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Fall 2017 Symposium: The Challenge of Crime in a Free Society: Fifty Years Later

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FOREWORD

Fall 2017 Symposium: *The Challenge of Crime in a Free Society: Fifty Years Later*

Roger A. Fairfax, Jr.*

My longstanding interest in the Johnson Crime Commission traces back to my earlier scholarly work on the history of criminal law reform movements, going back to the progressive criminal justice reform agenda in the early twentieth century and the activities of private law-reform coalitions and government-sponsored crime commissions during the interwar period, including the Wickersham Commission and the American Law Institute's various model code projects.¹ This research eventually led me to the Johnson Commission, the subject of this Symposium.

President Lyndon Johnson created the Commission on Law Enforcement and the Administration of Justice ("Johnson Commission") in 1965. Much like the participant roster for this Symposium, the John-

* Jeffrey and Martha Kohn Senior Associate Dean for Academic Affairs and Professor of Law, The George Washington University Law School. I would like to thank the *George Washington Law Review* and its editors, led by Senior Projects Editor Jill Greenfield and Editor-In-Chief Katelin Shugart-Schmidt. This Foreword is dedicated to the memory of Mr. Furman Woodward, Jr. (1953–2018).

¹ See generally, e.g., Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597 (2011) [hereinafter Fairfax, *American Criminal Justice Reform*]; Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Reform Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433 (2009); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398 (2006).

son Commission included leading lights of the academy and the bar. Attorney General Nicholas Katzenbach was appointed to chair the Commission.² Among the commissioners were Kingman Brewster, the president of Yale University; Leon Jaworski, who would later become the Watergate special prosecutor; Lewis Powell, who would become an Associate Justice of the United States Supreme Court; William Rogers, a former Attorney General who would become Secretary of State; Herbert Wechsler, the renowned Columbia Law professor who is known as the father of the Model Penal Code; and Whitney Young, the Executive Director of the National Urban League.³

The Executive Director of the Commission was James Vorenberg, who later would become Dean of Harvard Law School.⁴ Vorenberg led a group of talented staffers, consultants, and advisers, including Professor Elizabeth Bartholet, Professor Sheldon Krantz, Susan Shapiro, and the Honorable Patricia Wald, the former Chief Judge of the United States Court of Appeals for the D.C. Circuit—all four of whom are distinguished participants in our Symposium.⁵

The task of the Johnson Commission was to conduct a comprehensive review of criminal justice in the United States.⁶ As I have observed elsewhere, the Commission's work was "respond[ing] to rising crime rates in the 1960s . . . as well as continued urbanization and [ever] increasing racial, societal, and political tensions."⁷ The American public was hungry for solutions to crime, and politicians were eager to respond.⁸ Indeed, as noted criminologist Todd Clear wrote of the thirtieth anniversary of the Johnson Commission, "the [Johnson] Commission might well be seen as the first foray of politics into the crime policy arena."⁹

2 PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS, at iv (1967).

3 See *id.*; Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 603–04. One of the commissioners had a uniquely GW Law connection—the late Judge Luther Youngdahl of the U.S. District Court for the District of Columbia served as a commissioner and is the grandfather of Professor Todd Peterson.

4 See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 2, at iv; Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 604 n.49.

5 See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 2, at iv–v. In addition, Gerald Caplan, a former member of the GW Law faculty, was a member of the Commission staff. *Id.* at iv.

6 See Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 604; Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 94–95 (1998).

7 Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 604.

