When Criminal Rights Go Wrong

Forget liberal. Forget conservative. Think common sense.

by Paul Savoy

It has become one of those commonplaces of bicentennial speeches and Fourth of July orations to cite reports by pollsters that if the Bill of Rights were put to a vote today, a surprisingly large number of citizens would fail to ratify some of our most fundamental freedoms. A 1989 survey conducted by *The National Law Journal* showed that Americans are so fearful about the drug-driven crime epidemic that more than half of those polled who expressed an opinion favored cutting back the constitutional rights of criminal defendants and overruling Supreme Court decisions that limit police conduct in gathering evidence.

When Americans reject the ideals of one of our founding documents, we are urged to believe, as Garry Wills observed on the occasion of the 200th anniversary of the Declaration of Independence, that something has gone wrong with America; that somehow, in failing to subscribe to the Supreme Court's interpretation of certain 18th-century ideals, America "has ceased in part to be itself." What we have failed to consider is the possibility that what may be misguided are the orthodox teachings of the American legal establishment, not the majority opinions of the American people.

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The approach of the 200th anniversary of the ratification of the Bill of Rights provides a timely opportunity for the legal profession to consider an unsettling idea: There may be considerable validity to the profound, though poorly articulated, intuition of the public at large that the procedural guarantees of the Constitution are not to be used to undermine a defendant's responsibility for his criminal acts. Because readers will be (and should be) extremely skeptical of the claim that much of what law schools have been teaching and courts have been espousing since the advent of the Warren Court era may be fundamentally flawed, a heavy burden rests with those who would challenge the prevailing orthodoxy.

Taking rights too seriously?

Having provided the framework for what was surely the most ambitious and idealistic effort in the history of the Supreme Court to bring the Constitution to bear upon flagrant abuses in the administration of criminal justice, liberals have become willing to accept the assumptions and principles of that 1960s revolution as dogma beyond accountability to serious moral or intellectual inquiry. Deeper and more mature reflection on the history and purpose of the procedural guarantees of the Constitution—including most prominently the Fourth Amendment

prohibition of unreasonable searches and seizures and the Fifth Amendment privilege against compulsory self-incrimination—will show that these fundamental rights were not intended, and should not be construed, to protect the guilty.

In 1957, Edgar Smith was convicted of murdering a 15-year-old girl and sentenced to die in the electric chair. High school sophomore Vickie Zielinski had disappeared on her way home from visiting a friend, and her battered body was found the next day in a sand pit on the outskirts of the small New Jersey town where she lived. Her skull had been crushed with a 44-pound boulder, leaving a gaping hole in her head and her brains scattered along the bank.

In 1969, the Supreme Court ordered a hearing to determine if incriminating statements Smith made to police had been obtained in violation of his constitutional rights. Although Smith acknowledged that he had not been mistreated by the police officer who conducted the interrogation, and three psychiatrists testified that the statements were "the result of his free will and rational choice," a federal court in New Jersey ruled the statements were inadmissible because they were obtained under "coercive" circumstances: Smith had not been advised of his right to remain silent or his right to counsel, and his interrogation had extended over a period of more than 10 hours. After 14 years on Death Row, Smith, who continued to assert his innocence, was released from prison because, without his statements, there was insufficient evidence to retry him for first-degree murder.

Five years after his release, in 1976, Smith finally did confess to killing Vickie Zielinski—at a trial in San Diego in which he was convicted of kidnapping and attempted murder after abducting another woman and stabbing her with a six-inch butcher knife as she struggled to escape. "Don't ask me why I did it," Smith later wrote from San Quentin Prison regarding the San Diego attack. "Ask those self-righteous public servants why they gave me the opportunity to do it."

No constitutional controversy has generated as much public furor, nor elicited a more unsatisfying response from the legal profession, than the debate over the rights of people accused of crimes. The notion that criminals have constitutional rights may offend the average citizen concerned about the increase in drug-related crime and gang violence, but every law student soon learns that the common sense of the common man is wrong. The basic premise of our constitutional system of criminal justice is that a defense attorney has the duty to raise every available legal defense without regard to the actual guilt or innocence of his client. If cross-examination can be used to discredit a nervous and easily confused witness, use it, even though you know he is telling the truth. If the evidence has been illegally seized, move to suppress it, even though it establishes incontrovertible proof of your client's guilt. If the eyewitness's identification is tainted by an improperly conducted lineup, challenge it, even if the witness has correctly identified your client as her assailant. If the police interrogated your client without advising him of his right to remain silent, move to exclude his confession, without regard to whether it is truthful or whether your client is actually guilty of the kidnapping and murder with which he is charged.

