

# FOREWORD

## Addressing the Criminalization of Poverty and Marginalization

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Across the globe and throughout the United States, governments use petty offenses, such as loitering laws, to exert social control over marginalized communities. Petty offenses enable the policing of public spaces to reinforce social hierarchies and rigid gender norms. People experiencing homelessness regularly face the threat of criminal sanctions for fulfilling basic needs, and fines and fees in the justice system trap the poor in a cycle of poverty and incarceration.

In September 2019, the Human Rights Clinic<sup>1</sup> at the University of Miami School of Law hosted a symposium<sup>2</sup> on challenging petty offenses that criminalize poverty, marginalization, and gender non-conformity, in collaboration with the *University of Miami Law Review*, *University of Miami Race & Social Justice Law Review*, University of Miami School of Communication, National Law Center on Homelessness & Poverty, and the Open Society Foundations's Human Rights Initiative.<sup>3</sup> The symposium provided an opportunity

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<sup>1</sup> *Human Rights Clinic*, UNIV. MIA., <https://www.law.miami.edu/academics/clinics/human-rights-clinic> (last visited Oct. 1, 2020).

<sup>2</sup> *Petty Offenses Symposium*, UNIV. MIA., <https://www.law.miami.edu/academics/clinics/human-rights-clinic/petty-offenses-symposium> (last visited Oct. 19, 2020).

<sup>3</sup> *National Homelessness Law Center*, NAT'L L. CTR. ON HOMELESSNESS AND POVERTY, <https://nlchp.org/> (last visited Oct. 19, 2020).

to connect local, national, and global conversations on criminal law and social justice and to promote learning across movements and countries, bringing together leading advocates and scholars from the United States, Uganda, Sierra Leone, Nigeria, Malawi, Madagascar, Kenya, Jamaica, Israel, India, Hungary, Guyana, Guinea, and Ghana. Participants critically examined issues from a variety of perspectives and explored the use of litigation; human rights advocacy at the local, national, regional, and international levels; and creative campaigning in challenging petty offenses.

The symposium resulted in the development of various resources, capturing reflections and lessons. This includes a report providing a synopsis of the symposium,<sup>4</sup> as well as videos from the various sessions. In a Communications Workshop the day prior to the symposium, advocates developed a shared hashtag: *#PoorNotGuilty*, which brought together efforts to address petty offenses across the globe. Additionally, this special issue of the *University of Miami Law Review Caveat* presents articles and short response essays further probing symposium themes.

In “Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces,”<sup>5</sup> Anneke Meerkotter, Litigation Director at the Southern Africa Litigation Centre, writes about colonial-era vagrancy offenses in Africa. Specifically, she argues that the enforcement of vagrancy laws against people experiencing homelessness, street children, persons with HIV, persons with psycho-social disabilities, and sex workers marginalizes these communities by driving them out of public spaces and into crowded prisons. By enforcing these laws against vulnerable groups, police perpetuate notions of the other and violate persons’ rights to dignity, due process, a fair trial, and freedom of movement. Meerkotter skillfully chronicles various legal challenges to the use of vagrancy laws against marginalized groups, beginning with the laws’ prejudiced colonial

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<sup>4</sup> UNIV. MIA. HUM. RTS. CLINIC, PETTY OFFENSES SYMPOSIUM: CHALLENGING CRIMINALIZATION OF POVERTY, HOMELESSNESS, AND GENDER NON-CONFORMITY 1 (2019), <https://miami.app.box.com/s/q891w54b661c6bismf190x23835kamsq>.

<sup>5</sup> Anneke Meerkotter, *Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces*, 74 U. MIA. L. REV. CAVEAT 1 (2020), [https://law-review.law.miami.edu/wp-content/uploads/2020/01/Litigating-to-Protect\\_Anneke-Meerkotter.pdf](https://law-review.law.miami.edu/wp-content/uploads/2020/01/Litigating-to-Protect_Anneke-Meerkotter.pdf).

roots and examining recent efforts at dismantling the use of outdated laws to incarcerate people for minor offenses. Pulling from historical evidence and enduring legal principles, the article seeks to both criticize African countries for their continued enforcement of colonial-era vagrancy laws and cautiously praise regional and national civil society organizations for their recent attempts at coordinating strategies to invalidate laws that disproportionately affect poor and marginalized groups.

