Introduction

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What is the future of criminal justice in the United States? There is ample room for pessimism, especially with the constitutional aspects of criminal law. No one doubts that the Warren Court era of the early 1950s through the 1960s was a high point for the constitutional rights of criminal defendants. Nor is there serious dispute that, on balance, the Supreme Court since then has adopted a more restrained attitude toward the constitutional rights of criminal defendants.

Changes in constitutional criminal law reflect more than judicial appointments and judicial attitudes, however. They also derive from political decisions and popular attitudes. Since the mid-1960s, national and local politicians have tended to support the idea of a "war on crime" that puts a premium on toughness toward lawbreaking and offenders (or suspected offenders) at the expense of individual rights.[1] By and large, the voting public has supported these efforts.

The political decisions associated with the war on crime have had several concrete and negative results. More and more conduct has been criminalized, often through multiple statutes that define overlapping crimes (sometimes overlapping state and federal crimes) for the same basic conduct. Incarceration rates have expanded, especially among young black men;[2] maximum and supermax security prisons have proliferated;[3] mandatory minimums ensure lengthy prison sentences for nearly all felonies in many jurisdictions;[4] and the consequences of criminal convictions are dire. Police and prosecutors continue to enjoy wide discretion to control the outcomes of criminal cases,[5] and the development of new surveillance technologies expands their ability to gather evidence in ways that erode traditional notions of personal privacy. Politicians and commentators urge people to live in fear of violent crime and to be suspicious of people who act in unusual ways or who just seem to be out of place.[6] Undocumented immigrants automatically become

criminals through the act of crossing a national border. These developments are important in their own right; they are also causes and effects of judicial decisions to rethink the scope of constitutional rights and other constitutional and structural limitations on criminal law and punishment.

The reaction to the September 11, 2001, terrorist attacks has elevated the level of fear and added new fuel to the political responses to criminal justice. The resulting "war on terror" joined the war on crime and put increased pressure on courts to adapt constitutional rights and substantive law to meet the perceived new challenge.[7] Because antiterror activities are international in scope and involve military as well as police action, they also shine a spotlight on international and transnational criminal law, on the choice between military and law enforcement responses to disorder, and on the interactions between the civilian and military criminal justice systems.[8]

The overall picture, however, is more complicated than we have suggested so far. Alongside these developments eroding the constitutional rights of criminal defendants are Supreme Court decisions placing some limits on the power of the political branches to eliminate or restrict the scope of these rights. For instance, to the surprise of many, the Court struck down Congress's attempt to overrule *Miranda v. Arizona*,[9] the landmark decision requiring police to inform suspects of their rights to counsel and to remain silent before a custodial interrogation.[10] In another unexpected decision, the Court overruled a prior decision that gave the police virtually unchecked discretion to conduct a warrantless search of a vehicle's passenger compartment after an arrest of the vehicle's occupant.[11] Most recently, a unanimous Supreme Court ruled that officers must obtain a warrant before attaching a GPS device to an automobile.[12]

In light of this varied landscape, what is the future of constitutional criminal law in the United States? The chapters in this collection, each written by an expert in the field, address this question. They are grouped around a series of themes: the scope of the criminal law and access to counsel; policing and privacy; race and criminal procedure; technology and the surveillance society; confessions and *Miranda*; conviction, sentencing, and incarceration; and finally, immigration, terrorism, national security, and transnational crime. Each chapter addresses an important topic in constitutional criminal law, first summarizing the current state of the law and then offering an insightful glimpse into its future direction.

The first two chapters, which address foundational issues in criminal justice, compose Part I. Stephen B. Bright begins the book by detailing the contemporary crisis in the right to counsel. Too few lawyers are available, and they have opportunity to provide effective representation to their clients. The

criminal justice system ends up processing cases through plea deals, and the potentially meritorious issues that might emerge if lawyers had the time to think even briefly about cases instead are lost. The solution, Bright maintains, is not only obvious but also required by any meaningful commitment to equal justice and the right to counsel: "adequately funded, independent public defender offices." From the perspective of criminal procedure, a meaningful right to counsel is central to the future of criminal justice.

