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## The Pressures and Prospects for Change

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# CRIMINAL LAW

## THE PRESSURES AND PROSPECTS FOR CHANGE

RONALD J. ALLEN\*

The last decades of centuries are doubly significant in this country. The decades of the "90s" mark, on the one hand, the *fin de siècle*, thus stimulating reflection on the past, and on the other hand, mark the beginning of another century of national existence, thus stimulating speculation about the future. Always on the lookout for reasons to generate interesting scholarship, the editors of the *Journal of Criminal Law and Criminology* found the confluence of these two causes of speculation irresistible, and used them as the occasion to solicit essays from a distinguished panel of commentators on the criminal process. The charge given to the essayists was to speculate about areas of interest to them, free from the normal constraints of writing for law reviews. The result is the very interesting collection of essays in this Symposium.

The papers range over a variety of topics integral to the criminal process. Professor Uviller focuses his creative energies on a highly specific question—in his words the "possible constitutional impediments to the admission of evidence of the inculpatory implications of a suspect's refusal to allow a search of constitutionally shielded aspects of his person, or the places and things that enjoy the shelter of the fourth amendment"—and demonstrates how such a highly refined question demands a thorough rethinking of the interaction of the fourth and fifth amendments.<sup>1</sup> Professor Weisberg addresses the rise and apparent fall of habeas corpus in a remarkably lucid and penetrating fashion that cuts to the heart of the Supreme Court's troubled relationship with post-conviction review

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<sup>1</sup> Uviller, *Self-Incrimination by Inference: Constitutional Restrictions on the Evidentiary Use of a Suspect's Refusal to Submit to a Search*, 81 J. CRIM. L. & CRIMINOLOGY 37, 39 (1990).

processes.<sup>2</sup> Professor Dawson examines whether it is time to abolish the juvenile justice system, and although he concludes that it is not, his discussion exposes how difficult a question it is.<sup>3</sup> Professor Bradley reminds us that we do not live in a vacuum, that we have much to learn from other cultures, although not very much about criminal procedure from the Australian experience, and uses the lesson in comparative law to argue for replacing Supreme Court "rulemaking" in criminal procedure with congressionally enacted rules.<sup>4</sup> Professor Haddad continues his task of enlightening us on the implications of the confrontation clause and the failure of the Supreme Court to provide a consistent and principled approach to an interrelated set of questions.<sup>5</sup>

Each of these pieces is worthy of study in its own right and on its own terms, for each comprises a master of a field reflecting on an aspect of his speciality. I wish to engage these articles on a slightly different plane, however, for these pieces represent more than a collection of disparate essays. In addition to being intelligent commentaries about specific issues, taken together these essays reflect the collective wisdom of a set of astute commentators on the pressures and prospects for change in the field of criminal procedure, and that is the plane upon which I wish briefly to engage them.

Professor Uviller brings his impressive intellect and enormous experience<sup>6</sup> to the task of analyzing the consequences of a suspect's refusal to cooperate with the investigatory efforts of state officials. He uses as his primary point of departure *South Dakota v. Neville*,<sup>7</sup> in which the Supreme Court upheld a South Dakota statute permitting the refusal of a driver to submit to a blood-alcohol test to be introduced into evidence against the driver to prove he drove while intoxicated.<sup>8</sup> Professor Uviller sees the increasing technical sophistication of the investigatory process as the social condition giving rise to *Neville*. He sees its intellectual precursors to be cases such as *Schmerber v. California*<sup>9</sup> and *Griffin v. California*,<sup>10</sup> and he asks

<sup>2</sup> Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990).

<sup>3</sup> Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136 (1990).

<sup>4</sup> Bradley, *Criminal Procedure in the "Land of Oz": Lessons for America*, 81 J. CRIM. L. & CRIMINOLOGY 99 (1990).

<sup>5</sup> Haddad, *The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?*, 81 J. CRIM. L. & CRIMINOLOGY 77 (1990).

<sup>6</sup> On both issues, see H.R. UVILLER, *TEMPERED ZEAL* (1988).

<sup>7</sup> 459 U.S. 553 (1983).

<sup>8</sup> The statute also called for automatic suspension of the person's license, which appears to Professor Uviller, and to me, as unproblematic.

<sup>9</sup> 384 U.S. 757 (1966).

of the case doctrinal consistency, which he finds lacking.

