COUNTER-REVOLUTION IN CONSTITUTIONAL CRIMINAL PROCEDURE ?

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I do not here propose a direct defense of the Warren Court's exclusionary rule jurisprudence;[1] rather, I wish to make an observation about one of the negative consequences of the Supreme Court's gradual shift away from the Warren Court's constitutional criminal procedure jurisprudence.[2]

It is now almost conventional wisdom that an exclusionary rule regime is harmful because of the public disrespect for and cynicism about the criminal justice system that it engenders.[3] However, I contend that the public today actually has too much respect for our criminal justice system. The public has too much faith that the constitutional rights of those suspected of crime will be protected by the courts, and, concomitantly, too little appreciation of the dangers to civil liberties posed by expansive law enforcement powers. These public misperceptions contribute to an unfortunate willingness on the part of the popularly elected branches of government to use law-enforcement resources and the institutions of the criminal justice system as the first line of defense against every social ill—in ways that not only threaten civil liberties but have been and continue to be largely ineffectual.

The public's exaggerated faith in the fairness and protectiveness of our criminal justice system is at least partly a result of lax enforcement of the Warren Court's exclusionary rule regime. This perhaps paradoxical conclusion becomes

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1. For an example of my conclusions about Fourth Amendment jurisprudence, see Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (replying to Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994)).

2. The argument that follows has been developed into a full-length article. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

3. Judge Markman makes this very point in his Article. *See* Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425, 431 (1997).

more convincing if one contemplates a puzzle that goes back to the 1968 presidential election. When Richard Nixon ran for president in 1968, he campaigned on a now-familiar law-and-order platform. Among other things, he targeted the Warren Court's controversial decisions in the area of constitutional criminal procedure. When Nixon won the presidency and quickly replaced the Chief Justice and three Associate Justices with appointees of his own, it was widely predicted that the major innovations of the Warren Court would not long survive.[4] In the now almost 30 years since Nixon's victory and Earl Warren's retirement from the Court, the Supreme Court's pulse-takers have offered periodic updates on the fate of the Warren Court's criminal procedure revolution in the Burger and Rehnquist Courts.[5]

Now for the puzzle. The shared belief that the Warren Court revolution would die a quick death soon gave way to widespread disagreement about the nature and extent of the response of the Burger and Rehnquist Courts. On the one hand, many commentators (usually admirers of the Warren Court's handiwork) have lamented what they view as a wholesale repudiation of the Warren Court's work. Their comments are full of words like "retreat,"[6] "decline,"[7] and "counter-revolution."[8] On the other hand, other commentators (many of

4. Obvious examples of these innovations include: Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Fifth Amendment requires warnings to suspects preceding any custodial interrogation); Massiah v. United States, 377 U.S. 201 (1964) (holding that the Sixth Amendment precludes the use of incriminating statements deliberately elicited by law enforcement agents after a defendant's indictment in the absence of counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to the States).

5. *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 COUNTER-REVOLUTION THAT WASN'T 62, 682 (Vincent Blasi ed., 1983); Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 595 (1977); Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 MICH. J.L. REFORM 395, 400 (1989); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1324 (1977); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 208 (1980); Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471 (1985).

6. Chase, *supra* note 5, at 595.

7. Maclin, *supra* note 5, at 1259.

8. Whitebread, *supra* note 5, at 498.

them also defenders of the Warren Court) have maintained that these laments are "overstated"[9] and "considerably exaggerated,"[10] and that the basic structure of the Warren Court's criminal procedure jurisprudence is firmly "entrenched."[11] As one critic of the Warren Court recently has bemoaned, "[t]he voice that continues to urge repentance [from the Warren Court's criminal procedure] today is truly '[t]he voice of him that crieth in the wilderness.'"[12]

This intense scholarly disagreement about whether or not the Warren Court's work has survived in the ensuing decades could be explained in a variety of ways. One could attempt to explain disagreement about the nature of change by distinguishing between levels of abstraction (between, for example, "doctrinal" and "ideological" change).[13] Or one could note that the difficulties inherent in weighing and measuring any sort of jurisprudential shift are greatly exacerbated in the broad, diffuse, and fact-specific jungle that is constitutional criminal procedure. Or one could simply write off the more extreme statements on either side of this debate as a form of academic spin control.