In his chapter, Markus D. Dubber addresses a different, but equally important issue: the lack of any constitutional foundation for the American criminal justice system and, particularly, for the substantive criminal law. Dubber explains that, in contrast to European countries, there has never been a meaningful debate in the United States about "the legitimacy of punishment in a self-governing polity." What this means, moreover, is that the effort to provide such a foundation must focus on the present and the future. Dubber calls for an inquiry into the ways in which the Constitution could structure the criminal justice system and limit its scope. He finds a glimmer of hope for such an effort in the Supreme Court's 2003 *Lawrence v. Texas* decision, which suggested that "autonomy of self" is central to constitutional liberty[13] and which could support limiting doctrines similar to those developed by the Canadian Supreme Court and the German Constitutional Court.

The second part of the book considers race and criminal procedure. Susan A. Bandes assesses the impact of another landmark Warren Court decision: *Terry v. Ohio*,[14] which clarified the circumstances under which police can stop and frisk a person who they suspect might be engaged in criminal activity. The Court attempted to balance individual and law enforcement interests, but the impact of *Terry* has been to license the intensive – and all too frequently unjustified – policing of certain classes of people, typically black and Latino males, and certain kinds of neighborhoods, typically those with higher concentrations of minority and/or poor residents. Bandes considers a range of possible solutions, from changes in legal doctrine (which she doubts will be forthcoming), to legislative and administrative action (including investigations of local police departments by the federal Department of Justice), to changes in police culture. She is less than sanguine about the prospects for beneficial change, but she holds out the hope that informed, good faith dialogue could foster the political will necessary to move forward.

L. Song Richardson's chapter uses lessons from the field of psychology to analyze police practices and the Supreme Court's decision in *Terry v. Ohio*. More than four decades of research demonstrate that most individuals, regardless of their race, have implicit, that is, unconscious, racial biases that can influence behaviors toward and judgments of nonwhites. She argues that

these unconscious racial biases can explain why police disproportionately subject nonwhites to stops and frisks even though "stops and searches of whites are more often successful in yielding evidence of criminal activity." She also sheds light on how the *Terry* decision reinforces and magnifies the effects of that bias. Richardson considers several changes in legal doctrine but ultimately concludes that structural changes in the operation of police departments and in officer training are more likely to address the effects of unconscious racial biases on police behavior and offers some suggested reforms.

Part III turns to the intersecting issues of policing and privacy. Tonja Jacobi's chapter takes aim at the exclusionary rule, which as a constitutional remedy imposed on state courts for police violations of the Fourth Amendment is one of the most significant accomplishments of the Warren Court's criminal procedure revolution. Jacobi's criticisms, however, do not follow the familiar path of arguing that the exclusionary rule results in acquitting the guilty. Rather, marshaling social science evidence, she contends that the exclusionary rule's effects are far more perverse. Because juries and judges tend to assume that gaps in the prosecution's evidence result from exclusion of evidence, the rule does help the guilty, but it does so "at the expense of the actually innocent – the exclusionary rule actually *decreases* the chance of finding a reasonable doubt for those defendants most likely to be innocent." She insists that a rational system of criminal procedure would adopt "rules that aid screening between innocent and guilty defendants, and forgo rules [such as the exclusionary rule] that blur those categories."

In her chapter, Janice Nadler addresses a different Fourth Amendment issue – the widespread use of "consent searches." While the Constitution certainly permits law enforcement officials to conduct searches when a person freely consents, Supreme Court case law allows police to obtain consent under coercive circumstances. The Court's doctrine ignores the power imbalance between a police officer and, for example, a person on a bus that has been stopped by police. Even more, Nadler suggests, the Court's refusal to recognize the power imbalance expresses and shapes a set of undesirable attitudes on the part of both police and populace. Rather than pursue a policy of coerced consent that treats the subject of such a search as presumptively guilty, Nadler argues that police should act in ways that not only cultivate their legitimacy in the eyes of the public but also increase the chances of genuine cooperation.

