participated in the Symposium hope that the event and this issue of the *Berkeley Journal of Criminal Law* will provide evenhanded guidance to inform the ongoing debates on criminal law, policing, and criminal justice.