I resist these temptations to downplay or deny the conflict in the scholarly literature, because the debate over continuity and change in constitutional criminal procedure can best be accounted for in an entirely different way—a way that suggests a new kind of critique of the Burger and Rehnquist Courts' criminal procedure jurisprudence. The Supreme Court *has* profoundly changed its approach to constitutional criminal procedure since the 1960s, at least in the following fairly limited (but obviously important) sense: the Court has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order. In the last three decades, the Court has granted review to and found in favor of criminal defendants much less frequently than it did in the heyday of the Warren Court.[14] Thus, at least in

9. Israel, *supra* note 5, at 1324.

10. Kamisar, *supra* note 5, at 68.

11. Saltzburg, *supra* note 5, at 208.

12. Grano, *supra* note 5, at 400.

13. *See, e.g.*, Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983).

14. *See* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 352 (1983) (comparing the percentages of cases accepted for review by the Supreme Court from criminal defendants

Holmes' positivist sense of law as a prediction of what courts will do in fact,[15] the law has radically changed.

The *way* in which this change has occurred, however, may help explain the academic divide. Much of the change has occurred quite differently from what was predicted at the close of the Warren Court era. The Burger and Rehnquist Courts have not altered radically the Warren Court's constitutional norms regarding police practices. The edifice constructed by the Warren Court governing investigative techniques under the Fourth, Fifth, and Sixth Amendments remains surprisingly intact. Rather than redraw the line between constitutional and unconstitutional police conduct, the Supreme Court has revolutionized the consequences of deeming conduct unconstitutional. This revolution has not taken the form of wholesale abolition of the Fourth Amendment's exclusionary rule, or the Fifth or Sixth Amendments' mandates of exclusion; rather, the Court has proliferated a variety of what we might term "inclusionary rules"—rules that permit the use at trial of admittedly unconstitutionally obtained evidence, or that let stand convictions based on such evidence. Examples of inclusionary rules are the doctrines regarding standing, the good-faith exception to the warrant requirement, the "fruit of the poisonous tree,"[16] impeachment, harmless error, and limitations on federal habeas review of criminal convictions.

Helpful here is Professor Meir Dan-Cohen's distinction (which he in turn borrowed from Jeremy Bentham) between "conduct" rules and "decision" rules.[17] Bentham and Dan-Cohen make this distinction in the context of substantive criminal law. In that arena, conduct rules are addressed to the general public in order to guide its behavior (for example, "Let no person

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and prosecutors in the mid-sixties and the mid-seventies).

15. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

16. *See* Wong Sun v. United States, 371 U.S. 471, 485-88 (1963) (using the "fruit" metaphor to describe the mode of analysis for determining when the connection between illegal police conduct and recovered evidence is sufficiently attenuated to permit the use of the evidence at trial) (citing Justice Frankfurter's opinion in Nardone v. United States, 308 U.S. 314 (1939)).

17. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984) (quoting JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (Wilfrid Harrison ed., Basil Blackwell & Mott, Ltd. 1948) (1776 & 1789)).

steal"), and decision rules are addressed to public officials in order to guide their decision-making about the consequences of violating conduct rules (for example, "Let the judge cause whoever is convicted of stealing to be hanged"). But as any teacher of both substantive and procedural criminal law knows, constitutional criminal procedure is a species of substantive criminal law for the police. Thus, in this context, conduct rules (my "constitutional norms") are addressed to law enforcement agents regarding the constitutional legitimacy of their investigative practices, and decision rules (my "inclusionary rules") are addressed to courts regarding the consequences of unconstitutional conduct.

Let us examine a case that will illustrate this distinction: the prosecution of Robert Williams, whose case went up to the Supreme Court twice in a period of seven years.[18] Williams was arrested and charged with the abduction and murder of a ten-year-old girl. Although Williams was represented by counsel, one of the two detectives who accompanied Williams during a several-hour-long car trip between jurisdictions gave him the now-famous "Christian burial speech." Knowing that Williams was deeply religious and also a former mental patient, the detective addressed Williams as "Reverend" and noted that an oncoming snowstorm might bury the missing girl's body and make it impossible for her parents to find her and give her a Christian burial. The detective then stated, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."[19] Williams then made a number of incriminating statements and directed the detectives to the location of the girl's body.