In, “Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk,”<sup>6</sup> Kate Mogulescu, Assistant Professor of Clinical Law and Director of the Criminal Defense and Advocacy Clinic at Brooklyn Law School, assesses the disparate impact that anti-loitering laws have on female sex workers. Specifically, Professor Mogulescu argues that laws punishing individuals for loitering with the purpose of engaging in prostitution (“LPP laws”) disproportionately affect women of color, as well as transgender and gender non-conforming individuals. Moreover, while LPP laws appear to be objective in their application, they are often grounded in factors that are gendered, racialized, and antiquated. Professor Mogulescu’s article chronicles the effort to challenge New York’s LPP statute, explaining why litigation challenging the law has fallen short. Professor Mogulescu skillfully dissects courts’ flawed approach, arguing that courts’ reliance on antiquated notions of sexuality and gender have led to the perpetuation of discrimination against marginalized groups, driving those groups out of public spaces by criminalizing their identity. The article concludes by advocating for a more radical approach to address the problem. Specifically, Professor Mogulescu argues that only a commitment to less policing and the repeal of LPP statutes altogether can offer an enduring solution that protects vulnerable communities from police harassment and marginalization.

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<sup>6</sup> Kate Mogulescu, *Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop and Frisk*, 74 U. MIA. L. REV. 68 (2020), [https://lawreview.law.miami.edu/wp-content/uploads/2020/05/Your-Cervix-is-Showing\\_Page-Proof\\_FINAL.pdf](https://lawreview.law.miami.edu/wp-content/uploads/2020/05/Your-Cervix-is-Showing_Page-Proof_FINAL.pdf).

In “Regulating Cleanups of Homeless Encampments,”<sup>7</sup> Stephen J. Schnably, Professor of Law at the University of Miami School of Law and Co-Counsel for plaintiffs in *Pottinger v. City of Miami*, writes about cities’ efforts to “clean up” homeless encampments, highlighting the inequities perpetuated by these practices. Specifically, Professor Schnably assesses the practice of police sweeps that drive individuals experiencing homelessness from public spaces and criminalize their identity. Cities often conduct these sweeps in response to pressure from business owners and community leaders who view visible homelessness as a drag on their city’s aesthetic appeal. Yet, Professor Schnably argues that criminalizing homeless individuals for their existence in public spaces results in further marginalization because such practices often result in arrests and the destruction of property, making it harder for homeless individuals to find housing or jobs. The article examines clean ups in the context of four United States cities that have entered consent decrees resulting from litigation against their practices of sweeping homeless encampments. Professor Schnably offers both praise and criticism of the consent decrees, skillfully noting where the regulations help protect marginalized communities and where they fall short. Yet, regardless of his criticism, Professor Schnably concludes by recognizing that the consent decrees represent a positive step in the right direction, mandating basic decency and reducing the harm that comes with living on the streets.

This special issue of the *University of Miami Law Review Caveat* further includes essays in response to these articles. In “Sticky Colonial Criminal Laws,”<sup>8</sup> Tracy Robinson responds to Meerkotter’s article by reflecting on colonial era criminal laws in the Caribbean states. Similarly, Kirsten Anderson in “Homeless and Hungry, Please Help! A Constitutional Right to Communicate Messages of

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<sup>7</sup> Stephen J. Schnably, *Regulating Cleanups of Homeless Encampments*, 75 U. MIA. L. REV. 8 (2020), [https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Schnably\\_Regulating\\_Cleanups.pdf](https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Schnably_Regulating_Cleanups.pdf).

<sup>8</sup> Tracy Robinson, *Sticky Colonial Criminal Laws*, 75 U. MIA. L. REV. 58 (2020), [https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Robinson\\_Sticky\\_Colonial\\_Criminal\\_Laws.pdf](https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Robinson_Sticky_Colonial_Criminal_Laws.pdf).

Need,”<sup>9</sup> assesses the impact of new “vagrancy laws” criminalizing life-sustaining activities in the United States. In “The Inadequacies of Tinkering: Un-Meetable Promises and Failed Incrementalism in U.S. ‘Prostitution Diversion Programs,’”<sup>10</sup> Poonam Daryani, Ali Miller, and Ann Sarnak respond to Professor Mogulescu’s article by extending her analysis to prostitution diversion programs, arguing that these programs impermissibly grant power upon the criminal legal system to use discretion in its distribution of social services to sex workers. In “Walking While Trans: Policing Women’s Sexuality,”<sup>11</sup> Roman Rodriguez-Tejera responds to Professor Mogulescu’s article by looking at how LPP laws specifically target and marginalize transgender women. Finally, in “Taking Advantage of Political Processes to Challenge the Use of ‘Idle and Disorderly’ Offences to Police Sexuality in Uganda,”<sup>12</sup> Adrian Jjuuko and Justine Balya respond to both Professors Mogulescu and Meerkotter’s articles by examining the policing of sex work and homosexuality in Uganda.