Taken on its own terms, there is much to praise and little to criticize in Professor Uviller's discussion.<sup>11</sup> That will suggest to the astute observer, of course, that I want to take it on some other terms, which is accurate. Although I think Professor Uviller is correct so far as he goes, I suggest that cases like *Neville* are as much the product of another social condition as they are the product of our increasing technical sophistication. That social condition is the increasing complexity and urbanization of contemporary life. If I am right, then *Neville* must be seen as informed, at least in part, by *California v. Byers*.<sup>12</sup>

*Byers* upheld the constitutionality of a California statute requiring a driver involved in an accident to stop and identify himself. Byers, naturally enough, argued that this statute violated the fifth amendment self-incrimination clause in that its requirements imposed upon him an obligation that, if fulfilled, increased the odds of his being successfully prosecuted for various criminal offenses.<sup>13</sup> The Court nevertheless found that the regulatory aspects of the scheme predominated, and thus that the fifth amendment was not violated.<sup>14</sup> The problem, of course, is that everything in the last sentence from "thus" on seems to be a non sequitur. It should be sufficient to strike down a statute if it has any self-incriminating components, regardless of its primary purpose, as indeed would be the case in a setting where "criminal" was sharply distinguished from "civil," in a world in which "regulatory" for the most part did

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<sup>10</sup> 380 U.S. 609 (1965).

<sup>11</sup> There are a few details to wonder about, however. Uviller criticizes the logic of *Neville* on the grounds that it is an application of a "greater includes the lesser" approach, an approach which he finds "peculiar." Uviller, *supra* note 1, at 43. Having relied on the concept, *see, e.g.*, Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 342-48 (1980), needless to say, I find it considerably less peculiar than Professor Uviller does. Indeed, I do not quite know what it means to suggest that a logical form is "peculiar," at least if "peculiar" is distinguished from "illogical." Certainly the notion that the "greater includes the lesser" is not obviously illogical. If, for example, a person had the physical capacity to walk a mile, no one would claim it to be illogical to deduce from that fact that the person had the physical capacity to walk one half of a mile. After all, in this universe the person will have to walk the half of a mile to get to the mile. If on proof of certain facts, the state may imprison a person for at least 10 years, no one would think it illogical to deduce from that fact that the state may imprison that person for less than 10 years. To be sure, in order to apply this form of reasoning, one must first determine that the "lesser" is an instance of the "greater." But if it is, applying the notion of "greater includes the lesser" is no more peculiar than saying that the quantity 4 contains the quantity 3.

<sup>12</sup> 402 U.S. 424 (1971).

<sup>13</sup> *Id.* at 462.

<sup>14</sup> *Id.* at 432-34.

not exist. That may have been the world in which the fifth and fourteenth amendments were adopted, but it is not the world in which we live today. One of the questions posed by *Neville* is the significance of social change for the interpretation of the self-incrimination clause. Professor Uviller's analysis suggests that it may not be terribly significant, and he may be right. I, by contrast, suggest that social change may explain a goodly portion of recent case law, including but by no means limited to *Neville*.<sup>15</sup>

Two other conditions of modern life may explain in part the developments chronicled directly in Professor Weisberg's article, and indirectly in Professor Dawson's. As the population has increased and moved to the cities, it has aged and grown more conservative. The increasing population density in urban areas may explain in part an increasing crime rate. An increasingly older population certainly explains a decreasing tolerance for crime, and—somewhat more problematically—those two together may have contributed to the conservative shift that the country has undergone over the last decade. Whatever the causal relationships and interdependencies, these three variables—an aging, more conservative population increasingly intolerant of criminality—have been operating for some time now, and quite possibly their impact on national criminal justice policy is being seen in various ways, one of which may be the desire for swift and sure punishment that underlies the tales told by both Weisberg and Dawson.

In a remarkably lucid essay, all the more striking because of the complexity of the subject matter, Professor Weisberg tracks the rise of substantial federal intervention into state criminal process formally occasioned by the 1953 decision in *Brown v. Allen*<sup>16</sup> through its apparent demise in a pair of opinions in the current term.<sup>17</sup> While commendably cautious in his speculation, Weisberg offers that the evisceration may have been substantially driven by the Supreme Court's "frustrat[ion] with the inadequacy of the execution rate of America's death row inmates,"<sup>18</sup> and he offers compelling textual support for his proposition from an opinion of Chief Justice Rehnquist.<sup>19</sup>

I wish to add two considerations. First, there are numerous rea-

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<sup>15</sup> I think the implications of increasingly dense living conditions also explain the direction much fourth amendment law has gone recently, as exemplified by *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

<sup>16</sup> 344 U.S. 443 (1953).

