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Criminal Procedure in the Current Term

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Commentary

FIRST MONDAY—CRIMINAL PROCEDURE*

Bruce G. Berner**

I. INTRODUCTION

At first glance, the current Court's decisions in criminal cases may appear to be examples of "judicial passivism," casting many issues out of its own view and committing them to the discretion of other actors in the criminal justice system. A closer examination, however, begins to unveil a more result-oriented agenda since the only issues banished from view are ones historically of service to accused persons; this abdication of the Court's role is engaged in only when the Court can be confident that those other actors (police, states, lower federal courts) will "get it right" and convict defendants. Indeed, this so-called "passive" Court has generated new suspiciously activist theories pressing heretofore irrelevant facts into the service of diminishing the constitutional guarantees of persons accused of crime. In short, the Court's jurisprudence in the criminal area may have much less to do with its philosophy of judging than with its politics of crime control.

To demonstrate my thesis, I offer three pieces of evidence: (1) a comparison between the "good faith exception" to the exclusionary rule and a 1996 decision on pretext arrests; (2) recent Court decisions on when a "seizure" occurs, including a spectacular 1998 case which reaches a conclusion you will find fantastic (in the original sense of that word); and (3) this Court's basic jurisprudential tool for deciding difficult crime-connected constitutional questions—the "totality of the circumstances" test.

One more introductory note is important. Our complex of interests in enforcing the criminal law firmly (our "crime control" interest) is in constant, creative tension with the constellation of interests in treating accused persons fairly (the "due process" interest).¹ It is not as if we have

* This speech was delivered on October 5, 1998 (the first Monday).

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¹ The polestar work in understanding the criminal process as an admixture of two models—the "crime control" model and the "due process" model—is Herbert L. Packer's, *Two Models of the Criminal Process*, 113 U. PA. L.REV. 1 (1964).

to choose sides here, though the press often likes to play it that way; instead, we each want, in varying degrees, both interests served. Thus, the politics of "crime control" versus "due process" ebbs and flows with public opinion and may even ebb and flow within ourselves. But as an institution, the Supreme Court is not just a mediator of that tension, for it has been made the special guardian of those fundamental rights which together make up the "due-process" interest. When we find the Court pulling too strongly toward the crime-control side, we need to understand that it not only tips its hand as to its political sentiment but abandons one of its principal reasons for existence.

II. "GOOD FAITH" AND "PRETEXT"

In 1961, the Warren Court, generally reckoned to be among history's most activist courts, held in *Mapp v. Ohio*² that henceforth state courts could not accept in criminal prosecutions any evidence obtained in violation of the Fourth Amendment, that is, through an illegal search or seizure (and keep in mind that a seizure might be a seizure of goods or a seizure of a person—an arrest). This "exclusionary rule" of *Mapp* together with *Miranda v. Arizona*³ on custodial interrogation techniques and *Gideon v. Wainwright*⁴ on indigents' right to counsel, formed the centerpiece of what is often called "the Warren Court revolution."

In 1984, in the companion cases, *United States v. Leon*⁵ and *Massachusetts v. Sheppard*,⁶ the Court (now, of course, the Burger Court and on the brink of becoming the Rehnquist Court) created a new exception to the exclusion of evidence obtained illegally when the police can be shown to have operated in "good faith." Bear in mind that in each of these two cases, the arrest or search in question was, the Court found, illegal. (In *Leon*, the arrest was made without probable cause while in *Sheppard*, the search was conducted pursuant to a warrant which did not sufficiently particularize the items to be seized). Yet, in both cases, the Court stated that, the constitutional violation notwithstanding, excluding the evidence would be inappropriate because the police had acted reasonably; the mistakes were made by judges, not the police themselves. In 1995, this "good faith" exception was utilized to save an arrest made in reliance on computerized information inaccurately maintained by the court clerk's office.⁷ The Court

² 367 U.S. 643 (1961).

³ 384 U.S. 436 (1966).

⁴ 372 U.S. 335 (1963).

⁵ 468 U.S. 897 (1984).

⁶ 468 U.S. 981 (1984).

⁷ *Arizona v. Evans*, 514 U.S. 1 (1995).

noted that had the police been responsible for maintaining the computer records, the seizure would have led to inadmissible evidence. Only two current justices voted against the outcome in this case, so the "good-faith exception" can be fairly characterized as the strong stance of the current Court. What drives this good-faith doctrine is a belief that the state of the police officer's mind is relevant in determining how constitutional rights are protected. Even though there is an admitted constitutional violation, the individual policeman's "good faith" eliminates the principal remedy for a Fourth Amendment violation.⁸

Now, this has never made total sense to me. The police officer's personal intention—his *mens rea*, if you will—would surely be important if we were punishing him, but why should it matter in the defendant's criminal prosecution when it can be shown that someone else in government has engaged in behavior which violated the defendant's constitutionally protected right?⁹ But, never mind. Let's take the Court at its word here; the police officer's personal "good faith" matters.