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"Defense counsel has no obligation to ascertain or present the truth," explains Justice Byron White in a classic statement of the criminal lawyer's role. "Our system assigns him a different mission. . . . [and] permits counsel to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." If an injustice results, in the sense that a guilty person escapes a punishment he deserves, it results because the Constitution, according to the received view, not only permits it, but requires it. "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike," Justice William Brennan reminds us in a recent affirmation of this fundamental principle of constitutional jurisprudence. Beginning in the early sixties, the constitutional rights of criminal defendants came to be defended in such eloquent and eminently reasonable terms that no one with a modicum of civic virtue could disagree. That all people, without regard to guilt or innocence, are entitled to claim the procedural decencies of the Constitution in resisting the power of government to invade their freedom and privacy—who would dispute such a ringing affirmation of human dignity and the rule of law? Few statements about the Bill of Rights seem so obvious from the

text or sound so seductive. And yet few are so deeply and grievously flawed.

In the 1980s, the perception that there is something radically wrong with the prevailing liberal view of the rights of people accused of crimes became widespread. Outrage about the extent to which victims are sacrificed to the rights of criminals is evident

A long line of distinguished authorities confirm the conclusion that in common law, an arrest violated no right of the accused if he was actually guilty.

in the wave of films in the last several years that depart from the Perry Mason school of criminal law, in which all clients are innocent. The outrage is there in *The Jagged Edge*, the story of a defense lawyer portrayed by Glenn Close, who skillfully wins an acquittal for her client in a murder trial, only to discover that she is about to become his next victim. It is there in *Star Chamber*, in which a group of trial judges, fed up with having to dismiss cases against guilty defendants on technicalities, deputize themselves to try the culprits *in absentia* and order their execution by hired hit men. And in *True Believer*, James Woods portrays San Francisco attorney Tony Serra, a sixties defender of political activists turned eighties drug lawyer, who is berated by a disenchanted young associate for "using exalted principles to get off scumbags," until he gets a chance to redeem himself by defending an innocent man.

By the end of the 1988 presidential campaign, drugs and violent crime had vaulted to the top of the American political agenda. The defeat of Michael Dukakis became the most visible symbol of the deep fissures and contradictions in "liberal" that have made it synonymous with "soft-on-crime."

There is considerable irony in the extent to which liberalism has taken the heat for coddling criminals. Despite its rhetoric of liberty and human dignity, the due process school of criminal procedure is not a legitimate child of classical liberal thought. John Stuart Mill, the founding father of liberal legal theory, actually denounced as "sophistry" and as "palpably untenable and absurd" those arguments invoked by barristers in early 19th-century England to rationalize the use of procedural rules to defeat the prosecution of clients they knew were guilty of the crimes with which they were charged. "The benefit which would arise from the abolition of the exclusionary rule," Mill wrote in a postscript to Jeremy Bentham's classic treatise on the law of evidence, "would consist rather in the higher tone of morality that would be introduced into the profession itself." The exclusionary rule to which Mill was referring was the attorney-client privilege, which, in the context of criminal defense practice, "gives an express license to that willful concealment of the criminal's guilt, which would have constituted any person [besides the criminal's lawyer] an accessory to the crime." With Bentham, Mill called for a reform of legal ethics:

"We should not then hear an advocate boasting of the artifices by which he had [manipulated]. . . a deluded jury into a verdict in direct opposition to the strongest evidence; or of the effrontery with which he had, by repeated insults, thrown the faculties of a bona fide witness into a state of confusion, which had caused him to be taken for a perjurer, and as such, disbelieved. Nor would an Old Bailey counsel any longer plume himself upon the number of pickpockets whom, in the course of a long career, he had succeeded in rescuing from the arms of the law. The professional lawyer would be a minister of justice, not an abettor of crime; a guardian of truth, not a suborner of mendacity."