8 See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 99–106 (2016).

9 Todd R. Clear, *Societal Responses to the President's Crime Commission: A Thirty-Year*

The publication of the Commission report in 1967 was momentous.¹⁰ The lengthy report reached virtually every aspect of the administration of criminal justice in the United States: juvenile crime and justice, policing, criminal court administration, sentencing and corrections, organized crime, drug and alcohol abuse, gun control, and the use of technology in crime control.¹¹ The report made hundreds of recommendations to local, state, and federal jurisdictions; to private individuals and organizations; and to key criminal justice actors, such as prosecutors, judges, correctional officials, and police officers.¹²

The Commission's work "offered the legislative proposals that laid the groundwork for a revolution in American law enforcement, linking crime control and antipoverty policies in new and innovative ways."¹³ The 1967 report concluded with powerful language that is just as relevant today:

Taken together these recommendations and suggestions express the Commission's deep conviction that if America is to meet the challenge of crime it must do more, far more, than it is doing now. It must welcome new ideas and risk new actions. It must spend time and money. It must resist those who point to scapegoats, who use facile slogans about crime by habit or for selfish ends. It must recognize that the government of a free society is obliged to act not only effectively but fairly. It must seek knowledge and admit mistakes.

Controlling crime in America is an endeavor that will be slow and hard and costly. But America can control crime if it will.¹⁴

Retrospective, in U.S. DEP'T OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY: LOOKING BACK LOOKING FORWARD* 131, 134 (1998), *quoted in* Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 605.

¹⁰ See, e.g., Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 605 ("The Johnson Crime Commission released its 1967 report, *The Challenge of Crime in a Free Society*, with a great deal of attention and fanfare."); see also *id.* at 605 n.56 (citing Henry S. Ruth, Jr., *To Dust Ye Shall Return?*, 43 NOTRE DAME L. REV. 811, 830-31 (noting television coverage and broad release of the report)).

¹¹ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 17-291 (1967); see also HINTON, *supra* note 8, at 100; Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 605.

¹² See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 11. One such recommendation was the establishment of a national emergency number, 911. See *id.* at 250-51.

¹³ HINTON, *supra* note 8, at 100.

¹⁴ PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 11, at 291 (quoted in Fairfax, *American Criminal Justice Reform*, *supra* note 1, at 605).

It is vitally important to honor the past, but the more critical and urgent task before us is to try to shape the future. This Symposium does just that by addressing contemporary issues of policing, and prosecution, and prisons, and punishment, and policy, with many of the scholars, policymakers, and policy advocates I most admire and who have had some of the most cutting-edge voices in the renewed conversation on crime policy in America.

Over the past decade, we have seen unprecedented bipartisan cooperation on criminal justice policy.¹⁵ Even when these bipartisan efforts have not borne fruit, the fact that policymakers and advocates are willing to move beyond the tough-on-crime rhetoric of yesteryear, which fueled the mass incarceration crisis we face today, shows significant progress. To be sure, there are very real concerns about retrenchment.¹⁶ Nevertheless, I remain optimistic that many in the United States have begun to experience a fundamental change in consciousness around critical criminal justice issues.

Americans—voters and policymakers alike—have read popular press books such as Michelle Alexander’s *The New Jim Crow*, which sparked a conversation about race, criminal justice, and mass incarceration.¹⁷ Americans, for the past fifteen years, have watched television dramas like *The Wire* that go beyond the traditional police procedural and place under a microscope the complex problems that we must confront collectively.¹⁸ They have been watching documentaries like *13th* and *The House I Live In*, which present compelling treatments of the complex history of enforcement and penological policy in the United States.¹⁹

15 See, e.g., Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 814, 822 (2017).

16 See, e.g., Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, NEW YORKER (June 6, 2017), <https://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> [<https://perma.cc/EAC3-CFE7>]; Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017) https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?noredirect=on&utm_term=.a01e84ab99e5 [<https://perma.cc/EQ9P-WJDT>].

17 See MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); see also Ta-Nehisi Coates, *Mapping the New Jim Crow*, ATLANTIC (Oct. 17, 2014), <https://www.theatlantic.com/politics/archive/2014/10/mapping-the-new-jim-crow/381617/> [<https://perma.cc/KLU8-QUC6>].

