

CRIMINAL PROCEDURE AS THE SERVANT OF POLITICS

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Any assessment of what the Constitution is bad at must be grounded in a theory of what it is good for. So let me begin with a brief statement of such a theory: The Constitution is mostly good for providing a platform external from our ordinary politics from which current arrangements can be criticized.

This theory does not entail the view that all that matters is criticism. Any sensible political system requires legitimation as well as destabilization. The theory merely asserts that our ordinary political processes already provide very powerful legitimation. We do not need *constitutional law* to endorse results that our existing political system has already endorsed.

Nor does the theory entail the view that constitutional law necessarily privileges change. Political systems need to change, but they also need to maintain continuity. Although the Constitution can promote change, it can also appropriately entrench the status quo by providing a platform to criticize proposals for change.

The theory *does* entail the view that a constitutional provision that does no more than make us more satisfied with outcomes that already satisfy us is not accomplishing anything worthwhile. This is so because constitutional law should serve as a corrective to ordinary politics, and, so, is corrupted when it becomes the servant of politics.

If one shares my view of what the Constitution is good for, it follows, I think, that it is quite bad at dealing with problems of criminal procedure. If the Constitution were doing its job, it would obstruct and destabilize our political impulses concerning crime control. Yet today, the Fourth, Fifth and Sixth Amendments function mostly to make us satisfied with a state of affairs that should trouble us deeply.

Here are two facts about American criminal law: The United States has the most elaborate and detailed constitutional protec-

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tions for criminal defendants of any country in the world. The United States also has the second highest incarceration rate of any country in the world.¹

The relationship between these two facts (if, indeed, there is one at all) is controversial. Some critics of the Fourth, Fifth, and Sixth Amendments argue that they stymie effective law enforcement, thereby encouraging crime and requiring a high incarceration rate. Although this connection is theoretically possible, it is quite implausible. The best data available suggest that criminal procedure protections are doing very little to obstruct successful prosecutions. For example, a tiny percentage of criminal cases are lost or "no papered" because of fourth amendment problems.² Virtually every empirical study of the impact of *Miranda* suggests that it has not reduced the rate at which suspects confess.³ The poor quality of criminal defense work has led some distinguished commentators to conclude that counsel now serves primarily as a barrier to the defendant's participation in his own trial.⁴

In contrast, some defenders of the Constitution's criminal procedure provisions argue that incarceration rates would be even higher if these protections were unavailable. This claim is

1. As of June, 1994, there were 1,012,851 men and women incarcerated in state and federal prisons. See *State and Federal Prison Population Tops One Million*, Department of Justice Press Release, October 27, 1994. The United States is now behind only Russia in incarceration rates. It has an incarceration rate more than four times that of Canada, more than five times that of England and Wales, and fourteen times that of Japan. See Steven A. Holmes, *Ranks of Inmates Reach One Million in a 2-Decade Rise*, N.Y. Times, at 1 (Oct. 28, 1994).

2. In the course of an opinion arguing that the exclusionary rule imposes unacceptable costs, Justice White was forced to concede that "[m]any . . . researchers have concluded that the impact of the exclusionary rule is insubstantial." *United States v. Leon*, 468 U.S. 897, 908, n. 6 (1984). A General Accounting Office study showed that in federal criminal prosecutions, 0.4% of cases were not prosecuted because of illegal search problems. Evidence was excluded in 1.3% of cases studied, and only 0.7% of those resulted in acquittals or dismissals. Report of the Comptroller General of the United States, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 8-14 (1979). Studies of state prosecutions yield similar data. See National Institute of Justice, *Criminal Justice Research Report — The Effects of the Exclusionary Rule: A Study in California* 1 (1983); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 Am. Bar Found. Res. J. 611.

3. For a good summary of the empirical evidence, see Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 455-461 (1987).

4. See Lloyd Weinreb, *Denial of Justice: Criminal Process in the United States* 112 (1977). Cf. Stephen J. Schulhofer and David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 Am. Crim. L. Rev. 73, 86 (1993) ("[I]f the Chief Defender values attorneys for their ability to move cases quickly and to persuade reluctant defendants to plead guilty, the accused might be better off making his own, poorly informed choice.")

similarly implausible. By now, the Fourth Amendment is so riddled with exceptions and limitations that it rarely prevents the police from pursuing any reasonable crime control tactic.⁵ Although the Supreme Court continues to insist on the ritualistic reading of *Miranda* warnings, judges have virtually gone out of the business of actually policing the voluntariness of confessions and regularly sanction the sort of coercive tactics that would have led to the suppression of evidence a half century ago.⁶ The courts have been satisfied with formal rules requiring the presence of counsel in the courtroom, while tolerating actual courtroom performances that make a mockery of the formal protections.⁷ And even when a defendant can demonstrate that the prosecution has violated minimal Fourth, Fifth, and Sixth Amendment protections, the recent evisceration of habeas corpus means that there may be no court available to entertain her claim.⁸

It seems unlikely, then, that the criminal procedure amendments have either exacerbated our crime problem or provided an effective bulwark against police and prosecutorial overreaching.

