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The Failure of the Criminal Procedure Revolution: A Response

Craig M. Bradley

In The Failure of the Criminal Procedure Revolution, I describe in some detail why the criminal procedure "revolution" has been a failure. Unlike other commentators, I do not claim that this is because of the ideological predilections of the Warren, Burger, or Rehnquist Court. Rather, the reason is that it is impossible for any court, regardless of its ideological makeup, to produce, in a series of opinions promulgated over several decades, a coherent set of rules for police to follow. I thus agree with the justices' own assessment of their work in criminal procedure: that the Court's confession law is "murky and difficult," and its search-and-seizure law "intolerably confusing." Shortly after his retirement, Justice Stewart, a key figure in the criminal procedure revolution, called the Court's Fourth Amendment doctrine "as complex a delineation of rules, exceptions, and refinements as exists in any field of jurisprudence." Yet we expect police, untrained in the niceties of legal interpretation, to follow these rules.

The reasons for this situation inhere in the nature of judicial, as compared to legislative, decision-making. That is why commentators in the 1960s, such as Herbert L. Packer, Paul M. Bator, and James Vorenberg, argued that a code was the best way to declare rules for police to follow (though they did not recognize that Congress had the power to promulgate it).

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2. Bradley, supra note 1, at 51 (quoting Oregon v. Elstad, 470 U.S. 298, 316 (1985)).
4. Id. at 50 (quoting Potter Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Colum. L. Rev. 1365, 1365 (1983)).
5. Packer assessed the Supreme Court's takeover of criminal procedure rulemaking as "moves of desperation" designed to fill a "law-making vacuum." He concluded that "the rules of the criminal process, which ought to be the subject of flexible inquiry and adjustment by law-making bodies having the institutional capacity to deal with them, are evolved through a process that its warmest defenders recognize as to some extent awkward and inept." Bator and Vorenberg, the reporters of the Model Code Pre-Arraignment Procedure, recognized
A code is terse where Supreme Court decisions are verbose. The relevant sections of a code governing police interrogations, for example, could be posted on the wall of the police station for officers to read before interrogating a suspect. A code can be forward-looking, anticipating problems, whereas case law is, by definition, backward-looking and dependent on the facts of the case in question. Code drafters can receive guidance from affected parties in advance, rather than simply declaring rules with no input from anyone other than the litigants in a particular case. Finally, a code need not distinguish old rules. By contrast, Supreme Court opinions extensively discuss—and draw (frequently unconvincing) distinctions between—the case at hand and past decisions. This, in turn, causes confusion over the scope of the current rule as well as the reach of the distinguished, but not overruled, precedent.

My book goes on to argue that Congress has the power, under section 5 of the Fourteenth Amendment, to promulgate a federal code of criminal procedure governing the actions of all law enforcement personnel, state and federal. Congress should expand the jurisdiction of the Federal Rules Advisory Committee to draft detailed criminal procedure rules for police conduct, applicable in both state and federal jurisdictions, and limit itself to voting the product of that committee up or down. If this occurred, we could have a code that is clearer, more detailed, and no more political than the current series of "murky and difficult" pronouncements from the Supreme Court. The Court could then return to its appropriate role: interpreting the rules and deciding on their constitutionality. The book notes that virtually every other country in the world, including our common law mentors the British, has gone to a code system, and discusses other countries' codes at some length.

I predicted that conservatives would not like the idea of formalizing federal control over state criminal procedure (though it now exists de facto anyway). And liberals might not like it because they do not trust Congress. (The book was written before the Republican takeover of Congress in 1994.) This latter point proved to be particularly prophetic. While previous reviewers have

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6. Which should include such matters as how long the suspect may be subjected to continuous interrogation, whether he may be visited by friends or family members, and whether he can be deceived. See Bradley, supra note 1, at 149.

7. For a detailed discussion of the merits of making rules of criminal procedure by code rather than by court decision, see id. chs. 4 & 6.

8. I argued that since the process of "incorporation" in the 1960s the Fourteenth Amendment now includes the provisions of the Fourth, Fifth, and Sixth Amendments, Congress, as well as the Supreme Court, can "enforce," and hence delineate, the requirements that those provisions impose on the states. Id. at 146.

