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Criminal Procedure in a Conservative Age: A Time to Rediscover the Critical Nonconstitutional Issues

Richard S. Frase

Criminal procedure is changing fast these days, but teachers of criminal procedure are not. Most of us have probably given considerable thought to the philosophical and doctrinal significance of the Supreme Court's increasingly conservative approach to constitutional issues, but have we thought about the broader pedagogic and professional implications of this major doctrinal shift? For me, the current conservative trend raises fundamental questions about the kinds of *issues* we should be addressing in our teaching, research, and public service activities. In particular, we need to start asking ourselves whether our traditional heavy emphasis on constitutional issues (which has been going on since before most of us went to law school) is still appropriate. The answer is no, I believe, at least in the present conservative age, and perhaps in any age.

There has, of course, been some debate about the *degree* to which the Supreme Court under Chief Justice Burger has been less protective than was the Warren Court of the rights of criminal defendants and suspects.¹ All would agree, however, that the Burger Court has at least been somewhat more conservative all along, and many believe it is becoming more so all the time. Particularly in its decisions since the late 1970s, the Court often has not been content to merely hold the line on constitutional due process, but has begun to overrule major Warren Court precedents,² while continuing to cut back or narrowly construe exclusionary remedies³ and the scope of substantive constitutional limitations on searches and interrogations.⁴ Moreover, this conservative trend will probably accelerate if, as seems likely, President Reagan has the opportunity to make one or more additional appointments to the Court in his second term.

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1. See, e.g., Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in *The Burger Court: The Counterrevolution That Wasn't*, ed. Vincent Blasi, 62-68 (New Haven, Conn., 1983).
2. See, e.g., *Illinois v. Gates*, 103 S.Ct. 2317 (1983).
3. See, e.g., *United States v. Leon*, 104 S.Ct. 3405 (1984); *Nix v. Williams*, 104 S.Ct. 2501 (1984); and *Oregon v. Elstad*, 105 S.Ct. 1285 (1985).
4. See, e.g., *Immigration and Naturalization Service v. Delgado*, 104 S.Ct. 1758 (1984), and *New York v. Quarles*, 104 S.Ct. 2626 (1984).

Thus far, however, these significant doctrinal developments do not appear to have had much impact on the way in which criminal procedure teachers define their teaching, research, and public service roles. The only noticeable response has been the suggestion, by liberal teachers and jurists, of various ways in which defense attorneys can slow down or evade the reduction of constitutional standards—by discouraging appeals and otherwise seeking to avoid Supreme Court adjudication of federal constitutional issues, by vigorously contesting those issues that still reach the Court, and by requesting lower courts to define state constitutional guarantees more broadly than the minimum requirements imposed by the federal constitution.⁵ The liberal strategy, in other words, is to go on fighting the same constitutional law battles, with greater emphasis on litigation in state and lower federal courts. Conservative teachers are prompted to respond in kind—defending the current retrenchment of federal constitutional limitations, and arguing against the adoption of broader limitations under state law. Moderates likewise seem to go on playing the same old game with the same old issues, trying to sort out the merits of broader or narrower constitutional limitations under federal or state law.

It is time we stopped and asked ourselves whether the old game is still worth playing—indeed, whether it ever was. Does continued heavy emphasis on constitutional issues of criminal procedure really serve the best interests of defendants, suspects, and society? Is it the best way to improve (or at least maintain) the quality of criminal justice in this country? Is it the best allocation of scarce legal time, talent, and intellectual creativity—of lawyers, judges, ourselves, and our students? I think not. In saying this, I do not dispute the great philosophical importance of the Bill of Rights guarantees, as symbols of the relationship between American citizens and their governments. I also recognize that the obligations of professional responsibility may force defense attorneys to continue litigating many of these issues in every available forum. For academics, however, the question is whether we should encourage such litigation and symbol maintenance, and divert our own energies from other worthy causes, by continuing to strongly emphasize these constitutional issues in our teaching, scholarship, and law reform efforts. For the reasons developed below, I believe that criminal justice, and our students, will be better served if we deemphasize constitutional issues, especially certain heavily litigated search and interrogation questions, and refocus our efforts on reform of certain critical, but neglected, aspects of nonconstitutional criminal procedure. These reform proposals may well have the support of conservatives as well as liberals, thus giving them a reasonable likelihood of adoption and success, even in the current conservative political climate.

Two preliminary points before I begin. First, this article assumes liberal normative premises (which I share), and is addressed primarily to moderate

5. See generally, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 *Harv. L. Rev.* 1324 (1982).

and liberal teachers, because they must change their views the most on this subject. More conservative teachers presumably already agree that there is too much constitutional criminal procedure.