Amanda C. Pustilnik explores the increasing role that neurotechnology will play in criminal investigations. As researchers and investigators become more and more confident of their ability to analyze brain waves or blood flow in the brain, they will seek to use these technologies to supplement – and

perhaps even in some cases to replace – more familiar forms of interrogation and search. Pustilnik first explains developments in neuroscience that support the use of these technologies to assist the investigation of crime. She then considers the ways in which Fourth and Fifth Amendment doctrine could intersect with these efforts, particularly with respect to notions of privacy. She concludes that the inevitable expansion of these technologies "will require reexamining the relationship among physical, information, and spatial intrusions," and she details the difficult choices that will confront courts in the years ahead.

Part IV focuses on technology and the surveillance society. Wayne A. Logan discusses the use of information, particularly the information generated by registration and community notification laws, to monitor offenders who are no longer incarcerated and to inform the public about their movements. Although this example focuses on a specific form of postconviction monitoring, Logan's argument sweeps more broadly. He highlights the curiously passive role the judiciary has played as information gathering and sharing have increased, despite the fact that this information explicitly is used as a method of social control. But he also avoids treating social control through information as a negative development – as he points out, "compared to the manifold negative consequences of physical imprisonment, increased resort to any information-based, noncarceral strategy is a potential cause for optimism." That is to say, whether the gathering and sharing of information will become parts of a comprehensive, effective, but also humane response to criminal activity is, as Logan emphasizes, the critical issue.

For his part, Christopher Slobogin considers the increased use of monitoring technologies to monitor, track, and gather information about suspects. Most important to his analysis is the fact that contemporary Fourth Amendment doctrine has very little to say about these activities. As he explains, Fourth Amendment doctrine focuses largely on "physical searches" even as police increasingly are relying on "virtual searches … that do not require physical access to premises, people, papers, or effects and can often be carried out covertly from far away." Slobogin urges courts to bring the Fourth Amendment into the twenty-first century by including virtual searches within its confines so that courts can consider the reasonableness of the proposed activity. Equally important, he insists that constitutional criminal procedure has something to say about police practices in general, whether or not those practices conform to traditional models.

The chapters in Part V address the constitutional law of police interrogation. Richard A. Leo examines the problem of false confessions. His survey of this critical problem identifies three primary errors made by police: misclassification

of an innocent person as guilty, the use of psychologically coercive methods, and the disclosure of nonpublic facts to suspects, such that the false confession appears to contain "persuasive indicia of reliability." Turning to the law of false confessions, Leo points out that contemporary doctrine concerns itself with the process that produces the confession, such as whether or not the suspect received the *Miranda* warnings and had access to counsel, and not enough with the actual truthfulness of the confession that results from the process. If courts paid greater attention to reliability, Leo argues, the resulting doctrine would force changes in police practices while also reducing the number of false confessions and wrongful convictions.

Emily Hughes takes up the topic of the *Miranda* doctrine in its current form, as it applies to truthful statements obtained under circumstances that implicate the privilege against self-incrimination. Her chapter focuses on the 2003 decision in *Missouri v. Seibert*[15] that addressed a police tactic of interrogating without the *Miranda* warnings, obtaining a confession, then giving the *Miranda* warnings and having the suspect repeat the confession. The Supreme Court held that the confession was inadmissible, but its ruling made clear that cases will turn on their specific context. Justice Souter's plurality opinion proposed a multifactor inquiry to determine when "Miranda warnings delivered midstream could be effective enough to accomplish their objective."[16] Hughes highlights the ambiguity of *Miranda* law after the *Seibert* decision by presenting seven variations on the facts of *Seibert*. The ambiguities flowing from *Seibert*, she observes, support the conclusions that the Supreme Court is deliberately undermining *Miranda* and creating incentives for police and state judges to ignore the underlying principles of the *Miranda* doctrine. The Supreme Court is able to announce and adhere to clear rules. It is not too late, Hughes suggests, for the Supreme Court to turn the *Miranda* doctrine in that direction.