<sup>17</sup> *Butler v. McKellar*, 110 S. Ct. 1212 (1990); *Saffie v. Parks*, 110 S. Ct. 1257 (1990).

<sup>18</sup> Weisberg, *supra* note 2, at 9.

<sup>19</sup> *Id.* at 9-10.

sons why the Supreme Court may have become “frustrated with the inadequacy of the execution rate of America’s death row inmates,” some more commendable than others. One reason may be that the Court, or some of its members, thinks that more executions would be a good thing; another, subtly but dramatically different from the first, is that the Court, or some of its members, thinks that more executions would be a good thing if the citizens of any particular state desire them and have constructed reasonably fair procedures to impose them. I read the Court’s cases as clearly conveying the second of these messages, while only much more opaquely, if at all, conveying the first. It is not that the Court affirmatively approves of capital punishment that appears to be driving its cases today; rather, it is that the Court has concluded that the Constitution approves of capital punishment and that many states have constructed constitutionally acceptable capital punishment schemes. One is reminded of the probably somewhat apocryphal story of Justice Holmes’s retirement celebration. At its end, a distinguished member of the bench is said to have told the departing Holmes to “do justice.” “Not my job” he supposedly responded, and he was right. There is no general admonition in the Constitution requiring the states, or the Supreme Court to force the states, to do justice.

The second consideration I would add to Professor Weisberg’s story is that the Court’s death penalty habeas cases are embedded in its more general habeas jurisprudence, and that in turn is embedded in its due process jurisprudence. The changes that we see now are in part a function of the success of the Court’s previous efforts. Through the mid-1960s, the Court’s primary agenda was to tame the unruly state criminal process, which was accomplished primarily through due process adjudication. By the end of the 1960s, the Court had succeeded in subjecting state criminal process to the formal limits on governmental power in the Bill of Rights, and succeeded in breaking down resistance to its innovations in the lower state and federal courts. Because of the Court’s success, and in part because that success was achieved at the cost of increasing the difficulty of convicting guilty individuals, the Court has recently refocused the target of procedural criminal due process analysis to the question of the appropriate remedy. In a setting in which individual rights are believed to be widely respected rather than widely abused, the justification for repetitive appeals—especially conducted in the courts of a different sovereign—is problematic. If the lessons of the procedural revolution have been internalized by state court judges and are being implemented in a reasonable fashion, there is virtually no reason to superimpose the federal courts over

the state courts, regardless of the sentence imposed in any particular case. And merely because the country has become increasingly intolerant of criminality and more desirous of punishing malefactors is a reason not to do so. How good a reason, of course, is a crucial question, which again I leave to the reader's good judgment.

Professor Dawson deals with another aspect of the relationship between mercy and punishment. He examines the arguments for and against maintaining a separate juvenile justice system, and concludes on balance that the system should not be abolished. Dawson's discussion of the pros and cons of juvenile justice systems is incisive and informative, but I was most struck by the unspoken assumption of his piece. He does not defend the system because of its implementation of the rehabilitative ideal, although he mentions that more individuals involved with juveniles still possess that view than those in adult corrections. Rather, he defends it despite the collapse of the rehabilitative ideal, conceding that the juvenile system has reverted in large measure to a criminal system. He does not suggest that the juvenile justice system has a powerfully positive effect on the children caught up in it. Rather, he argues that in some small percentage of the cases some good might be done that would otherwise be lost. Although I may misapprehend Professor Dawson's views, I read him as struggling to keep alive the remembrances of a more humane time in the face of a punitive onslaught. One can wish him well, even in the face of disagreement over the meaning of such concepts as mercy and justice.