The first time this case went to the Supreme Court, the Court held that Williams' incriminating statements could not be used against him at trial.[20] The Burger Court rested its holding squarely on *Massiah*, the controversial Warren Court case that had held that the Sixth Amendment precludes law enforcement agents from using incriminating statements deliberately elicited from defendants after the right to counsel has attached.[21]

18. *See* Brewer v. Williams, 430 U.S. 387, 392-93 (1977); Nix v. Williams, 467 U.S. 431 (1984).

19. *Williams*, 430 U.S. at 392-93.

20. *Id.* at 400.

21. *See Massiah*, 377 U.S. at 201.

Moreover, the Court's construction of the concept of "deliberate elicitation" was a very generous one, extending beyond direct interrogation. Despite predictions that the Court would use Williams' case to limit *Miranda*, on which the decision below had partly rested, the Burger Court not only left *Miranda* intact, it also reaffirmed *Massiah* and even gave it new force.

Williams' case, however, was not over. He was retried and convicted again, and his case went back up to the Supreme Court. In this second case, the Supreme Court held that the second trial court had properly admitted evidence relating to the condition of the girl's body (as opposed to Williams' incriminating statements, which were not used by the prosecution), because the body would very likely have been found by the police even without the improper Christian burial speech.[22] Thus, the Court created the so-called "inevitable discovery" rule. This is an example of an inclusionary rule that permits the government to use at trial evidence that was originally discovered as a result of unconstitutional police conduct.

The *Williams* example, in its two incarnations, neatly illustrates a more general trend: a Court protective of constitutional norms, with strong rules about what the police are and are not permitted to do under the Constitution, combined with an expansive construction of a multitude of inclusionary rules that permit the government to escape the consequences of police misconduct. The dichotomy between decision rules and conduct rules helps to explain the existence of such a deep academic divide. The proponents and debunkers of the "counter-revolution" hypothesis are *both* right: the Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional "rights," while waging counter-revolutionary war against the Warren Court's constitutional "remedies" of evidentiary exclusion and federal reversal of state convictions.

The tendency on the part of the Burger and Rehnquist Courts to reverse the Warren Court's criminal procedure revolution in this particular way—through decision rules rather than through conduct rules—is a dangerous thing. To show why it is dangerous, let us return for a moment to Professor Dan-Cohen's

22. *Williams*, 467 U.S. at 450.

distinction between conduct and decision rules. Professor Dan-Cohen used this distinction to illustrate the concept of what he termed "acoustic separation." Certain areas of substantive criminal law, observed Dan-Cohen, reflect divergence between the decision rules courts use to enforce the law and the conduct rules announced to the general public, so that it seems as if the decisionmakers and the members of the public are in separate, soundproof rooms, unable to hear the rules announced to each other.[23] The transformation of decision rules in constitutional criminal procedure creates a similar sort of acoustic separation between the law-enforcement community and the general public. The law-enforcement community, through training and on-the-job experience, has direct access to the decision rules used by courts. The general public, which receives its information largely through the media, has much greater access to conduct rules governing police behavior (i.e., the public's "constitutional rights") than to decision rules in criminal procedure cases as they are implemented by courts (i.e., which violations of constitutional rights actually result in a court-imposed sanction).

The danger is thus apparent. The law-enforcement community's easy access to decision rules should create concerns that sophisticated law-enforcement agents will see incentives to violate conduct rules when no court-imposed sanction will follow. In addition, the public's lack of access to decision rules should cause us to worry that the public overestimates the court-imposed constraints on law enforcement—in other words, that it is "bluffed"[24] by the gap between conduct and decision rules. The public hears the conduct rules and believes, as Judge Markman contends, that we are a country like no other, with extraordinary protections against police overreaching.[25] But the public does not hear the decision rules that blunt the effects of these protections. They do not see the great distance between the rights that are articulated and the remedies that the Court gives for these rights. The public's overly sanguine picture of the role of the courts in constraining police power may be one factor, among

23. *See* Dan-Cohen, *supra* note 17, at 630-34.
24. *See id.* at 677.
25. *See* Markman, *supra* note 3, at 431.

many, that leads Americans down a fruitless and dangerous path—toward placing more and more public trust and money in the institutions of law enforcement and the criminal justice system, in the vain hope that these institutions can solve all of our most pressing social problems.