The chapters in Part VI address topics related to conviction, sentencing, and incarceration. Gabriel J. Chin canvasses the collateral consequences of criminal convictions, which range widely from loss of the right to vote, to possible deportation, restrictions on employment, registration requirements, and more. With few exceptions, the Supreme Court has allowed these consequences to proliferate without constitutional regulation, on the theory that they are not punishment. Furthermore, Chin suggests, the high levels of criminal convictions in most states, coupled with the costs of mass incarceration, create strong incentives for governments to use collateral consequences as an alternative sanction since they are less costly. Chin argues that the Supreme Court should revisit its general refusal to intervene in this area and, instead, should "recognize that systematic subjection to collateral consequences is

constitutional punishment." At the very least, he urges, judges should warn defendants about the possible consequences of the decision to plead guilty.

Adam R. Fox and Reid Griffith Fontaine address the intersection of mental illness and criminal responsibility, and the implications of this intersection for Eighth Amendment doctrine. They note that the Supreme Court recently has been receptive to specific claims about the reduced responsibility of juveniles and mentally handicapped individuals. Their chapter considers whether these rulings should extend to psychopathic individuals, a possibility that they recognize "is considerably less likely to attract public sympathy." After describing the behavioral features of psychopathy and the kinds of criminal behavior in which psychopaths are more likely to engage, they discuss the evidence that psychopathy has a neurological basis that diminishes the moral agency and responsibility of psychopaths for criminal conduct – albeit to different degrees for different individuals. They suggest that Eighth Amendment doctrine supports the conclusion that courts should take into account the diminished responsibility of psychopaths at various stages in the criminal process.

Part VII introduces several topics that too often are excluded from discussions of criminal justice but that are increasingly central to the operation of federal criminal law. Juliet P. Stumpf's chapter, for example, examines the rise of "crimmigration" – the increasing intersection of criminal law and immigration law. Much of crimmigration law is federal, punishing people who have not complied with federal immigration law (often, the lack of compliance takes the form of illegally entering the country). However, her chapter explores some of the ways in which state law contributes to the crimmigration phenomenon. Stumpf identifies "a submerged norm of proportionality" that should play a role in evaluating the legitimacy of state criminal law responses to illegal immigration. She argues that to the extent that a person's unlawful presence in the United States also includes "the potential for lawful integration," state criminalization of immigration not only has the potential to frustrate the purposes of federal immigration regulation, but also threatens to burden that person with the label of criminal even as he or she still has the "potential for redemption through legalization."

Susan N. Herman's chapter covers the so-called war on terror. She argues that the response to the September 11 attacks "has profoundly changed American criminal law in two very different ways." First, it has fostered a system of military detention and military commission trials for people who, before 9/11, would have gone through the ordinary criminal justice system. Second, the creation of these extraordinary processes creates pressure to dilute the protections that typically accompany prosecution in the ordinary system. She warns that these changes place the ordinary criminal justice system at risk, so that

all defendants, in whatever forum, will have to make do with "exceptions and watered down rights." Herman provides significant examples of how these pressures are playing out in American criminal justice. However, she also reminds readers of the web of laws and doctrines that have undergirded criminal law for decades, a structure that is capable of handling the challenges posed by the war on terror, if only officials – and the public – will trust it. Whether the future will see a return to the pre-9/11 structure, or whether the processes set in motion by the response to those events will continue to reshape the criminal justice system, is a critical but still unanswerable question.

Stephen I. Vladeck's chapter considers a related development: the convergence of the civilian and military justice systems. Vladeck notes that the typical account of this process extolls the extent to which the military justice system has become more like the civilian one, gradually developing greater procedural protections and making room for independent appellate review by civilian judges, including the Supreme Court. But his chapter focuses on a different convergence: the gradual increase in the criminal jurisdiction of military courts to include conduct previously reserved for civilian courts. Courts-martial now prosecute service members for any offense, even those unrelated to their military service. In addition, Congress has expanded the ability of military courts to try civilians who serve with or accompany the armed forces overseas. Vladeck's third example is the use of the military commissions established at Guantánamo Bay Naval Base to prosecute noncitizens for war crimes, including crimes that are not subject to military jurisdiction under international law. Vladeck cautions against this expansion and urges a return to the principle that military jurisdiction should be confined to where it is necessary.