9. Id. at 153.
found much to like about the book, they have manifested little enthusiasm for its main proposal.\footnote{E.g., Welsh S. White, Improving Constitutional Criminal Procedure, 93 Mich. L. Rev. 1667, 1669 (1995) ("Even those who disagree with Bradley's principal positions will be impressed by his insights and will gain a deeper understanding of our criminal justice system from this book."); M. W. Bowers, 31 Choice 868, 869 (1994) ("Extensive appendices, index, and bibliography add to an already excellent work, one that should be read by anyone concerned with the criminal justice system."); Bernadyne Weatherford, 18 Legal Stud. F. 229, 232 (1994) ("While I may question some of Bradley's conclusions, his suggestions for reform deserve serious consideration. Anyone interested in the future of criminal procedure in the United States will find food for debate for years to come by perusing this book."); L. H. Leigh, 35 Brit. J. Criminology 476, 477 (1995) ("This reviewer has doubts [about the proposal] but in any event this aspect of the book is of less importance to the foreign reader than is the exposition of the limits of judicial law-making and the exposition of current defects and a current malaise in American procedural systems. For that discussion, the book is well worth reading.").}  

Now comes Thomas Y. Davies, writing in the June 1996 issue of this journal. In his review, Davies goes beyond disagreeing with the proposals of the book and raises strident questions about my competence, my objectivity, and, to some extent, my honesty.\footnote{"Bradley effectively asserts that the same data prove opposite conclusions." 46 J. Legal Educ. 279, 284 (1996). "Unfortunately, inconsistency is not the only hobgoblin that haunts Bradley's foray into statistics. He also makes several irresponsible statistical claims that exaggerate the 'disturbingly high number' of released criminals [thanks to the operation of the exclusionary rule]." Id. "Bradley[] attempt[s] to maintain a posture of ideological neutrality," id. at 283, but "the fact that Bradley goes out of his way to endorse the myth of 'disturbingly high' costs may lead some readers to wonder if his views about criminal procedure are really ideologically neutral." Id. at 285.} In Davies' view, I am apparently either the unwitting stooge of a Rehnquist/Gingrich plot to dismantle the Warren Court's criminal procedure initiatives or a closet conservative who is slyly, if ineptly, trying to achieve that goal myself.\footnote{I would be doubly incompetent to advance such a "conservative" agenda since, as noted, most conservatives, including Rehnquist, loathe the idea of formalizing and expanding federal control over criminal procedure. Nevertheless, another reviewer also feared that the book either was "naïve" or reflected a "Machiavellian intent to solidify conservative gains by trying to depoliticize what has been [a] political issue for many years." Roy Flemming, The Failure of the Criminal Procedure Revolution, 3 Law & Pol. Book Rev. 123, 126 (1993). We moderates get no respect.}  

Davies levels two basic criticisms.\footnote{Another point raised by Davies, that the book's "treatment of doctrinal history" is "conventionally superficial," seems to deny that there was a criminal procedure revolution in the 1960s. Davies, supra note 11, at 280. I suppose anyone who believes that all the Warren Court did was to apply preexisting federal rules to the states wouldn't agree that there was a criminal procedure revolution to fail. This view is, to say the least, unusual.} The first is set forth in the initial paragraph of his review:

This book is written around Craig Bradley's belief that criminal procedure should be formulated consistently according to either a model in which "clear rules" are applied rigorously, or a model of "no rules" in which doctrine provides only flexible guidelines for fact-based decisions to be made by the lower courts. For example, a strict warrant requirement for searches of houses would be an example of a "clear rule," while a simple requirement that all searches of houses be reasonable in the circumstances would be an
example of the "no rules" approach. Bradley repeatedly asserts that which model is adopted is not as important as that one or the other be consistently adopted.\textsuperscript{14}

This assertion, which Davies repeats several times, makes one wonder if he has read the book at all. The whole point of the book, as noted above, is "that Congress, acting through a rulemaking body appointed by it, . . . should enact a national code of criminal procedure."\textsuperscript{15} The book goes on to say that "what is needed is a comprehensive code setting out with as much particularity as possible, the rights and duties of police, suspects and others concerned in the criminal investigation process."\textsuperscript{16} Any residual doubt that the book calls for a detailed code of procedure should have been allayed by the sample code section for vehicle searches which sets forth with particularity the powers and limitations governing the police in such cases.\textsuperscript{17}

Davies' second criticism is, essentially, that the book exemplifies Disraeli's declaration that there are "lies, damned lies, and statistics." The book devotes only six pages to statistical data. These pages are a peculiar portion to zero in on since they are preceded by the disclaimer: "Studies concerning the impact of the exclusionary rule are not very helpful in assessing the overall success of the Warren Court's criminal procedure innovations."\textsuperscript{18} The reason for this is simple. If we find that much evidence is lost through the operation of the exclusionary rule, is the rule bad, because it allows a lot of criminals to go free, or is it a vital branch on the tree of liberty because it shows how much police illegality there is? A similar point can be made about statistics that show that the exclusionary rule has not had much impact.\textsuperscript{19}

That said, my brief discussion of statistics then moves on to quote the Supreme Court's conclusion that "the small percentages [of cases where

\textsuperscript{14} Id. at 279 (emphasis added). "Bradley is unwilling to choose one approach or the other—or at least to announce his choice . . . ." Id. at 280.