18 See *The Wire* (Home Box Office 2002–2008), <http://www.hbo.com/the-wire> [<https://perma.cc/22Q8-W9ZG>].

19 See *13TH* (Netflix 2016), <http://www.netflix.com/title/80091741> [<https://perma.cc/Q554-RJWC>]; *THE HOUSE I LIVE IN* (Charlotte Street Films 2012), <http://www.pbs.org/independentlens/films/house-i-live-in/> [<https://perma.cc/NJC4-5GT8>].

As a result of this popular engagement, Americans have begun to make the connection that money spent on incarceration is money not spent on schools, and roads, and other societal investments.²⁰ They are beginning to respond to the opioid crisis with the compassion and public health orientation that should have marked the response to the crack cocaine crisis in the 1980s and 1990s.²¹ Some prosecutors and other candidates running for office are talking to voters about enforcement policies, incarceration rates, and other critical issues of criminal justice.²² Recent high-profile killings of mostly unarmed African-Americans have sparked a national conversation on policing and race and have spawned the next generation of civil rights advocacy, particularly among millennials.²³

This momentum on criminal justice reform need not be lost, and if legal scholars, policy advocates, and policymakers keep these issues front and center, we can continue to transform American criminal justice, just as the Johnson Commission attempted to do fifty years ago. This Symposium is a part of that effort.

The Symposium, held in October of 2017, boasted some of the leading voices in criminal justice today²⁴ and produced the excellent and thought-provoking essays in this issue. The first is an edited transcript of the Symposium opening remarks by Chief Judge Patti B. Sa-

²⁰ See, e.g., Stephanie Kelly, *The US Spends a Troubling Amount of Money on Prisons Compared to Schools*, BUS. INSIDER (Jul. 7, 2016, 7:49 PM), <http://www.businessinsider.com/r-us-spending-on-prisons-grew-at-three-times-rate-of-school-spending-report-2016-7> [https://perma.cc/3TFJ-MVSX].

²¹ See, e.g., Ed Stetzer, 'Lock Them Up:' My Double Standard in Responding to the Crack Crisis vs. the Opioid Epidemic, WASH. POST (Oct. 26, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/10/26/lock-them-up-my-double-standard-in-responding-to-the-crack-crisis-vs-the-opioid-epidemic/?utm_term=.39b8d84dcc27 [https://perma.cc/TFG7-K2ZB].

²² See, e.g., Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 911–12 (2012); Eric Gonzalez & Miriam Krinsky, *How a New Generation of Prosecutors Is Driving Criminal Justice Reform Outside of Congress*, HILL (Feb. 26, 2018, 3:40 PM), <http://thehill.com/blogs/congress-blog/judicial/375656-how-a-new-generation-of-prosecutors-is-driving-criminal-justice> [https://perma.cc/D2JQ-UVS2].

²³ See, e.g., ANGELA J. DAVIS, *POLICING THE BLACK MAN*, at xi–xiii (2017).

²⁴ The Symposium participants included Chief Judge Patti B. Saris, U.S. District Court for the District of Massachusetts (for whom the author had the honor of clerking twenty years ago); Dean Alan Morrison; Judge Patricia Wald; Professor Elizabeth Bartholet; Professor Sheldon Krantz; Susan Schapiro; Congressman Bobby Scott, U.S. House of Representatives; Dean Roger Fairfax; Professor Devon Carbado; Professor Nancy Leong; Dean Song Richardson; Professor Renée Hutchins; Professor Kristin Henning; Professor Erik Luna; Professor Tracey Meares; Congressman Jamie Raskin, U.S. House of Representatives; Judge Ketanji Brown Jackson; Edward Chung; Todd Cox; Professor Brandon Garrett; Professor Paul Marcus; Nkechi Taifa; Professor Cynthia Lee; Professor Angela Davis; Professor Adam Gershowitz; Professor Daniel Richman; and Professor Ronald Wright.

ris of the U.S. District Court for the District of Massachusetts.²⁵ Chief Judge Saris, who recently served as Chair of the United States Sentencing Commission, offers a sweeping historical overview of the arc of criminal justice policy in the United States from the late 1960s when the Johnson Commission did its work, through the 1970s and 1980s when the War on Drugs was conceived and implemented, to the resulting mass incarceration of the 1990s and 2000s. As with the other two featured speakers—U.S. Representative Bobby Scott and U.S. Representative Jamie Raskin—these plenary remarks by Chief Judge Saris helped to frame the discourse throughout the Symposium.