The so-called "liberal" model of criminal procedure that prevails in the United States today is actually an odd coupling of free-market theory with a particularly interventionist form of governmental regulation—not regulation of the private sector, but regulation of government by government: regulation of the police by the courts. It is governmental regulation in the name of individualism, not the traditional individualism of Jefferson or John Stuart Mill, but the free-enterprise individualism of modern libertarianism decked out in the pious rhetoric of the founding fathers.

Staples of injustice

In the early morning hours of May 5, 1979, the badly burned body of Sandra Boulware was discovered in a vacant lot in the Roxbury section of Boston. An autopsy revealed that she had died of multiple compound skull fractures caused by repeated blows to the head. After an investigation, police linked the homicide to one of the victim's boyfriends, Osborne Sheppard, and obtained a warrant authorizing a search of Sheppard's house. Police officers found several pieces of incriminating evidence there,

including a pair of bloodstained boots, a hairpiece belonging to the murdered woman, and strands of wire similar to wire fragments found on the victim's body.

Sheppard was found guilty of first-degree murder after a trial in which these items were received in evidence. Two years later, the Massachusetts Supreme Judicial Court overturned the conviction on the ground that the evidence had been illegally seized. Because Detective Peter O'Malley had applied for a search warrant on a Sunday, the local courthouse was closed, and he could not find an application form for the warrant. O'Malley finally obtained a warrant form designed for narcotics cases, but he failed to delete the reference to "controlled substances" in the part describing the evidence to be seized. O'Malley had included a detailed description of the evidence in an affidavit that accompanied the warrant application, and the warrant would have been valid if the judge had written "see attached affidavit" on the form and stapled the affidavit to the warrant. But the judge issued the warrant without making the necessary changes. The mistake proved fatal, insofar as the Fourth Amendment requires that a warrant "particularly describe" the evidence to be seized. Because of a failure to staple two pieces of paper together, the state's highest court reversed Sheppard's murder conviction.

In 1984, the U.S. Supreme Court agreed to hear the case. By then, the Burger Court had already begun whittling away at the 1961 Warren Court decision in *Mapp v. Ohio*, which established the principle that evidence seized in violation of the Fourth Amendment is inadmissible in state as well as federal prosecutions. In an opinion written by Justice White and joined by five other members of the Court, Sheppard's conviction was reinstated and the exclusionary rule was modified to incorporate a "good faith" exception. This exception permits illegally seized evidence to be used against a defendant if the police officer who conducted the search reasonably believed that it was authorized by a valid warrant. Affirming earlier indications of the Burger court that the exclusionary rule is not to be regarded as a "personal constitutional right of the person aggrieved," the conservative majority in *Sheppard* concluded that illegally seized evidence should not be excluded when the benefits of the rule in deterring police misconduct are outweighed by its costs in freeing guilty defendants.

Civil libertarians denounced the Court's decision as tantamount to repealing the Fourth Amendment. Liberal defenders of the exclusionary rule, including

Justices William Brennan and Thurgood Marshall, who both dissented from the Court's ruling in the Sheppard case, maintained that the exclusionary rule is not a discretionary remedy that the Court is free to balance against the costs of letting guilty defendants off, but rather, "a direct constitutional command." In a widely quoted speech delivered the following year, Justice Brennan, one of the two remaining members of the Warren Court majority, lamented the Court's failure in the post-Warren years to fulfill its historic mission "as a protector of the individual's constitutional rights."

The debate between liberals and conservatives over the good-faith exception to the exclusionary rule has manifested itself in the form of a question that captures the constitutional crisis in a more compelling way than might at first appear—as a kind of Zen koan for our times: *Does a police officer's reasonable belief in the reasonableness of an unreasonable search make the search reasonable?* The cabalistic nature of such constitutional conundrums is not so much a function of some profound legal mystery as it is a symptom of the breakdown of the ruling doctrines that have shaped the Court's thinking about them. Behind the smoke and mirrors of the constitutional arguments is one simple and fundamental disagreement between liberals and conservatives that everyone could understand if candid explanations were not ruled out by the legal profession's allegiance to the cult of complexity: Liberals believe that everyone is entitled to claim the protection of the Fourth Amendment, without regard to their guilt or innocence; conservatives, while they pay lip service to this constitutional canon, do not actually believe it—and with good reason. That a person driving a car with a corpse in the trunk and a five-year-old kidnap victim on the floor has some legitimate expectation of privacy is about as ludicrous a proposition as one could imagine. But back on the record, Everyman's car is his castle.