Second, my thesis should not be overstated; constitutional issues need to be deemphasized, not abandoned. Thus, despite my skepticism about whether certain heavily litigated search and confession rules have had much impact on either the outcome of cases or police practice, I continue to believe—as do many law enforcement officials⁶—that the existence of constitutional rights and exclusionary rules has had a beneficial impact on police behavior, and that abandonment of all exclusionary rules, or further narrowing of important substantive rights, would encourage serious police illegality. There may be certain constitutional rights that are so demonstrably important, either to the truth-seeking function of the criminal process or to other widely shared values, that they merit—and will reward—continued efforts to maintain or expand federal and state constitutional requirements.⁷

What I am saying is that we need to become much more *selective* in choosing constitutional issues to teach, research, and litigate. We must ask ourselves: “Even if courts could be persuaded to adopt or maintain a ‘better’ rule on this issue, so what? Will the rule really improve things enough to justify the time and expense of creating, maintaining, and trying to enforce it?”⁸ Asking this question should lead us to deemphasize issues that offer a relatively low “due process payoff,” for one or more of the following reasons: (1) the underlying due process values are generally perceived to be of lesser importance; (2) such values are too fact-dependent to yield meaningful and enforceable rules of law; (3) substantive rights are rarely applicable, or are unlikely to be asserted by those who possess them; and/or (4) exclusionary remedies are unlikely to be granted, or to affect police behavior. Specific examples of heavily emphasized but “low payoff” issues

6. See, e.g., Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 *Crim. Just. Ethics* (Summer/Fall, 1982).

7. One example of such an issue may be the right to counsel at precharge lineups. See *Kirby v. Illinois*, 406 U.S. 682 (1972), criticized in Joseph Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain against the Dangers of Convicting the Innocent?*, 72 *Mich. L. Rev.* 717 (1974). Several state supreme courts have rejected the *Kirby* limitation, and have extended the right to counsel to lineups conducted prior to formal charging, unless “exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation.” See, e.g., *Blue v. State*, 558 P.2d 636, 642 (Alaska 1977). It must be recognized, however, that the value of the counsel safeguard is likely to be substantially undercut by the willingness of courts (already demonstrated in the postcharge context) to “readily avoid . . . reversing convictions by stretching, often beyond reason and logic, the doctrines of independent source and harmless error.” Grano, *supra*, at 722. Nor should we lightly create a new occasion for case-by-case litigation of “exigent circumstances.” See text at note 12, *infra*.

8. See generally Derek A. Bok, *A Flawed System of Law Practice and Training* (Report to the Board of Overseers, Harvard University, 1981–1982), reprinted in 33 *J. Legal Educ.* 570–85 (1983), questioning whether many “legal safeguards . . . are worth in justice what they cost in money and delay” (at 581), and lamenting the “massive diversion of exceptional talent into pursuits that often add little” to the social good (at 573).

include searches of automobiles, and containers therein;⁹ informant-based probable cause (the *Aguilar* problem);¹⁰ and most *Miranda* issues.¹¹ The

9. In view of the number of theories now available to police and prosecutors seeking to introduce evidence derived from a car search, and the applicability of most of the "low payoff" criteria discussed in text (especially the extremely low value on privacy courts apply in these cases), it seems very unlikely that further litigation or doctrinal analysis will lead very many courts, state or federal, to recognize broader, enforceable constitutional protections in this area. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Ross*, 456 U.S. 798 (1982); *Michigan v. Long*, 105 S.Ct. 3469 (1983); *Rakas v. Illinois*, 439 U.S. 128 (1978); and *South Dakota v. Opperman*, 428 U.S. 364 (1976). When such protections are recognized, it will probably be in those rare cases in which a clearly defined police practice significantly affects the freedom of a large number of ordinary, law-abiding citizens (that is, "us" not "them"). See, e.g., *State v. Koppel*, 499 A.2d 977 (N.H. 1985), invalidating a drunk-driving roadblock despite nondiscretionary procedures used.
10. I do not mean to suggest that the "veracity" and "basis of knowledge" requirements were not useful criteria; my point is simply that efforts to reestablish these requirements under state law may not be worth the effort. It is difficult for anyone familiar with the *Aguilar* case law to dispute the Supreme Court's argument that these standards had become "an elaborate set of legal rules," increasingly technical and refined in their application. *Illinois v. Gates*, 103 S.Ct. 2317, 2327 (1983); indeed, *Aguilar* could be "refined" to achieve almost any result, including a finding of probable cause on the facts of *Gates* (see Justice White's concurrence, 103 S.Ct. at 2347-50). See generally, Richard S. Frase, *Criminal Evidence—Constitutional, Statutory, and Rules Limitations 27-29* (St. Paul, Minn., 1985), discussing the major pre-*Gates* cases in the United States and Minnesota Supreme Courts. Such ever-increasing complexity and refinement were inevitable, the Court argued in *Gates*, because the concept of probable cause itself depends entirely on an "assessment of probabilities in particular factual contexts", and is "not readily, or even usefully, reduced to a neat set of legal rules." 103 S.Ct. at 2328.

What the Court in *Gates* did not say, but which everyone familiar with criminal courts knows, is that the "legal" standard of probable cause is no better than the reliability of the police testimony offered to meet the standard. Since defendants are not entitled to demand disclosure of the identity of an informant who provided probable cause, *McCray v. Illinois*, 386 U.S. 300 (1967), the police can "create" probable cause, and evade even the strictest *Aguilar*-type rules, by suitably "padding out" their informant's tip—or simply quoting a nonexistent informant. Cf. Irving Younger, *The Perjury Routine*, *The Nation*, May 8, 1967, at 596-97 (criticizing *McCray*.) *McCray* was a *Warren Court* decision, and few state courts have shown a willingness to go beyond it.