In his Essay, *Evidence-Informed Criminal Justice*,²⁶ Professor Brandon Garrett examines the opportunities and challenges inherent in the relatively recent influence of evidence-based and data-driven methods in the development of criminal justice policy.²⁷ He notes that the Johnson Commission's aspirations regarding the role of scientific research in criminal justice have gone largely unfulfilled.²⁸

Professor Adam Gershowitz, in his Essay *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*,²⁹ advances the innovative proposals that prosecutors should catalog the reasons for voluntary dismissals of cases and that they should convey this data to law enforcement agencies in an attempt to enhance and improve training and evaluation of police officers and use of police discretion—all aims of the law enforcement professionalization rhetoric of the Johnson Commission report.³⁰

In her Essay, *In a Different Force*,³¹ Professor Nancy Leong explores research revealing gender differences in law enforcement performance and behavior—particularly differences in the use of excessive force—and calls for policies designed to remove barriers to increased recruitment of women as police officers—a goal *not* emphasized in the work of the Johnson Commission.³²

²⁵ Patti B. Saris, *The Pendulum of Criminal Justice Since 1967*, 86 GEO. WASH. L. REV. 1472 (2018). The author had the privilege of serving as a law clerk to Judge Saris from 1998 to 1999.

²⁶ Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490 (2018).

²⁷ See *id.* at 1516–23.

²⁸ See *id.* at 1523–24.

²⁹ Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525 (2018).

³⁰ See *id.* at 1540–49.

³¹ Nancy Leong, *In a Different Force*, 86 GEO. WASH. L. REV. 1552 (2018).

³² See *id.* at 1561–62.

In their co-authored Article, *The Right to Counsel in Criminal Cases: Still a National Crisis?*,³³ Professors Mary Sue Backus and Paul Marcus explore the shortcomings of indigent criminal defense in the more than half century that has passed since the landmark ruling in *Gideon v. Wainwright*,³⁴ decided just a few years before the Johnson Report was issued.³⁵

Professor Kristin Henning, in her Article *The Challenge of Race and Crime in a Free Society: The Racial Divide in 50 Years of Juvenile Justice Reform*,³⁶ indicts the Johnson Commission Report for its failure to account for “the scope and cause of racial disparities in the administration of juvenile and criminal justice,”³⁷ and offers a roadmap and recommendations to guide contemporary efforts to reprise the Johnson Commission’s work.³⁸

Finally, Professors Ron Wright and Kay Levine, in their co-authored Article *Career Motivations of State Prosecutors*,³⁹ use empirical research—including original interviews of hundreds of state prosecutors—to draw conclusions and inform recommendations regarding the relationship between the professional identity of line prosecutors and the likelihood of achieving lasting criminal justice reform.⁴⁰

All these scholarly contributions and the thoughtful discussions which took place at the Symposium are a source of hope that increased engagement of scholars and policymakers will facilitate much-needed and long-overdue improvements to the administration of criminal justice in the United States.

³³ Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564 (2018).

³⁴ 372 U.S. 335, 342–43 (1963) (requiring states to provide counsel to indigent criminal defendants).

³⁵ See Backus & Marcus, *supra* note 33, at 1567–71.

³⁶ Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in 50 Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604 (2018).

³⁷ *Id.* at 1607.

³⁸ See *id.* at 1636–66.

³⁹ Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018).

⁴⁰ See *id.* at 1703–09.