

INTRODUCTION

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CRIMINAL PROCEDURE STORIES: INTRODUCTION

The United States is unique in the world in the degree to which its criminal processes—both police practices and adjudication—are governed by federal constitutional law. Constitutional litigation that episodically and unpredictably reshapes the structure of criminal justice systems throughout the nation stands in sharp contrast to other modes of criminal justice reform, such as legislation, specialized commissions, or administrative oversight. Whether this emphasis on constitutional regulation provides important safeguards or whether it is nuts (simply no way to run a railroad)—or perhaps both—is an interesting question, which the chapters that follow help in various ways to answer. But, at a minimum, this arrangement assures that the development of American criminal procedure is driven by stories, by the individual Supreme Court cases that have left a lasting imprint on the doctrines that manage the interactions between citizens and law enforcement agents and that structure the adjudicative process.

Perhaps more so than cases in any other legal category, criminal procedure cases make great stories—which is why so many variations on these issues find their way into movies and television shows. This book hosts an extraordinarily colorful cast of characters, ranging from the Damon Runyon-esque character of Charlie Katz,¹ to the Tony Soprano-esque character of “Fat Tony” Salerno,² to the Hoffa-esque and Kennedy-esque characters of Jimmy Hoffa and Bobby Kennedy themselves, squaring off over the Kennedy Justice Department’s prosecution of Hoffa for jury tampering.³ The crimes at issue in these cases range from the sort of serious violent crimes, such as murder and rape, that one might expect to drive important developments in constitutional doctrine, to the more surprising, oddball offenses. Who would have thought that the pornographic pencil doodle seized by the police from Dollree Mapp would lead to the incorporation of the Fourth Amendment exclusionary rule, or that Paul Hayes’ bad check to the Pic Pac grocery store would launch a thousand pleas?⁵

¹ See *Katz v. United States*, 389 U.S. 347 (1967).

² See *Salerno v. United States*, 479 U.S. 1026 (1987).

³ See *Hoffa v. United States*, 385 U.S. 293 (1966).

⁴ See *Mapp v. Ohio*, 367 U.S. 643, 668 (1961) (Douglas, J., concurring).

⁵ See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (approving the constitutionality of plea bargaining in a case involving the passing of a forged check for \$88.30).

The stories I have chosen for inclusion in this volume span roughly equally the divide between police practices and adjudication, and they include many of the cases that will be found in any Criminal Procedure syllabus (*Mapp*⁶ and *Miranda*⁷ for police practices, and *Brady*⁸ and *Batson*⁹ for adjudication). When I have included cases that are less universally studied (*Powell*,¹⁰ *Brignoni-Ponce*,¹¹ and *Mistretta*,¹² for example), it is because they allow the consideration of themes (the history of racial discrimination in the administration of criminal justice in the South, the limits on the use of racial profiling as a tool of law enforcement, and the constitutional status of the Federal Sentencing Guidelines) that are central to understanding the development of American criminal procedure.

Close consideration of the stories behind these cases—the individuals, the social and political worlds in which their criminal prosecutions arose, the provenance of their legal claims, the Supreme Court’s internal struggles to resolve the claims, and the human and doctrinal repercussions of the Court’s decisions—offers many rewards. Of course, it is intriguing and entertaining. Teachers of criminal procedure have long relied upon the intrinsic, voyeuristic thrill of studying cops-and-robbers and courtroom drama, and they will not be disappointed by the vivid details unearthed in these tales (John Brady’s journey from death row to a law-abiding life outside of prison; the prosecutor who named his dog “Batson” after his most famous case). But consideration of these stories as a unit also yields powerful and perhaps surprising insights that go beyond mere narrative enrichment.

The most striking theme that emerges from the stories behind the cases—far more than the opinions themselves suggest—is the intersection of the criminal procedure revolution and the struggle for racial equality, especially in the South. It is no accident that the story of the “Scottsboro boys” appears first in this volume and is depicted on its cover, as the Scottsboro case represents the Supreme Court’s first, early

⁶ *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the 4th Amendment exclusionary rule).

⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring the administration of warnings to permit the introduction of statements taken by law enforcement agents during custodial interrogation).

⁸ *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring prosecutors to disclose to the defense all material exculpatory evidence).

⁹ *Batson v. Kentucky*, 476 U.S. 79 (1986) (changing the rules for proving discriminatory intent in the use of peremptory strikes during jury selection).

¹⁰ *Powell v. Alabama*, 287 U.S. 45 (1932) (reversing the capital convictions of the “Scottsboro Boys” for violation of their Sixth Amendment right to counsel).

¹¹ *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (allowing roving border patrol agents to use Mexican ancestry as a factor, but not the sole factor, in deciding whether to stop and question motorists).

¹² *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the Sentencing Reform Act of 1984, which established the Federal Sentencing Commission and led to the promulgation of the Federal Sentencing Guidelines).

foray into the constitutionalization of state criminal procedure in a self-conscious effort to check abuses of the criminal justice process engendered by pervasive racial subordination. The *Scottsboro* case is almost a caricature of Southern justice run amok: flimsy charges of rape brought against black men by white women lead to quick convictions and death sentences with a minimum of legal process. But other cases that are less frequently recognized as “race” cases reveal themselves to be crucibles of similar struggles.