11. Notwithstanding Justice Marshall's recent lament that the Court's new "public safety" exception to *Miranda* puts an end to "eighteen years of doctrinal tranquility," *New York v. Quarles*, 104 S.Ct. 2626, 2644 (1984) (Justice Marshall, dissenting), I think *Miranda*'s scope and meaning have been anything but clear from the beginning, and that the rule has become steadily more complex, and less enforceable. See, e.g., *Oregon v. Mathiason*, 429 U.S. 492 (1977) (suspect at police station was not "in custody"); *Berkemer v. McCarty*, 104 S.Ct. 3138 (1984) (defendants not yet formally arrested or taken to the police station may still be in "custody"); *Rhode Island v. Innis*, 446 U.S. 291 (1980) ("interrogation" includes more than "express questioning," but did not include apparent use of a stratagem—playing on suspect's humanitarian impulses—often recommended in police interrogation manuals); *Michigan v. Mosley*, 423 U.S. 96 (1975) (waiver upheld, despite suspect's earlier invocation of right to remain silent); *Edwards v. Arizona*, 451 U.S. 477 (1981) (waiver invalid, after invocation of right to counsel, absent defendant "initiation" of further discussions with police). In practice, of course, it appears that defendants usually do "waive" their *Miranda* rights, and that statements or derivative evidence obtained in violation of *Miranda* are often admissible anyway, see note 16, and accompanying text, *infra*.

If *Miranda* was not already a dead letter, practically speaking, the final nail in its coffin was driven by the Court's holding, in *Oregon v. Elstad*, 105 S.Ct. 1285 (1985), that a warned statement obtained forty-five minutes after an unwarned statement is not suppressible when there is no showing that either statement was involuntary. Since one of the principal reasons for the *Miranda* safeguard, however, was the difficulty of determining "voluntariness" long after the events in question, it can safely be predicted that few post-

extraordinary emphasis on such issues in recent teaching, research, and litigation strikes me as the modern-day equivalent of medieval debates over how many angels can dance on the head of a pin. The resulting doctrinal overrefinement recently led Justices O'Connor and Marshall, in a rare display of unity, to lament the "finespun . . . doctrine [and] hair-splitting distinctions, that currently plague our Fourth Amendment jurisprudence."¹² The problem goes beyond the Fourth Amendment, however.

Doctrinal refinement is not necessarily bad, of course, if the underlying values are important enough, the rules make sense, and they are frequently invoked and enforced. These criteria are often not met, however. I shall not dwell on the first point; those with more liberal views than mine may reasonably disagree about the importance of (in the examples cited above) limiting automobile searches and broadly defining the substantive and procedural meaning of a "voluntary" confession. Nor do I expect others to universally agree with my views on the second point—that such key concepts as probable cause and voluntariness (however defined) are highly fact-dependent value judgments that *cannot* be reduced to meaningful and enforceable rules of law. Instead, I rest my case primarily on the third and fourth criteria suggested above, and on the considerable empirical evidence showing that *all* constitutional search and confession rules—not just those criticized above—are rarely applicable, rarely invoked, rarely enforced by the courts, and rarely a principal reason for nonconviction. Thus, in retrospect at least, the elaborate constitutional limitations on searches and interrogations appear, even at their fullest, to be largely symbolic statements of our political ideals, having relatively little effect on either police behavior or the outcome of criminal cases.¹³

Elstad consecutive confession cases will result in suppression on voluntariness grounds. Moreover, the Court in *Elstad* did not dispute the general assumption that defendants are very likely to confess again, once they have "let the cat out of the bag." *Miranda* is dead, indeed, and it is unlikely to be resurrected by state courts, many of whom had already adopted the *Elstad* rule. *Oregon v. Elstad*, *supra*, 105 S.Ct. at 1294, n. 2, citing state cases.

One major reason for these disappointing results is our underlying ambivalence about the due process values at stake; at least during the early, "inquisitorial" stage of police investigation, we seem unwilling to enforce a definition of "voluntariness" which goes much beyond problems of unreliable confessions and brutal police methods (e.g., to include a right to make a *rational, informed* choice to confess). Cf. Joseph Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 *Am. Crim. L. Rev.* 1, 25-28 (1979) (implying that, after the commencement of "adversary judicial proceedings," such a broader definition is more appropriate, or at least an acceptable compromise). For better or worse, this is the value judgment we have made, and it is time to admit it.

12. *New York v. Quarles*, 104 S.Ct. 2626, 2636 (1984) (Justice O'Connor, concurring and dissenting); *id.* at 2645 (Justice Marshall, dissenting).
13. Cf. Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 *N.Y.U. L. Rev.* 785, 786 (1970), concluding that the Supreme Court's constitutional pronouncements are largely uniformed by—and unlikely to substantially affect—"the doings in the dark pit in which criminal suspects, police and the functionaries of the criminal courts wrestle." Amsterdam's pessimistic assessment is remarkable not only because of its author's indisputable liberal credentials, but also because it was made at what, in retrospect, appears to have been the high water mark of constitutional due process—the end of the Warren Court era. For a more recent discussion of the gap between due process ideology and practice, see Thomas Davies, "Do Criminal Due Process

The specific reasons why these constitutional rules have so little impact are familiar to us all, but their cumulative effect may not have been fully appreciated. To begin with, substantive search and confession rights rarely apply, or are easily avoided by the police, because the rights themselves have always been narrowly defined, or are routinely waived. Thus, recent research has confirmed that most searches occur either incident to arrest or by consent,¹⁴ and therefore require neither a warrant nor probable cause to search.¹⁵ As for police interrogations, although most were (until recently, at least) subject to *Miranda* requirements, the available empirical evidence suggests that defendants usually waive their rights to silence and counsel.¹⁶