I suppose one could also wish Professor Bradley's proposal well, but personally I do not, as much of an admirer of Bradley's work, including his contribution here, as I am. But I get slightly ahead of myself. Bradley has two main objectives in his article. The first is to provide a comparative analysis of Australian and American criminal procedure, focusing on right to counsel, search and seizure, and self-incrimination issues. This is done in an admirably clear-eyed fashion, which is a welcome relief from the dewy-eyed appraisals of foreign systems that frequently characterize comparative scholarship.<sup>20</sup> The problem, though, is that Bradley concludes that we have virtually nothing to learn from the Australian experience. Its system of criminal justice is where ours was perhaps forty

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<sup>20</sup> One might compare Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) with Allen, Köck, Riechenberg & Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U.L. REV. 705 (1988). The story continues in, and thus one might also want to compare Langbein, *Trashing The German Advantage*, 82 NW. U.L. REV. 763 (1988) with Allen, *Idealization and Caricature in Comparative Scholarship*, 82 NW. U.L. REV. 785 (1988).

to fifty years ago. The only thing we have to learn from the Australian experience, according to Bradley, is that legislative codes of criminal procedure work better than quasi-codes created by courts. Consequently, Bradley proposes that Congress preempt judicial rulemaking, and he finds the authority to do so in section five of the fourteenth amendment. After all, he reasons, if the federal courts can reverse criminal convictions for violations of fourteenth amendment due process, whatever the state did must be regulated by the fourteenth amendment and accordingly within the power of Congress. Bradley's piece thus demonstrates that most important criterion of excellent scholarship, audacity.

Audacious, yes, but convincing? Not yet, in my judgment. The first difficulty is that, in a sense, Bradley's comparison of statutory and judicial approaches to problems may be similar to comparative law scholarship that compares idealizations to caricatures.<sup>21</sup> Judicial decisionmaking certainly suffers from the problems that he identifies, and perhaps legislative decisionmaking does not to the same extent. But what about other problems that infect legislative decisionmaking that do not affect courts? What about the impact of special interests groups, log rolling, the concern for reelection, uninformed voting, and the like? Similarly, what is the evidence that legislatures are particularly adept at writing procedural codes? After all, most of the ones we have in the United States were drafted primarily by judges, whatever their theoretical foundation. In terms of clarity and simplicity, what exactly are the models that suggest Congress would do a "bang up" job? Here the problem is that the possibilities range from the virtually uninformative, such as the Sherman Act, to the ridiculous, such as the tax code with its supporting regulations. These and similar questions may have answers, but in their absence it is not, as I say, easy for me to wish this particular proposal well.

Even if the questions of detail posed above are answered, there are certain deeper questions lurking that must be addressed. It is one thing to decide as required to do so, as the courts do; it is another to take responsibility for the regulation of a large area of responsibility, as legislation normally does. Certain problems at the margins of due process adjudication do not directly translate into a need for comprehensive legislative action. And even were that wrong, there is a profound political question of who should provide the needed legislative correction. Merely because Congress has the power, assuming it does, does not mean Congress should exercise it

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<sup>21</sup> See *supra* note 20.

and preempt the states. Although it may be, heaven forbid, dewy-eyed on my part, there are substantial reasons to view the criminal process as peculiarly local in significance. The federalization that would occur under Bradley's proposal would seriously undermine those values for no obviously good reason except uniformity of treatment.

This brings me to the last of the pressures for change represented in this Symposium that I will discuss, and that is the desire for doctrinal consistency, which is the driving force behind Professor Haddad's contribution. Haddad has been a persistent critic of the Supreme Court's confrontation clause jurisprudence, but unlike some critics he has not been motivated by political agendas, or if he has one cannot tell from his writings.<sup>22</sup> He is motivated instead by a strongly held belief that judicial decisionmaking must be constrained at least by the minimal demands of consistency, and the further faith that divergent lines of decision eventually will be reconciled. In a sense, this belief and faith underlie all of the contributions to this Symposium, and thus we are brought full circle. The Authors may, indeed clearly do, disagree about the relative importance of consistency among the constellation of values that informs the criminal process and judicial decisions affecting it, and thus of the version of rationality that it rests upon. They clearly do agree on the value of discourse, however, and it is now time to let them speak for themselves.

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<sup>22</sup> See, e.g., Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AMER. CRIM. L. REV. 1 (1980); Haddad & Agin, *A Potential Revolution in Bruton Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use?*, forthcoming in 81 J. CRIM. L. & CRIMINOLOGY (Summer 1990).