Perhaps the best example is *Duncan v. Louisiana*,¹³ the case that incorporated the right to trial by jury. The opinion is often taught as a case about the abstract value of juries, excerpted to showcase quotes about the advantages and disadvantages of lay decision-making in criminal cases. But the story behind Duncan’s prosecution (and the prosecution of his *lawyer*, as well) reveals just how common it was for the criminal justice system to be wielded as a weapon against civil rights organizers during the civil rights movement of the 1950s and ‘60s. Local law enforcers in the South used the criminal justice system in their communities very much as dictators use their armies—to intimidate dissenters with threatened and actual violence sanctioned by law. Although the *Duncan* Court makes little mention of race or Southern-style criminal justice, the context could not have been lost on the Supreme Court in the flashpoint year of 1968. And while the Court was surprisingly reluctant to discuss race in many of its key criminal procedure decisions of the 1960s, it emphasized again and again the theme of “equality” for criminal defendants. For example, the need for equality of poor or uneducated defendants vis-à-vis wealthier or more sophisticated defendants was central to the *Miranda* Court, just as equality of defendants in general vis-à-vis the prosecution was a major theme sounded by the *Brady* Court.

It is interesting to speculate why discussion of criminal procedure as a tool of racial equality is so absent from the formal decisions of the Court during the criminal procedure revolution of the 1960s. Perhaps the Court’s decision to regulate the criminal process by incorporation of the criminal procedure provisions of the Bill of Rights through the Due Process Clause seemed to preclude overt reference to issues of racial justice, which the Court tended to address under the rubric of Equal Protection. Perhaps incorporation felt more universal and “colorblind,” or less controversial and “political,” than overtly race-based rulings, given the divisive politics of the time. But it is impossible to read the *Duncan* story and conclude that racial justice could be anywhere but just beneath the surface of the Court’s concerns.

The *Duncan* story points up another subterranean issue that evaded direct treatment from the Court but could not have escaped its notice:

¹³ 391 U.S. 145 (1968).

the harshness of much criminal punishment in relation to the offenses at issue. Gary Duncan himself faced a potential two-year sentence—and actually received two months and stiff fine—for what at most constituted a slap at the arm of another teenager. Paul Hayes faced life in prison for forging an \$88 check for groceries. And the Federal Sentencing Guidelines in general were widely decried for their overall severity and for constricting judicial discretion to allow for leniency. But *Duncan*, *Bordenkircher*, and *Mistretta* were all cases—as the title of this volume declares—about criminal *procedure*, not about the substantive criminal law. The same Court that ushered in a so-called “revolution” in constitutional criminal procedure was far more reluctant to undertake any potent constitutional regulation of criminal justice outcomes, despite the potential power of the Eighth Amendment’s prohibition of “excessive fines” and “cruel and unusual punishments.” As a result, some of the Court’s decisions seem oddly out-of-tune with the concerns of the day. *Mistretta* is a case in point: did anyone really think that the primary defect of the Sentencing Guidelines was that they violated constitutional separation of powers by giving the judiciary *too much* power?

But tone-deafness is not the worst defect of the Court’s emphasis on procedure over substance in its constitutional regulation of criminal justice. The most significant cost of the Court’s neglect of criminal justice outcomes is the unchecked rise of the American prison population with its concomitant increased racial disparate impact, as Bill Stuntz elaborates in his chapter on *Bordenkircher* and plea-bargaining. It is a profound irony that the Warren Court, famous for its concerns about racial justice, equality, and the rights of criminal defendants, failed to prevent—indeed, failed to even try to prevent—the tidal surge of mass incarceration, overwhelmingly of poor and minority defendants, during the last quarter of the twentieth century.

Indeed, re-reading the landmark cases of the infamously “soft on crime” Warren Court, especially in light of the next several decades of legal developments, suggests that the Court hardly deserves the blame for handcuffing the police that its detractors asserted, with their “Impeach Earl Warren” bumper stickers that helped elect Richard Nixon to the presidency in 1968. Or, from the opposite political perspective, the Warren Court’s criminal procedure revolution looks a lot less revolutionary in assuring the rights of criminal defendants when viewed through the rear-view mirror thirty or forty years later. In particular, Chief Justice Warren’s careful, almost tortured, opinion in *Terry v. Ohio*,¹⁴ approving brief warrantless intrusions on less than probable cause, ultimately legitimized a wide variety of other such intrusions, as Justice Douglas predicted at the time of the *Terry* decision and reiterated in a stinging rebuke in the Court’s first racial profiling case less than a

¹⁴ 392 U.S. 11 (1968).

decade later.¹⁵ Similarly, the Court’s opinion approving the use of an undercover informant in Jimmy Hoffa’s case, which relied crucially on an “assumption of risk” theory first developed by Justice Brennan, has had broad repercussions in legitimizing a wide variety of intrusive law enforcement tactics, as elaborated by Tracey Maclin in his chapter on the *Hoffa* case.

