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A holistic approach to criminal justice scholarship

The narrow focus of law school curricula and academic analysis

is at least partly responsible for the public's lack of confidence

in the criminal justice system.

by William T. Pizzi

The American public is clearly angry with the criminal justice system and has little confidence in it. This is apparent from public opinion polls and in statement after statement from victims who fairly shout that the criminal justice system systematically ignores their interests and those of the broader public. And, of course, this anger is reflected in political rhetoric where every politician wants to be perceived as tough on crime.

Although responsibility is widespread, the academic community must take a large share of the blame for loss of public confidence in the criminal justice system. There are two reasons for this. First, law schools are not giving students an adequate perspective from which to view the system. While they do a good job of training students to think like lawyers to the extent that graduates are comfortable navigating Supreme Court case law and are well

about "rights" and about this decision or that decision but lacks the ability to see the system in broader perspective.

The second reason for lack of confidence involves the quality of academic analysis. Too often scholarship in the criminal area rests on truncated and incomplete analysis. A strong system of criminal justice should strive to achieve a number of objectives that can conflict with each other. It should treat those who come in contact with the system—whether as defendants, victims, or witnesses—with dignity and respect. It should have procedures that allow it to determine guilt or innocence with a high degree of reliability. And it should make wise and careful use of its limited resources. But much scholarship begins and ends by focusing on the treatment of suspects and the constitutional rights of defendants, while overlooking any consideration of other legitimate and important goals.

When one combines the way law students are taught about the criminal justice system and the way academics analyze criminal justice problems—and the two are obviously related—it comes as no surprise that in 1995 we have a system that is heavily proceduralized, one that places a high premium on lawyers and their skills. At the same time, however, it is a system in which many citizens, and some law-

yers, have lost confidence.

While this essay is about law professors and how they train their students, this is equally an essay about lawyers and judges who practice in and help shape the system. Clearly, the causal mechanics between those teaching about the system and those working in it go both ways. While law professors may have some influence on the system, the system has considerably more influence on them and on what they must teach if the students they train are to be successful. To the extent that the criticisms made here about the way law professors teach and analyze legal issues are valid, they apply equally to the way issues are argued, analyzed, and resolved within the criminal justice system.

Teaching criminal procedure

The typical course in criminal procedure focuses on the U.S. Constitution, with very heavy emphasis on the Fourth and Fifth Amendments. The course covers the major doctrines in those areas, such as the exclusionary rule, the good faith exception to the exclusionary rule, the meaning of probable cause, the mechanics of warrants, various specific search categories, stop and frisk, *Miranda* warnings, the meaning of interrogation, the public safety exception to *Miranda*, attempts to elicit information from a suspect after the attachment of the Sixth Amendment, and, finally, various doctrines relating to operation of the exclusionary rules.

Focusing a course on criminal procedure this way provides students some perspective on the police and what they do but very little perspective from which to examine the roles lawyers and judges play. It also deludes students into thinking that the investigative process is the heart of criminal procedure, and that it can be considered in isolation.

This is a serious mistake. Law school should force students to understand that the criminal justice system is an integrated whole that functions only as well as its weakest part. It is no good having the best investigative procedures in the world if the trial system screens out too much reliable evidence or doesn't allow the evidence

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prepared to function within the system, they graduate students who have very little perspective on the system as a whole and no training at thinking critically about it. Training a student to think like a lawyer now has a negative connotation in the criminal area. It indicates someone who can talk glibly

that is admitted to be properly tested and evaluated. And it is also no good having the best trial procedures in the world if the investigative process does not allow the system to gather sufficient evidence to convict the guilty and acquit the innocent with a high degree of reliability. And even if a system has the best investigative and trial procedures in the world, it is a weak system if its fact finders cannot be trusted to weigh the evidence fairly and reach reliable decisions.

In addition, the nearly complete identification of criminal procedure with the constitutional rights of defendants means that criminal procedure issues that do not fit within a narrow constitutional context rarely get raised. Consider, for example, the system's preference for a fact-finding body that is entirely passive. What are the premises that justify or support such a preference? Wouldn't a trial be more likely to reach a reliable verdict if the jury could indicate the evidentiary issues that it sees as troubling? Or consider another issue ignored in criminal procedure courses: the "wood shedding" of witnesses by lawyers in order to rehearse them for their performances in court. Is this consistent with the premises of our trial system? What are the effects on the system? How might such witness preparation alter the way witnesses see the system and their roles? Why is the rehearsing of witnesses to make them more effective on the stand usually considered highly improper in other Western trial systems, both adversarial and nonadversarial?

Not well versed in the social sciences and relying on casebooks that provide only strings of cases, law professors and lawyers are more comfortable remaining within the confines of Supreme Court case analysis. But while it is fun to debate the merits of the good faith exception to the exclusionary rule or to try to decipher the latest pronouncement on how the Fifth and Sixth Amendments intersect in the interrogation room, a steady diet of

Supreme Court cases encourages students to believe that criminal procedure issues are far simpler than they actually are. The Court has before it a nice narrow set of facts and legal briefs arguing strenuously for or against the remedy sought. What the Court lacks, however, is an empirical basis on which to estimate reliably: (1) how often the problem at hand comes up around the country; (2) how serious the problem is when it does occur; (3) how effective the proposed remedy is likely to be in eliminating the problem; and (4) what the proposed remedy's likely impact on the system would be in terms of efficiency and reliability.