Even where Fourth Amendment or *Miranda* rights are violated, the exclusionary remedy has long been subject to numerous exceptions. Defendants lack "standing" to object to even the most outrageous violations of another person's rights. Derivative "fruits" of the violation are admissible if there is sufficient "attenuation" of the causal link between the illegality and the fruits: if the police can show a legal, "independent source" for the evidence; or (more recently) if they can show that the "fruits" would "inevitably" have been discovered by lawful means. Moreover, the defendant is never a "suppressible fruit," no matter how illegal the arrest; only physical or other evidence *derived* from the arrest is suppressible. Furthermore, illegally obtained evidence is almost always admissible to impeach the defendant's testimony at trial, and may be almost as valuable to the prosecution in this supposedly "limited" use—or as a means of discouraging defendant from testifying at all—as it would be if introduced

Principles Make a Difference? A Review of *McBarnet's Conviction: Law, the State, and the Construction of Justice*, 1982 Am. Bar. Found. Res. J. 247-68; Jesse Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1-212 (1984), concluding that some criminal procedure rulings (e.g., right to counsel at preliminary hearing and trial; prohibition of physically coerced confessions) have been much more successful than others (e.g., *Miranda*), and that the impact of constitutional rights and exclusionary remedies in general may be greater than the impact of particular rulings. *Id.* at 9-10 (n.27), 15-17, 30-35, 57, 112-17.

14. See R. Van Duizend, L. P. Sutton & C. A. Carter, *A Review of the Search Warrant Process*, *State Court Journal* 4, 6 (Spring 1984).

15. See *United States v. Watson*, 423 U.S. 411 (1976) (warrantless arrest in a public place) and *United States v. Robinson*, 414 U.S. 218 (1973) (search incident to custodial arrest requires neither warrant nor probable cause to search). As for consent, the findings of the study cited in note 14, *supra*, suggest that "consent is the easiest thing in the world to obtain . . . you just make an offer that cannot be refused." As one officer put it:

[You] tell the guy, "Let me come in and take a look at your house." And he says, "No, I don't want to." And then you tell him, "Then, I'm going to leave Sam here, and he's going to live with you until we come back [with a search warrant.] Now we can do it either way." And very rarely do the people say, "Go get you get your search warrant, then."

State Court Journal, *supra* note 14, at 6. One might add that such "offers" are particularly irresistible when made to a *nonsuspect* who has sufficient "joint access or control" over the premises to give valid "third-party" consent. See *United States v. Matlock*, 415 U.S. 164, 171, n. 7 (1974).

16. See, e.g., Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of *Miranda**, 47 *Denver L.J.* 1 (1970), and authorities cited therein.

in the case-in-chief. If all else fails, courts are inclined to find that any improper evidence was harmless error, provided (as is usually the case) that there is other substantial evidence of guilt.

The cumulative impact of all these exceptions and limitations is reflected in the results of empirical studies of the exclusionary rule in practice: constitutional evidence problems have little or no impact on the outcome of federal criminal cases,¹⁷ and the impact in state cases has not been much greater.¹⁸ It is still possible, of course, that constitutional rules shape police behavior even if they are rarely enforced. In particular, many believe that the existence of constitutional rights and exclusionary remedies has encouraged police administrators to increase preservice and inservice training in proper investigatory procedures, and also encourages police to seek, and prosecutors to offer, legal advice on constitutional requirements.¹⁹ It seems unlikely, however, that police can be trained to understand and follow all the finer points of current search and confession doctrine.²⁰ The police cannot apply a rule they cannot understand, and they will refuse to apply it if it seems overly technical or arbitrary; for the same reasons, reviewing courts are reluctant to enforce such rules, thus further limiting their impact on case outcomes and police practices.

Perhaps the most important practical impact of increasingly complex search and interrogation rules and remedies has been the considerable amount of time and energy they have consumed, both for overworked courts and attorneys and for law professors, their students, and other potential

17. See U.S. Comptroller General, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions*, 8, 11, 13-14 (1979) (only 0.4 percent of matters U.S. attorneys declined to prosecute were rejected primarily because of a search and seizure problem; of prosecuted defendants, 11 percent filed a Fourth Amendment motion to suppress, evidence was excluded in 1.3 percent of all cases, and half of the cases with exclusion still ended in conviction).

18. See, e.g., Thomas 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. B. Found. Res. J. 611-90 (in the four-year period 1976-1979, only five percent of felony complaints rejected for prosecution in California were rejected primarily due to search and seizure problems, and such search and seizure rejections comprised less than 1 percent of matters referred for prosecution by the police; looking at the cumulative effect of the exclusionary rule through all stages of the adjudication process, only about 2.4 percent of felony arrests were dropped due to illegal searches); Peter Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. Bar. F. Res. J. 585, 593-602 (study of 7,500 cases in three states, finding that motions to suppress physical evidence were filed in 5 percent of all cases (mostly in drug and weapons cases), were granted in 0.7 percent of all cases, and resulted in nonconviction in 0.6 percent of all cases; motions to suppress identifications or confessions were filed in 5 and 7 percent of all cases, respectively, were granted in 0.08 and 0.16 percent of cases, and resulted in nonconviction in .01 and .07 percent of all cases).

It is possible, of course, for a constitutional violation to affect disposition even if the case results in conviction: the defendant may receive a reduced sentence, reduced charge, or both as a result of a threatened or actual motion to suppress. The extent of this phenomenon has not been empirically evaluated. See Davies, *supra* note 18, at 668-69.