\textsuperscript{15} Bradley, supra note 1, at 4.

\textsuperscript{16} Id. at 146 (quoting with approval the Australian Law Reform Commission, Report No. 2, at 23) (emphasis added). The book repeatedly argues for a "comprehensive set of rules." E.g., id. at 5; see also id. at 149.

\textsuperscript{17} Id. at 156-58. It is true that, in a 1985 article, I did make the proposal that the Supreme Court (not Congress) should either declare more detailed rules governing searches and stick to them, or else leave it to trial judges to decide whether a search was "reasonable" or not. Two Models of the Fourth Amendment, 83 Mich L. Rev. 1468 (1985). I repeated that proposal in the concluding chapter of the book, "Alternative Models of Criminal Procedure." As the title states and the text makes clear, I offered this suggestion only if the book's proposal for a detailed legislative code of procedure failed and the Supreme Court continued its course of declaring "rules" for police to follow through a series of often confusing and contradictory opinions.

\textsuperscript{18} Bradley, supra note 1, at 41.

\textsuperscript{19} The most relevant statistic discussed in the book, which Davies ignores, is the finding by William Heffernan and Richard Lovely that when 547 police were asked if six fact situations were properly handled by police, they correctly evaluated the police behavior only 3.4 times out of 6—just slightly better than random. Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law, 24 U. Mich. J.L. Ref. 311 (1991) (discussed in Bradley, supra note 1, at 45). Unlike any other study, this makes my point: the rules are confusing to police.
evidence is excluded] mask a large absolute number of felons who are re-
leased because the cases against them were based in part on illegal searches.\textsuperscript{29} Davies' lengthy statistical critique again misses the point. These statistics are offered not in support of an argument to abolish the exclusionary rule,\textsuperscript{21} as Davies seems to think, but for the unexceptionable proposition that if the rules were clearer, the police would be able to follow them more easily and we wouldn't have to exclude so much evidence.

But if Davies' specific criticisms are not well taken, the more important issues remain. First, would we be better off with a code of criminal procedure than with a series of Supreme Court decisions, as a means of controlling police behavior? And second, is it possible to create such a code without letting political considerations unacceptably diminish the rights of criminal suspects?

As to the second issue, I must admit that I, too, am disquieted by the thought of a Gingrich-led Congress taking on this task, though the presidential veto and Supreme Court oversight of such a code would likely produce an acceptable result. In any event, with the composition of Congress and the Court in constant flux, any ideological assumptions about the content of a future code are as likely to be wrong as they are to be right.\textsuperscript{22} The only meaningful issue therefore is whether, leaving ideology aside, a code is a better way to provide rules for police to follow. My conclusion, bolstered by the approach of virtually every other country in the world, and my own assessment of thirty-plus years of Supreme Court rulemaking, is that it is.

20. Bradley, \textit{supra} note 1, at 42 (quoting United States v. Leon, 468 U.S. 897, 907 n.6 (1984)). The book then discusses a table compiled by the ABA describing a study of judges and practitioners which showed that from zero to 11 percent or more of cases were lost through the operation of the exclusionary rule. \textit{Id.} at 43. There was an error at this point. The book declared that since there were about 3 million serious crimes in 1988, “if 5 percent of cases were dismissed due to search problems and another 5 percent due to \textit{Miranda} problems, 30,000 cases were dismissed nationwide in one year because of the exclusionary rule.” Actually, a zero got lost somewhere in the publishing process: 10 percent of 3 million is, of course, 300,000, not 30,000. Therefore the effect of the exclusionary rule is much greater than the book claimed. Davies neglected to mention this point in his statistical critique.

21. As a further example of just how sly I have been in my Machiavellian plan to advance a conservative agenda, I have consistently supported the exclusionary rule over the years. E.g., \textit{The Exclusionary Rule in Germany}, 96 Harv. L. Rev. 1032 (1983) (demonstrating that American conservatives were wrong in their claim that the exclusionary rule was unique to America).

22. In my view, the “criminal procedure revolution” was an aspect of the civil rights revolution and was driven in large part by the unique situation that existed at that time: the unacceptably unequal status of blacks in this country. Anyone who expects a new liberal-activist Warren-like Court to rise up to lead a new charge on behalf of criminal defendants is likely to be disappointed. Moreover, with state court benches that are vastly more diverse than they were in the 1960s, and with certain key rights of defendants well established, the need for such a “revolution” is surely less.