Beyond this special issue, however, we would like to point out some of the additional forthcoming scholarship that came about as a result of the 2019 Petty Offenses Symposium. In a forthcoming issue of the *University of Miami Race & Social Justice Law Review*, Lisa Foster, retired judge, former Director of the Office for Access to Justice at the United States Department of Justice, and Co-Director for the Fines and Fees Justice Center, is publishing an article entitled, “The Price of Justice: Fines, Fees, and the Criminalization

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<sup>9</sup> Kirsten Anderson, *Homeless and Hungry, Please Help! A Constitutional Right to Communicate Messages of Need*, 75 U. MIA. L. REV. 34 (2020), [https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Anderson\\_Homeless\\_and\\_Hungry.pdf](https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Anderson_Homeless_and_Hungry.pdf).

<sup>10</sup> Poonam Daryani, Ali Miller, & Ann Sarnak, *The Inadequacies of Tinkering: Un-Meetable Promises and Failed Incrementalism in U.S. ‘Prostitution Diversion Programs’*, 75 U. MIA. L. REV. 76 (2020), [https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Daryani\\_The\\_Inadequacies\\_of\\_Tinkering.pdf](https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Daryani_The_Inadequacies_of_Tinkering.pdf).

<sup>11</sup> Roman Rodriguez-Tejera, *Walking While Trans: Policing Women’s Sexuality*, 75 U. MIA. L. REV. 67 (2020), [https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Rodriguez-Tejera\\_Walking\\_While\\_Trans.pdf](https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Rodriguez-Tejera_Walking_While_Trans.pdf).

<sup>12</sup> Adrian Jjuuko & Justine Balya, *Taking Advantage of Political Processes to Challenge the Use of ‘Idle and Disorderly’ Offences to Police Sexuality in Uganda*, 75 U. MIA. L. REV. 43 (2020), [https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Jjuuko\\_Taking\\_Advantage\\_of\\_Political\\_Processes.pdf](https://lawreview.law.miami.edu/wp-content/uploads/2020/10/Jjuuko_Taking_Advantage_of_Political_Processes.pdf).

of Poverty in the United States.” Judge Foster writes about how the imposition of stiff fines and fees on those convicted of criminal and civil offenses in the United States criminalizes poverty and marginalizes minority communities. Judge Foster surveys the scope of the problem by looking at the increase in the use of fines and fees by state governments, and then she explores how fines and fees harm marginalized communities by criminalizing their status. Judge Foster skillfully demonstrates why the use of fines and fees in this manner is problematic, and she highlights reform measures adopted across the country. Judge Foster argues that only by eliminating fees altogether and making fines proportionate to the offense and individual can the justice system stop criminalizing poverty.

Additionally, David Stuzin, a fellow with the University of Miami Human Rights Clinic, is publishing a note entitled, “The Promotion of The General Welfare: Using the Spending Clause to End the Criminalization of Homelessness in America” in a forthcoming issue of the *University of Miami Law Review*. Mr. Stuzin analyzes homelessness in the United States and argues that Congress ought to use its spending power to end the criminalization of homelessness in local communities across the nation. Mr. Stuzin dissects the problem of homelessness in general and then applies the constitutional framework of *South Dakota v. Dole*<sup>13</sup> and *National Federation of Independent Business v. Sebelius*<sup>14</sup> to argue for federal legislation that conditions federal funding to induce local governments to remove, or lessen, their enforcement of laws criminalizing homelessness.

Finally, the *Cardozo Law Review* will be publishing a piece entitled, “Challenging Domestic Injustice through International Human Rights Advocacy: Addressing Homelessness in the United States” by Eric Tars, the Litigation Director of the National Law Center on Homelessness & Poverty and the University of Miami Human Rights Clinic. This piece looks at how international human rights norms and procedures can serve as a powerful tool in challenging injustice in the United States, using work addressing the criminalization of homelessness as a case study. Moreover, it explores how advocacy initially focused on negative state obligations

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<sup>13</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>14</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

and civil and political rights can provide an entry point for asserting positive obligations and the human right to adequate housing.