More than 30 years ago, before *Mapp* was decided and the ideological silos had hardened, Edward Barrett, former dean and professor emeritus of the University of California at Davis, posed the common-sense question in an article in the *California Law Review*: "If one were to look only to the rights of the defendants, why would it not be reasonable to take the position that by engaging in [criminal activity] within their houses, they have waived their constitutional right to privacy and could in no event complain of the police entries?" A closer reading of certain celebrated 18th-century cases, frequently cited by liberal jurists and commentators as "landmarks of English liberty," supports Professor Barrett's suggestion that criminals should not have any right to use their privacy to conceal criminal activity. It appears that the original purpose of the Fourth Amendment was not to create a personal sanctuary where even the criminal might claim a legitimate expectation of privacy, as modern authorities assert, but rather to protect law-abiding citizens from invasions of privacy by overzealous law enforcement officers.

Common law, common sense

In 1763, the Chief Justice of the English Court of Common Pleas, later elevated to the peerage as Lord Camden, authored an opinion which would immortalize him, in the words of Samuel Johnson, as the "zealous supporter of English liberty by law." John Wilkes, a member of Parliament, and 49 other individuals had been arrested the preceding year and charged with seditious libel in connection with their publication of one of a series of political pamphlets that contained an unusually bitter attack both on Charles II and on the use of general warrants to search for evidence of violations of an unpopular tax on cider. A general warrant was issued by the secretary of state, pursuant to which Wilkes' house was ransacked and all his private papers seized. Wilkes brought a civil suit against the governmental official responsible for the execution of the warrant and won a judgment of 1,000 pounds.

Although Lord Camden roundly condemned the use of general warrants as "totally subversive of the liberty of the subject," a careful reading of his opinion makes it clear that the guilt or innocence of the householder was far more relevant to the validity of the search than the standard liberal accounts suggest. The chief justice declared that although the warrant was unsupported by probable cause, "If upon the whole, they [the jury] should esteem Mr. Wilkes to be the author and publisher [of the pamphlet], the justification [for the search] would be fully proved."

A long line of distinguished authorities, from Sir Matthew Hale's classic 18th-century work on the English common law of liberty to the American Law Institute's modern *Restatement of Torts*, confirm the conclusion that under common law, an arrest, even though made without a warrant or probable cause, violated no right of the accused *if he was actually guilty of the crime for which he was arrested.* It was the common sense of the common law that the criminal had no standing to complain of being caught.

This is not to say that in acting without probable cause or in failing to obtain a valid warrant, the police have not violated the Fourth Amendment, but only that in so acting, *they have violated no personal right of a felon.* On this revisionist view of the Fourth Amendment, the function of the exclusionary rule,

when invoked by a factually guilty defendant to object to illegally seized evidence, is not to vindicate any personal right of the accused but actually enables him as a representative of the public interest to enlist the judiciary in protecting the collective security of

The right to remain silent reflects our unwillingness as a society to permit an innocent person to become the instrument of his own conviction.

the rest of us. The defendant, in effect, is "asserting that he must be recognized as a private attorney general, protecting the Fourth Amendment rights of the public at large," explains Columbia University Professor of Constitutional Law Henry Monaghan.

The public debate over the exclusionary rule has proceeded as if the issue were "the rights of the suspect" versus "the rights of society." Formulating the problem in such terms misapprehends the true nature of the rights asserted by the criminal defendant. When a defense attorney moves to suppress the 400 pounds of cocaine with which his client was caught red-handed, what is actually being defended is not a personal right of the defendant, but the right of drug traffickers to defend the rights of the rest of us without our consent—a prerogative that leading constitutional scholars are beginning to recognize has no basis in the Bill of Rights.