Even the primary treasures (or targets, depending on one’s point of view) of the Warren Court’s revolution—*Mapp*, *Gideon*, *Brady*, *Miranda*—have generally failed in important respects to deliver on their ringing promises. This failure is due not merely to intentional abandonment of the Warren Court’s commitments resulting from the changing membership of the Court over time (though of course, such changes were important). Rather, the absence of effective remedies undermines rights, however broadly they may be asserted, as David Cole and Stephanos Bibas elaborate in their discussions, respectively, of *Gideon* and *Brady*. Conversely, the creation of extremely powerful or drastic remedies has a natural tendency to lead to the limitation of whatever right is at stake, as Yale Kamisar and Pam Karlan demonstrate in their treatments, respectively, of *Mapp* and *Batson*. As a result, many of the great pronouncements of rights in constitutional criminal procedure have had more symbolic than concrete significance, a theme that is developed most explicitly by Mike Klarman’s rich history of *Scottsboro* and Steve Schulhofer’s evaluation of *Miranda*.

But before we write off the criminal procedure “revolution” as just so much overblown hype, it is striking to see in these pages how doctrines long thought virtually lifeless can be rejuvenated in a different context or a different day. For example, the right to a jury trial, incorporated by *Duncan* and rendered virtually obsolete by the system of plea-bargaining approved in *Bordenkircher*, came back with a vengeance in the line of cases flowing from *Apprendi v. New Jersey*,¹⁶ which eventually led to the invalidation of the Federal Sentencing Guidelines and various state sentencing schemes as well, as discussed by Kate Stith in the *Mistretta* chapter. In an even more startling turn-around, the Supreme Court has wielded the extremely deferential standard for evaluating claims that a criminal defendant received “ineffective assistance of counsel”¹⁷ to overturn three capital convictions in the past five years, a development that introduces a ray of hope into David Cole’s otherwise bleak assessment of the right to counsel in his chapter on *Gideon* and *Strickland*. Pam Karlan’s chapter on *Batson*, too, concludes with

¹⁵ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 888 (1975) (Douglas, J., concurring) (“The fears I voiced in *Terry* about the weakening of the Fourth Amendment have regrettably been borne out by subsequent events.”). Justice Douglas’ views are discussed both by John Barrett in his *Terry* chapter and by Bernard Harcourt in his chapter on *Brignoni-Ponce* and racial profiling.

¹⁶ 530 U.S. 466 (2000).

¹⁷ See *Strickland v. Washington*, 466 U.S. 668 (1984).

consideration of the Supreme Court's recent invalidation of a Texas man's capital conviction because of a pattern of race-based preemptory strikes by the prosecution.

Moreover, even when it is not reinvigorating old doctrines to generate surprising outcomes, the Court continually returns to its prior work to seek tools for crafting new solutions to new problems. In the classic tradition of common-law development, nothing is ever wasted; even when the Court is scanning the horizon into the future, it always has one eye simultaneously looking back over its shoulder. David Sklansky describes how Justice Scalia, when faced with the challenge of limiting "the power of technology to shrink the realm of guaranteed privacy,"¹⁸ returned to and reconciled with the Court's much-maligned approach in *Katz* more than three decades earlier, when the technology at issue was much cruder and less pervasive. Dan Richman demonstrates how the Court's struggle with the validity of preventive detention in the context of the pre-trial confinement of mobster Anthony Salerno set the terms of discussion for the even bigger and more vexing problem of non-criminal preventive detention of suspects in the post-9/11 "war on terrorism."

The nature of Fourth Amendment limits on the use of emerging technology and the scope of constitutional limits on law enforcement techniques in the war on terrorism are only two of many important unanswered questions that will become pressing in the immediate future. The invalidation of sentencing guidelines in federal and some state courts will no doubt lead to legislation that will require further constitutional consideration by the Court. The permissibility of racial profiling in its many possible incarnations is overdue for consideration by the high Court. And the future dimensions or even life of controversial doctrines like *Mapp* and *Miranda* always remain in question, especially as the new Roberts Court takes shape. Whatever new chapters will be written on these issues, however, there can be little doubt that the story starts with the stories considered here.

When I first started this project, the most striking challenge was narrowing the cases to a manageable number. There seemed to be so many stories that needed to be told, so many legal developments that should have been included, so many thoughtful debates that have framed the issues. But now, looking back on the completed project, what strikes me is how *little* law there really is, how much has not yet happened, how much we do not know. This multitude of unanswered questions is, of course, one of the great frustrations of our system of regulating the criminal process through constitutional adjudication. But it is also one of the great and exciting challenges of our system for students, lawyers, judges, and scholars. I hope that the work done here in faithfully preserving these stories and reflecting on their significance helps in some small way to advance this common task.

¹⁸ *Kyllo v. United States*, 533 U.S. 27, 34 (2001).