As a protection for citizens against clear abuses of state power, these issues

Law professors and lawyers are more comfortable remaining within the confines of Supreme Court case analysis.

should not be important. But when the Court is trying, through the prism of defendants' rights, to mandate detailed rules meant to govern all manner of police-citizen contacts as well as attempting to set the basic parameters for trial procedure, the narrow focus of Supreme Court decisions becomes a liability, not a strength. Unfortunately, the nearly exclusive reliance of criminal procedure courses on Supreme Court cases turns the Court's institutional weaknesses into pedagogical weaknesses in the training of future leaders of the bench and bar. Law schools encourage the belief that criminal procedure is about defendants' rights, and that other issues such as the reliability of the system or how the system treats those who are not defendants can take care of themselves.

Writing about the system

This criticism of criminal procedure courses and lawyer training may seem

unfair because individual teachers can use cases as springboards for raising many different issues. And professors may teach very different criminal procedure courses out of the same casebooks. But the same weaknesses that are present in criminal procedure courses appear in scholarly writing. So much of it is full of bold suggestions for the expansion of this or that constitutional right without a historical or comparative perspective on the perceived problem and without even a minimal attempt to assess the broader impact of the remedy on the system as a whole.

To take one striking example, consider articles that start from the premise that *Miranda* and its progeny do not go nearly far enough because suspects in an interrogation setting are no match for skilled interrogators and cannot be expected to waive their rights with a full understanding of their constitutional protections. The articles then argue that the Supreme Court should expand *Miranda* by either automatically providing counsel to suspects in advance of any police questioning

or by simply abolishing all custodial interrogation. These are radical proposals with possibly devastating implications for cases, such as murder or rape, where the perpetrator tends not to stick around after the crime. While the exact costs of *Miranda* are often debated, many suspects continue to waive their rights and make incriminating statements to the police even after they receive *Miranda* warnings.

Given the radical nature of the various proposals to expand the rights of suspects, one might think that a scholar putting forward such an expansion of the right to remain silent would feel an obligation to put this proposal in a broader perspective. After all, murders, rapes, and similar serious crimes take place in other countries, these crimes have to be investigated by the authorities, and many of these countries guarantee suspects a right to silence in the face of

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Viewpoint

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official questioning as well as recognize a privilege against self-incrimination. But does any country actually interpret the right to silence in this radical way? Or for that matter, how does the balance between suspects and police in the interrogation room compare to the balance set out by *Miranda* and its progeny? It would be sobering for these scholars to look at interrogation in other countries, especially those with which we share a common legal heritage.

But even more important, isn't there some obligation to attempt to assess the likely impact of this proposal on the acquittal rates for different categories of crimes? What does it mean for the system to go from a waiver rate that may be as high as 40 or 50 percent to a system in which stationhouse confessions are rare? Although there is strong support among scholars for a radical expansion of suspects' rights under *Miranda*, there have been no attempts to assess the consequences of this expansion. Once discussion of constitutional rights is separated in our think-

ing from difficult concerns about the impact of those rights on the efficiency and reliability of the system, rights analysis becomes simple and straightforward but shallow and superficial.

There is no easy answer to how interrogation should be handled in a modern society. And it certainly is not as easy as it is assumed to be in most American legal scholarship. This is clear from the fact that there is no consensus in other countries on interrogation or on how the right to remain silent should be viewed. In Ireland, an arrestee must be cautioned prior to any questioning, but part of the caution informs the suspect that his failure to account for his presence near the scene of the crime or to account for any evidence implying his participation in the crime may be introduced at trial. In England, a suspect has the right to remain silent, but at the same time the police have the right to question the suspect. This means that invoking the right to remain silent does not cut off questioning. While the right to silence is thus narrower in England than it is in the United States, this difference will soon be much more pronounced. Legislation has just taken effect in England that, among other things, permits adverse inferences to be drawn from the failure of the accused to mention any fact to the police that the accused later relies upon at trial.

Scotland permits access to a suspect as a source of evidence in a quite different way. At a committal hearing after charges have been filed, the prosecutor questions the suspect in front of a judicial officer with the defendant having been warned that failure to answer any question may be introduced at trial if the defendant raises a point in his defense that he failed to mention during his committal questioning.

These comparative perspectives are admittedly sketchy and superficial. They are offered not to advocate a certain position but to provide an idea of the rich comparative perspective available on proposals to alter our system. One might think that a system that en-

dures into constitutional stone would be extremely careful and cautious about what it is doing since it is not easy to undo mistakes. But it seems that constitutional analysis has quite the opposite effect: it liberates academics so that they are free to offer suggestions for reform based on incomplete and simplistic analysis.

As persons trained in a common law system, academics and lawyers are naturally more comfortable working with parts of the system than with the whole. Civil law lawyers do not have this problem because their systems are built from the ground up in detailed codes of criminal procedure, and any proposed reform is always viewed and discussed as a part of the whole. Because the American criminal justice system has no such common reference point and because our system tends to evolve bit by bit, it should be the responsibility of the academic community to help lawyers, judges, and law students gain perspective on the system as a whole. But instead, it prefers to stay within the comfortable bounds of Supreme Court case analysis. Whatever may have been its merits in times past, taking students up and down lines of Supreme Court cases on issues such as search and seizure and interrogation, in which subtle distinction is piled upon subtle distinction, is insufficient to meet today's responsibilities. Our criminal justice system does not need another subdivision of this or that line of cases but rather a reform that looks at the system and asks some hard questions about how well the system is functioning in terms of its reliability, the way it is using its resources, and the way it treats those who come in contact with it. Unfortunately, law schools are not currently turning out lawyers equipped to lead such a reform effort. ⚖️

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