The Court has no power per se to reverse a conviction because the police have violated the Constitution. The rights guaranteed by the Constitution normally may be enforced only by someone whose own personal protection was infringed by the violation. In the rare instance when individuals are permitted to assert the rights of third parties or of the public at large, the Court has held that some relationship must exist that makes the individual asserting the right an adequate representative of the members of the public in whose behalf the right is claimed.

We have done something strange and almost incomprehensible in our constitutional system of criminal justice. On the one hand, the justices have closed the federal courthouse door to law-abiding citizens seeking to protect their own rights with public interest lawsuits and have refused to issue injunctions against police misconduct even when individuals have been seriously injured as a result of those abuses. (In a lawsuit challenging the use of choke-holds by the Los Angeles Police Department, the plaintiff, who had been strangled into unconsciousness by a police officer during the course of a stop for a traffic infraction, was denied injunctive relief against the use of the holds, even though by the time the Court heard the case in 1983, 16 deaths had occurred as a result of the departmental practice.) On the other hand, the Supreme Court has deputized criminals to protect the constitutional rights of law-abiding citizens. The factually guilty defendant, however, insofar as he seeks to enforce the public interest by obtaining exemption from punishment, is a most improbable and inadequate representative of the public interest.

The real objection to using illegally seized evidence against a factually guilty defendant is not that such use is contrary to the Constitution, but that a court is normally unable to determine whether a defendant is guilty of using his privacy for criminal purposes without considering the very evidence that has been unlawfully seized. The Supreme Court has declared that "an arrest is not justified by what the subsequent search discloses." Perhaps it is time for the Court to reconsider this doctrine and permit the fruits of the search to be used, not to justify the search, but to determine whether the defendant was using his privacy for criminal purposes, thereby reserving the exclusionary rule for people who maintain a legitimate expectation of privacy.

A dubious privilege

After being arrested at his home in Phoenix, Arizona, Ernesto Miranda was picked out of a lineup by an 18-year-old victim as the man who had kidnapped and brutally raped her. Two officers then took Miranda into a separate room to question him. At first he denied his guilt, but after two hours of interrogation, he gave a detailed oral confession and then wrote out and signed a brief statement in which he admitted and described the crime. Although unmarked by any of the traditional indicia of coercion, Miranda's oral and written confessions were held inadmissible because the police had failed to advise him of his right to remain silent and his right to a lawyer. As Justice John Harlan suggested, in dissenting with three other members of the Warren Court from the majority's ruling almost 25 years ago in *Miranda v. Arizona* "one is entitled to feel astonished" that the Constitution can be read to create such a dubious privilege: *a right of criminals to conceal their crimes.*

MY FELLOW ARMENIANS. . .

Judith Martin's account in *The Washington Post* of the welcoming ceremony for Spanish King Juan Carlos at the White House: "President Ford emphasized the historical contributions of Spain to the United States, correcting himself quickly when he referred to the country as 'Stain' and when he slipped and said that America had been discovered in 1942."

—July/August 1976

This ad appeared in the August 27, 1981 *San Diego Union:*

"Reagan's new tax law enabled me to buy my own airplane." Thanks to the new tax law and Western Sun Aviation, I have my own airplane . . . and I paid for it with tax dollars! Now I'm flying to places like San Francisco, Catalina, the Grand Canyon, and many others.

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WHO SAYS BANKS ARE UNFEELING?

Credit and Financial Management magazine looks forward to automated electronic banking: "It won't be long before customers should be able to complete most of their banking transactions without any personal contact. This will enable banks to offer more personalized services."

—March 1977

JINGLE BELLS, JINGLE BELLS/JINGLE ALL THE WAY/OH WHAT FUN TO PACK A ROD/SO GO AHEAD AND MAKE MY DAY

To wish people well over the holidays, John M. Snyder, chief lobbyist for the Citizens' Committee for the Right to Keep and Bear Arms, sent out Christmas cards with a picture of a beaming Bernhard Goetz sitting astride Santa's knee and receiving a "full pardon" for Christmas, with the Manhattan District Attorney Robert Morgenthau downcast, sulking alongside.

—February 1987