19. See Sachs, *supra* note 6, at 30-32. For a review of the voluminous literature on whether and to what extent the Fourth Amendment exclusionary rule affects police behavior, see Choper, *supra* note 13, at 30-33.

20. See, e.g., cases discussed in notes 9 to 11, *supra*.

reformers of our criminal justice system. We have spent literally millions of hours teaching, writing, and arguing about matters that, however important they may be in principle, have little effect upon the outcome of most cases, and perhaps even less effect on police behavior. This situation is unlikely to change very much if we begin to give greater attention to constitutional litigation in the lower courts (except that the law of searches and interrogations will become even more complex, as courts in fifty states address the issues previously dominated by the Supreme Court). There is little reason to think that most lower courts will be much more receptive than is the current Supreme Court to complex due process arguments in search and confession cases. Lower federal courts are also increasingly staffed by Reagan and Nixon appointees; state courts are presumably even more "political," and thus at least as likely to succumb to current pressures to "get tough" on criminals and disregard constitutional "technicalities."²¹

Meanwhile, the issues of criminal justice that really *matter* in most cases—the rules and practices that directly affect the quality of justice, the likelihood of conviction, and the severity of punishment—will continue to receive insufficient attention. Although any "priority" list of criminal justice issues is admittedly somewhat subjective (and highly dependent on local conditions), it is not difficult to identify examples of neglected problem areas and issues which, in most criminal cases and in most jurisdictions, are *more* important than the kinds of search and confession rules which have dominated our attention—without suggesting that these are the *only* important alternative issues, or that they are the *most* important in every jurisdiction. My own "alternative agenda" of criminal justice issues would focus on four interrelated problems: unnecessary pretrial detention, coercive plea bargaining, unregulated sentencing discretion, and dehumanizing prison conditions. Most observers of our criminal courts would agree that these problems account for some of the worst, and most widespread, failures of justice in this country, yet these important issues were neglected by the Warren Court and by many criminal justice reformers of the 1960s and 1970s. Most of these problems are difficult to resolve as a matter of federal constitutional law²²—they must be addressed at the state

21. Some states have already begun to retreat from their earlier expansions of state due process rights. See, e.g., *People v. Lance W.*, 37 Cal.3d 873, 694 P.2d 744 (1985) (1982 amendment to state constitution forbids exclusion of evidence on state grounds that would not be excludable under federal constitution).

22. Prison reform may be the exception here, in view of the extensive constitutional litigation of prison conditions, beginning in the early 1960s. A recent review of the "prisoners' rights movement" (defined to include not only litigation, but also efforts to work directly with legislatures, executive agencies, and professional organizations such as the American Correctional Association) concluded that it had "contributed greatly to the reduction of brutality and degradation, the enhancement of decency and dignity, and the promotion of rational governance." James B. Jacobs, *New Perspectives on Prisons and Imprisonment* 60 (Ithaca, N.Y., 1983). The author also noted, however, that prisons remain "too often dilapidated, overcrowded, underfunded, and poorly governed." *Id.* See generally, Steve Lerner, *Rule of the Cruel: How Violence Is Built into America's Prisons*, *The New Republic*, October 15, 1984. In large part this situation may be due to the inability of constitutional litigation to deal with the fundamental problems of underfunding and overcrowding. Cf. *Rhodes v. Chapman*, 452 U.S. 337 (1981) (double-celling not cruel and

and local level, in light of local practices, resources, and values. Such local reforms are often slow and difficult, and are beyond the immediate professional responsibilities of defense counsel; thus, they have too often been neglected in favor of constitutional litigation of Bill of Rights guarantees.

Legal educators may bear a particular heavy responsibility for this state of affairs; our teaching²³ and scholarship have strongly emphasized the most frequently litigated constitutional issues of criminal procedure, which in turn helps to perpetuate and reinforce this emphasis in the minds of students, lawyers, and policy makers. As teachers, we may claim that we must train our students to "play the game" (and, before that, pass the bar exam), whether or not the rules really matter; a similar justification might be offered for the heavy emphasis on constitutional issues in our scholarship. It is also possible, however, that we prefer constitutional law for its greater prestige, or because emphasis on federal law shows that we are a "national" law school, or simply because we already have a substantial teaching and research investment in these familiar issues—I know I do.

It is time, nevertheless, to redefine our priorities and our roles as teachers, scholars, and law reformers. Training future criminal lawyers to "play the game" may be *one* of our roles as teachers, but it is not the most important one. Law school is a "liberal arts" institution, not a trade school, and Criminal Procedure is, or should be, a course designed for future legislators and other public opinion leaders and policy makers, as well as for future criminal lawyers.²⁴ Such a course must seek to open students' minds to

unusual punishment). Moreover, some have argued that prisoners' rights litigation contributed to an *increase* in prison violence, as inmates gained increased freedom of unsupervised movement. Lerner, *supra*, at 21.