The final chapter, by John T. Parry, considers the growth of transnational and international law enforcement efforts. Parry suggests that, in general, globalization leads to an increase of executive power at the expense of legislative power. In the area of crime control, this expansion also draws on the already immense and increasing executive power over criminal prosecutions. The rise of what Parry calls the "national security sovereign" – an executive branch that claims the authority to manage seemingly frequent foreign relations crises and advance the national security interests of the United States – completes the picture. Taken together, these developments pose several risks, such as diluted procedural rights and new or redefined substantive offenses that will generalize beyond the national security context. Even more, Parry argues, these developments will increase the politicization of criminal law and will erode traditional rule of law values. Only a multifaceted opposition, or the unlikely development of self-restraint on the part of the executive branch, can stop or reverse the growth of the national security sovereign.

The Constitution and the Future of Criminal Justice in America puts cutting edge issues of theory and doctrine into concrete and accessible context. Our goal is not only to advance academic debate but also to influence a broader conversation about public policy in these areas. By looking to the future, this collection seeks to shape an ongoing dialogue about criminal justice and the Constitution.

Every book of this kind has gaps. This is a collection of essays about the Constitution and criminal law. It is not a book that focuses on criminology or criminal law more generally (either philosophically or doctrinally),[17] although several chapters touch on these topics. Most of the time, the chapters in this book focus unapologetically on legal doctrine. Courts create, apply, and change doctrine, and they do it in specific cases that have direct impacts on the interests of individuals. Judicial decisions, made within the parameters of legal doctrines, send people to jail or release them. Legal doctrines shape the reasoning of judges and the arguments of lawyers. They also impact police policies, training, budgets, and political decisions. And, not least important, these doctrines also impact the ways in which people think about their civil rights and liberties. This book exists precisely because constitutional law matters to criminal justice. Looking forward, the overarching goal of this book is to make sure that the ongoing interaction between the two is beneficial.

Notes

1 For an early and pessimistic assessment, see James Vorenberg, *The War on Crime*, The Atlantic Monthly, May 1972. For a more recent and even more pessimistic assessment, see Henry Ruth & Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response (2003).

2 Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

3 E.g., Sharon Shaley, Supermax: Controlling Risk through Solitary Confinement (2009).

4 For a useful introduction to the debate over and effect of mandatory minimums in the context of federal sentencing, see U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalities in the Federal Criminal Justice System* (Oct. 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm (last visited May 1, 2013). For the specific issue of life without parole as a sentencing option, see Life without Parole: America's New Death Penalty? (Charles J. Ogletree & Austin Sarat eds., 2012).

5 This is a major theme in William J. Stuntz, The Collapse of American Criminal Justice (2011).

6 See Jonathan Simon, Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (2007).

7 E.g., William J. Stuntz, *Local Policing after the Terror*, 111 YALE L.J. 2137 (2002).
8 For many useful early perspectives on these issues, see *Symposium: Law and the War on Terrorism*, 25 HARV. J. L. & PUB. POL'Y 399–834 (2002).
9 *Miranda v. Arizona*, 384 U.S. 436 (1966).
10 *Dickerson v. United States*, 530 U.S. 428 (2000).
11 *Arizona v. Gant*, 556 U.S. 332 (2009), overruling *New York v. Belton*, 453 U.S. 454 (1981).
12 *United States v. Jones*, 132 S. Ct. 945 (2012); see also *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that use of a thermal imaging device to scan a residence "is a 'search' and is presumptively unreasonable without a warrant").
13 *Lawrence v. Texas*, 539 U.S. 558 (2003).
14 *Terry v. Ohio*, 392 U.S. 1 (1968).
15 *Missouri v. Seibert*, 542 U.S. 600 (2003)
16 *Id.* at 615.
17 For useful recent books on these topics, see CRIMINAL LAW CONVERSATIONS (Paul Robinson et al., eds. 2009); THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R. A. Duff & Stuart Green, eds. 2011); CRIME AND PUBLIC POLICY (James Q. Wilson & Joan Petersilia, eds. 2011).