5. In many contexts, the Court has refused "to transfer from politically accountable officials . . . the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger," and concluded that "the choice among such reasonable alternatives remains with the government officials who have a unique understanding of, and a responsibility for, limited public resources." *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990). The modern Court has declined to treat "probable cause" as a fixed and rigid requirement that the police must meet before privacy is invaded. Instead, it is a "practical, nontechnical conception," *Brinegar v. United States*, 338 U.S. 160, 176 (1949), that is "not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The Court has insisted that the expertise of the officer at the scene be taken into account, *United States v. Ortiz*, 422 U.S. 891, 897 (1975), and that he not be shackled by post hoc judicial second guessing. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Even if the police act without probable cause, they need not fear the exclusion of evidence if they reasonably rely on a warrant, see *United States v. Leon*, 468 U.S. 897 (1984), and the warrant and probable cause requirements themselves are riddled with exceptions. See e.g., *New York v. Burger*, 482 U.S. 691 (1987) (exception for administrative searches); *California v. Acevedo*, 500 U.S. 565 (1991) (exception for automobiles); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (exception for "special needs").

6. In the quarter century since *Miranda*, the Court has reversed only two convictions on the ground that post-*Miranda* custodial interrogation produced an involuntary statement, compared with twenty-three Supreme Court reversals on voluntariness grounds in the comparable time period immediately preceding *Miranda*. See Louis Michael Seidman, *Brown and Miranda*, 80 Cal. L. Rev. 673, 744-45 & nn. 239, 240 (1992).

7. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (judicial review of counsel's performance should be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.")

8. See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991) (habeas unavailable after procedural default); *Teague v. Lane*, 489 U.S. 288 (1989) ("new rules" generally unenforceable on habeas); *Stone v. Powell*, 428 U.S. 465 (1976) (Fourth Amendment exclusionary rule generally unenforceable on habeas).

A third possibility is more plausible: constitutional protections intended to make prosecution more difficult instead serve to make the prosecutor's job easier.

This reversal of the historic mission of the criminal procedure amendments functions on both the individual and the global level. In individual cases, criminal procedure protections make the punishment we inflict on criminal defendants seem more acceptable. Although the amendments do little to make the prosecutor's job harder, people commonly believe that they obstruct the prosecution of dangerous criminals. Some doubt and ambivalence that might otherwise accompany the use of violent and coercive sanctions is thereby dissipated.

On the global level, criminal procedure protections serve to redirect and exacerbate the popular anger about crime. While crime rates have remained static and even declined slightly in recent years,⁹ the rate of incarceration has skyrocketed.¹⁰ There is no easy way to demonstrate that the crime rate would not be higher if we had incarcerated fewer people, but, at a minimum, these statistics demonstrate that the increased rate of incarceration is not caused by an increase in crime. Instead, it seems to be fed by the public *perception* that crime is out of control and that still more draconian punishments are necessary to deal with it.

Popular misconceptions about criminal procedure protections feed this perception. Because people believe that "legal technicalities" set large numbers of guilty and dangerous criminals free, they think that too many miscreants are escaping punishment. Because they believe that the problem could be brought under control if only the "legal technicalities" were changed, they fail to focus on the bankruptcy of mass-incarceration as a crime fighting strategy.

In the United States today, over one million people are imprisoned, the largest number in our history and the second largest percentage in the world.¹¹ One out of every 193 adult Americans is behind bars, and the total inmate population is

9. The most recent data, from 1993, indicate that the crime rate fell by three percent from the previous year, the second consecutive year of decline. The violent crime rate showed an annual decline of two percent. See Federal Bureau of Investigation, *Crime in the United States, 1993: Uniform Crime Reports* 11 (1993).

10. For the first six months of 1994, while the crime rate was declining, the number of prisoners grew by nearly 40,000, the equivalent of 1,500 per week. In the last decade, the United States prison population has doubled on a per capita basis. See *State and Federal Prison Population Tops One Million*, United States Department of Justice Press Release, Oct. 27, 1994.

11. *Id.*

roughly equivalent to that of the city of Phoenix.¹² Despite the absence of any evidence that these extreme measures have helped to control crime, political pressures grow for still more prisons, longer sentences, and more executions.

The criminal procedure amendments have done nothing to slow this decline into barbarism. Instead, they have contributed to an atmosphere that promotes acceptance of a situation that ought to shock us.

12. See Pierre Thomas, *U.S. Prison Population, Continuing Rapid Growth Since '80s, Surpasses 1 Million*, Washington Post, at 3 (Oct. 28, 1994).