23. With few exceptions, criminal law and procedure texts maximize coverage of constitutional issues, and ignore or only briefly address problems of nonconstitutional procedure. Most criminal law texts almost completely ignore issues of criminal justice administration and its reform; a notable exception is Caleb Foote & Robert Levy, *Criminal Law—Cases & Materials* (Boston, 1981). Criminal procedure texts are often limited *entirely* to constitutional issues, although a few devote substantial space to nonconstitutionalized rules and procedures, see, e.g., Yale Kamisar, Wayne LaFare & Jerold Israel, *Modern Criminal Procedure—Cases, Comments, Questions*, 5th ed. (St. Paul, Minn., 1980, and annual supplements). Nevertheless, the primary emphasis of these broader texts (and especially their annual supplements) still seems to be on constitutional issues, especially search and interrogation doctrines and exclusionary rules; indeed, this material is so voluminous that if it is not specifically *deemphasized* (and heavily "edited down") by the teacher, it can easily consume almost all the available time in a three-credit, one-semester course. As a result, criminal procedure courses probably cover very little beyond the "core" Fourth, Fifth, and Sixth Amendment material. Separate courses and seminars on criminal justice administration or "advanced" criminal law or procedure exist in many law schools, but they can attract only a handful of third-year students who have the prerequisite coursework and motivation to continue their studies of criminal justice. For an example of a text designed specifically for such a course, see Franklin Zimring & Richard S. Frase, *The Criminal Justice System: Materials on the Administration and Reform of the Criminal Law* (Boston, 1980).

24. I would agree that "liberal arts" in this context also includes developing an appreciation for the ideals of justice reflected in constitutional guarantees, whether or not the rules make much difference; it further includes giving future lawyers the ability to understand, apply, and interpret (to clients and the public) the sometimes mystifying decisions of courts on

issues that have *not* been heavily litigated but *should* be; to explore issues best resolved through legal processes other than litigation (rule making and legislation, for example); and to raise issues that are important although difficult to resolve through *any* existing legal process. Similarly, I view our roles as scholars and law reformers to be broader than simply contributing to the development of "better" appellate case law. Indeed, our most important roles may be to address issues, and pursue legal processes, which courts and practicing attorneys inevitably tend to neglect.

But even if we shift our attention to these neglected issues and processes, will it really make any difference? Many moderate and liberal criminal procedure teachers would agree that reforms in such areas as pretrial detention, plea bargaining, sentencing, and prison conditions are long overdue in most jurisdictions. They might also grudgingly concede (off the record, at least), that further preoccupation with highly refined constitutional search and interrogation issues is unlikely to substantially benefit defendants, suspects, citizens in general, or even our students. The more likely objection is that the proposed nonconstitutional reforms will be no more successful than continued litigation of search and interrogation issues; since such reforms tend to be viewed as favorable to defendants, they will never succeed in the current conservative political climate. Properly understood, however, reform in each of these areas deserves, and can obtain, "bi-partisan" support.

In the case of bail reform, it is true that unnecessary pretrial detention of persons who would appear for trial if released hurts these defendants more than anyone else, but society pays the bill eventually, in a variety of ways: increased costs to build and maintain jails, lost productivity and income taxes, increased welfare expense for dependents, disruption of stabilizing family and community ties, and the understandable bitterness of detainees who eventually receive probation or dismissal of their charges, or who are coerced into pleading guilty in order to obtain immediate release from intolerable jail conditions.²⁵ Even if pretrial detention is viewed as a means to prevent further crime by the accused—a purpose illegal in almost all

these issues. Again, I do not propose that we completely abandon constitutional issues, only that we not spend practically *all* of our time, in the *only* criminal procedure course most students will ever take, on these increasingly technical, "low payoff" issues.

25. The problem of bail and its reform is considered in Zimring and Frase, *supra* note 23, at 296-349. See also Hans Zeisel, *The Limits of Law Enforcement* (Chicago, 1982), analyzing pretrial release and detention practices in New York City. Despite that city's reputation for liberal pretrial release policies, Zeisel found that about one-third of felony defendants were not released, *id.* at 208. Moreover, detained defendants appeared to be much more likely to be convicted and receive custody sentences than similar defendants who obtained pretrial release (due in part to the pressure on detained defendants to plead guilty in return for immediate release and a sentence of "time served"). *Id.* at 220-27. Nevertheless, Zeisel also found that 32 percent of detained defendants were *not* convicted, and another 17 percent of all detainees were convicted but did not receive custody sentences, *id.* at 219; thus, about half (49 percent) of those detained prior to trial were never found legally deserving of custodial punishment. The policy implications of this data are discussed in Richard S. Frase, *Review Essay: Defining the Limits of Crime Control and Due Process*, 73 *Cal. L. Rev.* 212, 239-43 (1985).

jurisdictions,²⁶ but which everyone knows is the real reason for detention in many cases—our present indirect approach to this problem is unsatisfactory. The use of high money bail to prevent the release of persons who *might* be dangerous—with no evidence, standards, or argument directed to this issue—results in the detention of the poorest, not necessarily the most dangerous, defendants.²⁷ The “preventive detention” of many nondangerous persons is not only wasteful and unfair, it is also shortsighted; enforced idleness in the company of criminals can only encourage more crime (and more successful crime) following release.

Some conservatives also view prison reform as “coddling criminals” by sending them to “country club prisons.” Closer examination of the sordid reality of our prison systems should serve to dispel this misconception; although there are a few minimum security prisons that bear some physical resemblance to a college dorm, if not a country club, none are places in which any sane person would want to be locked up overnight. Moreover, the vast majority of American prisons are old, overcrowded, insufficiently staffed, and therefore highly dangerous to both prisoners and guards.²⁸ Imprisonment under such conditions is not only inhumane, it is self-defeating. Since most prisoners will be released when they are still young enough to resume their criminal careers, we must strive to make our prisons places that at least do not make offenders *more* prone to crime than they were before being imprisoned, even if we can do little to make them less so. But the current conditions in most of our prisons seem well designed to turn out more dedicated and skillful criminals, persons who have been systematically brutalized, stripped of self-respect and dignity, unable to assume the responsibilities of freedom, and trained for no calling but crime. If a large number of them soon return to that calling,²⁹ we should not be

26. But see D.C. Code 23-1321 et seq., a 1970 statute authorizing the preventive detention of defendants charged with certain violent crimes. This statute was upheld in *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (*en banc*). See also Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, chap. 1, Sections 201-203, 98 Stat. 1976-85 (1984), permitting preventive detention in any federal criminal case where the court finds that “no condition or combination of conditions [of release] will reasonably assure . . . the safety of any other person and the community.” *Id.*, Section 203, 98 Stat. 1978 (to be codified at 18 U.S.C. 3142(e).

27. A significant new development here is the inclusion, in the bail provisions of the Comprehensive Crime Control Act of 1984, *supra* note 26, of a statutory “right to affordable bail.” The act provides that federal magistrates and judges “may not impose a financial condition [of release] that results in the pretrial detention of the person.” *Id.*, Section 203, 98 Stat. 1978 (to be codified at 18 U.S.C., Section 3142(c).

28. See generally, Lerner, *supra* note 22.

29. No one knows the true recidivism rate for persons released from prison, but we do know that a large number of them are returned to prison within a few years. A recent study of twenty states found that the cumulative percentages returned to prison at one, two, and three years following release were 15 percent, 25 percent, and 31 percent, respectively. U.S. Dept. of Justice, Bureau of Just. Statistics, Special Report: Returning to Prison (1984), table 1. In some states, as many as half were returned for “technical violations” of parole conditions, rather than conviction of a new criminal offense; on the other hand, not all offenses by such releasees were detected, and some may have been charged with offenses in other states, *id.* at 2. It is also possible that many recidivists would have returned to crime *whether or not* they

surprised. For these reasons many conservatives—including Chief Justice Warren Burger³⁰—have recognized and begun to advocate the cause of prison reform.

Reforms of plea bargaining and sentencing practices have also received increasing support from conservatives, who view prosecutorial and judicial discretion as typically conferring undeserved leniency on the accused.³¹ But again, reform in these areas is, or ought to be, a “bi-partisan” issue; the truth is, plea bargaining and uncontrolled sentencing discretion hurt defendants *and the public*, sometimes in the same case. Although some defendants receive undeserved charge³² or sentence leniency through plea bargaining, others are coerced into pleading guilty to charges of which they could not be convicted at trial.³³ When a defendant resists this coercion and is convicted at trial, he may receive an unjustly harsh sentence, as punishment for daring to exercise his constitutional rights.³⁴ Judicially imposed sentencing disparity also has its private as well as public costs. For

had been held for a time in prison, and that brutal prison conditions persuade some inmates to *give up* crime. In the absence of better data on these crucial points, we must draw our own conclusions, based on our assumptions about human nature. I suggest that it is implausible to expect criminal propensities to remain constant or decrease as a result of prolonged exposure, as witness, victim or perpetrator, to rape, violent assault, theft, and destruction of property.

30. See, e.g., Warren E. Burger, *The Need for Change in Prisons and the Correctional System*, 38 Ark. L. Rev. 711-26 (1985).
31. President Nixon's “crime commission” (unlike the one appointed by President Johnson), for example, refused to accept plea bargaining as inevitable or desirable, and called for its abolition within five years. U.S. National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, Standard 3.1 (1973). Sentencing reform has also been supported by conservatives as well as liberals. For an account of the “strange bedfellows” coalition which helped to enact one recent sentencing reform, see Sheldon Messinger & Phillip Johnson, *California's Determinate Sentencing Statute: History and Issues*, in *Determinate Sentencing: Reform or Regression?* 13-57 (U.S.G.P.O., 1978), reprinted in Zimring & Frase, *supra* note 23, at 950-87.
32. See Frase, *supra* note 25, at 231-33, summarizing the particular problems of “non-evidentiary” charge bargaining—that is, the dropping of *provable* charges in return for a plea. Such problems include understating the true seriousness or frequency of defendant's crimes, and distorting court and criminal history records; allowing prosecutors to exercise what is essentially judicial sentencing power; and undercutting sentencing and parole reforms.
33. See William Rhodes, *Plea Bargaining: Who Gains? Who Loses?* (Institute for Law and Social Research, Washington, 1978), reprinted in Zimring & Frase, *supra* note 23, at 550-58. Using a model developed from cases that went to trial, Rhodes found that the probability of acquittal for defendants who pled guilty in the District of Columbia was 34 percent for assault cases, 16 percent for robbery cases, 31 percent for larceny cases, and 32 percent for burglary cases. Zimring & Frase, at 557.
34. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), upholding habitual offender conviction and life sentence imposed on a defendant who refused offer to plead guilty to initial charge of forgery in return for a five-year prison term. Although the majority assumed that the habitual offender charge was “fully justified by the evidence” (434 U.S. at 359), Justice Powell, dissenting, suggested that the prosecutor's decision to initially file only the forgery charge showed that even he recognized that a life sentence would be excessive (434 U.S. at 370-71). For an analysis of some recent data suggesting that guilty plea defendants do both better and worse than they would if they went to trial, see Frase, *supra* note 25, at 226. The general problem of plea bargaining and its reform is discussed in Zimring & Frase, *supra* note 23 at 493-687.

every defendant who gets an unduly lenient sentence from a "soft" judge, there is another who receives unjustified severity from a "hanging" judge.³⁵ Racial and economic biases are also likely to result from the exercise of broad plea bargaining and sentencing discretion. But the conservatives are still right: these defects of plea bargaining and sentencing hurt all of us, not just certain "unlucky" defendants. Justice is the final victim, and law enforcement loses the respect and support it must have from the public, and from its own officials, to maintain high standards of crime control and due process.

Why have we tolerated such a lawless system of adjudication and punishment? The reasons are probably as complex as our society and its legal institutions, but one important cause—the overwhelming dominance of a few constitutional issues in criminal procedure teaching, research, and litigation—is waning, or ought to be. Criminal procedure teachers must begin to ask themselves whether their past efforts have been well spent. It may be that both as a nation and as individuals, we have squandered our idealistic energies on matters about which we can do little (at least by means of constitutional rules of evidence), while neglecting issues that have much more impact on the quality of criminal justice, and that may be more responsive to reform efforts. A number of states and local jurisdictions have already made significant progress toward reform in the areas of pretrial detention,³⁶ plea bargaining,³⁷ sentencing,³⁸ and prison reform;³⁹ change is

35. See, e.g., Shari Diamond & Hans Zeisel, *Sentencing Councils. A Study of Sentencing Disparity and Its Reduction*, 43 U. Chi. L. Rev. 109 (1976), finding that when federal judges reviewed *identical* cases, the sentencing recommendations of some judges were as much as 58 percent more severe than the average of all judges of the same court (at 123, table 7). The problem of sentencing disparity and reform is discussed in Zimring & Frase, *supra* note 23, at 690-1006.

36. One study of pretrial release practices in twenty major cities found that the percentage of felony defendants released in 1971 varied from a low of 38 percent to a high of 87 percent. Wayne Thomas, *Bail Reform in America* 41 (Berkeley, 1976). Between 1962 and 1971, most of these jurisdictions had substantially increased the proportion of defendants released, *id.* at 40 and 41; for all twenty cities combined, the percentage released increased from 48 to 67. See also Frase, *supra* note 25, at 239-44, discussing the particular importance of further reducing pretrial detention in less serious cases, and suggesting ways to achieve this result.

37. For an evaluation of Alaska's attempt to prohibit plea bargaining as of July 1, 1975, see Michael Rubinstein & Teresa White, *Alaska's Ban on Plea Bargaining* (Alaska Judicial Council, 1978), reprinted in Zimring & Frase, *supra* note 23, at 674-84. See also Frase, *supra* note 25, at 230-33 (discussing several types of plea bargaining which are particularly in need of regulation or prohibition, and suggesting procedures to achieve this); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931-1050 (1983); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037-1107 (1984) (examining the use of court trials instead of plea bargaining, in Philadelphia, and arguing that this approach is affordable and preferable).

38. For a description of Minnesota's Sentencing Guidelines, which limit both the decision whether to impose prison as well as the length of prison terms, see Foote & Levy, *supra* note 23, at 825-41. The current guidelines are published in Minnesota Rules of Court 273-330 (St. Paul, Minn., 1986). The history and implementation of the Minnesota guidelines are reported in Minnesota Sentencing Guidelines Commission, *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation* (1984).

possible, but much remains to be done. Perhaps the recent conservative trend of the Supreme Court will help to shift greater attention to these neglected issues; if so, it may well prove, even for liberals, to have been a cloud with a silver lining.

But what if the Supreme Court's recent conservative trend moderates in the years ahead? Indeed, what if the liberal justices "hold on" until 1988, a Democratic president is elected, and the Court becomes more liberal again? Or suppose a large number of state supreme courts are persuaded to substantially expand constitutional due process protections, under state law? Any of these scenarios might usher in a new "golden age" of constitutional criminal procedure, at least in some states. Even then, however, moderates and liberals must look at the reality of criminal justice in the "best" years of the Warren Court, and ask themselves whether more liberal search and confession rules really make much difference for most defendants or for the rights of citizens in general. The broader thesis here is that they do not, that there are far more important issues of criminal justice which cry out for our attention, and that the constitutional law brain drain must end.

Since the Minnesota Guidelines went into effect in 1980, very similar sentencing reforms have been enacted in Washington state and for the federal courts. See Washington Sentencing Guidelines Commission, Report to the Legislature (January 10, 1983), containing proposed guidelines applicable to felonies committed on or after July 1, 1984; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, chap. II, Sections 217-236, 98 Stat. 2017-2034 (1984), creating a Federal Sentencing Guidelines Commission charged with developing guidelines to govern sentencing of federal offenders.

39. See generally Jacobs, *supra* note 22. To the extent that prison overcrowding is the principal current barrier to improved prison conditions, the solution may lie in sentencing reforms designed specifically to stay within existing or planned prison capacity. This was one of the explicit goals of sentencing reform in Minnesota, and the goal has been largely achieved; Minnesota's prison population increased by only 8 percent in the four years following implementation of the guidelines (1980-1984), whereas state prison populations nationwide increased by 41 percent during the same period. U.S. Dept. of Justice, Bureau of Justice, Statistics, Bulletin: Prisoners in 1984 (1985), table 3.