Enter *Whren v. United States*¹⁰ in 1996. For many years, arrests and searches had been invalidated when defendants could show that an actual, if technical, violation of law was used to effect an arrest which was, in reality, a pretext to search for evidence of some other crime. Indeed, earlier decisions had routinely invalidated police procedures that were avowed to be for a legitimate purpose when it could be shown that they were being conducted purely for an illegitimate one. For example, police can inventory impounded vehicles for safety and administrative reasons, principally to safeguard valuables contained in the vehicle. But if a given police department inventories only those impounded cars they suspect may contain drugs, it betrays that the "real" reason for the search is not safeguarding but crime detection; the Court does not accept the fruits of these searches.¹¹ Or, in the common pretextual arrest pattern, police,

⁸ The matter really begins to get zany when one tries to determine exactly what remedy would be available to the defendant. A tort or § 1983 action is a bad candidate given that the only available candidates for defendant are the police officer and the judge. The police officer is, by hypothesis, acting in good faith, so he or she has a defense. And the judge has complete immunity for this kind of judicial action. The victim of the constitutional violation has a right, but no remedy, whatever that means.

⁹ As a matter of fact, a systemic remedy like exclusion is the ideal remedy for violations by persons so embedded in the system that immunities designed for the system's protection covers them.

¹⁰ 517 U.S. 806 (1996).

¹¹ See, e.g., *Colorado v. Bertine*, 479 U.S. 367 (1987).

desiring to get a look into x's car in transit because they have a suspicion of contraband in the car, but not enough suspicion to justify stopping the car, might experience a sudden intense interest in enforcing a statutory policy that all cars have working license-plate lights.

In the *Whren* case, plainclothes vice officers in an unmarked car were patrolling a "high drug area" of Washington, D.C., and their suspicions were aroused by a dark Pathfinder truck with temporary plates, a vehicle being driven and occupied by young black males.¹² Desiring any excuse to look inside the vehicle, they paid close attention to it. They noted that the driver stopped for an inordinate time at a stop sign, looked down at the lap of one of the occupants and then, upon seeing the officers, turned left *without signaling*.¹³ The officers pursued and pulled the truck over.¹⁴ Now it is a good bet that these officers had not made an honest-to-goodness traffic arrest since they shed their uniforms. Indeed, D.C. Municipal Police regulations prohibited plainclothes officers in unmarked cars from making *any* traffic stops except in the case of a "violation that is so grave as to pose an immediate threat to the safety of others."¹⁵ As the officers approached the truck, one officer immediately saw two large plastic bags of what appeared to be crack cocaine.¹⁶ The occupants were arrested and a search of the car turned up more illegal drugs.¹⁷ The case is the paradigm of a pretextual arrest; we know that the police would not have made the stop but for their interest in searching for drugs (for which they admittedly had no probable cause). In a 7-2 ruling, the Court upheld the search. The logical path of the holding is simple: (1) the driver violated a traffic law and was subject to valid arrest; and (2) during the course of a valid arrest, police found contraband in "plain view." But what about the pretextual nature of the arrest? Justice Scalia's opinion for the court includes this language:

We think [prior cases] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.¹⁸

Well, they certainly play a role when they are in "good faith!" It is only the "bad faith" motivations which are pressed out of view.

¹² *Whren v. United States*, 517 U.S. 806, 808 (1996).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 815.

¹⁶ *Id.* at 808-09.

¹⁷ *Id.* at 809.

¹⁸ *Id.* at 812.

To be fair, I must stress that I do not claim that the good-faith cases and the pretext case are inconsistent with each other. They fit under different paths of analysis (one is a substantive rule, one a rule about a remedial response) and have distinctly different lineages. The law is full of instances where you can pull one case each out of two totally different conceptual paths and make them look silly by comparing them in isolation. But such a burlesque is not my intention. My claim is only that these cases should cause us to hesitate before denominating this Court "activist" or "passivist." A passivist Court would not embark on a new sojourn questing for "good faith." An activist court would not sweep "bad faith" under the rug. But a Court firmly committed to crime control could consistently develop both the "good-faith" line and the "pretext" line of cases, as this Court has done.

III. THE "SEIZURE" CASES

Two recent decisions on when a "seizure" of a person occurs demonstrate this Court's tendency to press critical constitutional issues out of judicial view entirely, thereby committing the decision to the police not only in the first instance but permanently and exclusively. In the 1991 decision *California v. Hodari D.*¹⁹ police pulled up and got out of their prowler near a group of young black males. Many of them, including Hodari D., broke and ran.²⁰ Officer Pertoso gave chase to arrest Hodari though the State admits that there was no legal basis for any imposition of custody, be it a full-blown arrest or an investigative "stop."²¹ During the chase, Hodari jettisoned something.²² After Pertoso physically tackled Hodari, he walked back and determined that Hodari had dropped crack cocaine, for which he was then prosecuted.²³ The Court understands that if Hodari's actions of exposing the crack were produced by an unlawful seizure, its use as evidence would be disallowed under the "fruit of the poisonous tree" doctrine, an offshoot of the exclusionary rule.²⁴ But the Court holds 7-2 that the exposure of criminal evidence happened *before* the seizure, a seizure which the Court dates from the physical capture, and not from when Pertoso gave chase.²⁵ As the dissent points out, all of Hodari's actions (and regardless of what you think of them, put yourself in the

¹⁹ 499 U.S. 621 (1991).

²⁰ *Id.* at 623.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 624.

²⁵ *Id.* at 629.

position of a black teenager in Los Angeles for whom the arrival of white policeman seldom augers free ice cream or even pleasant inquiries) are reactions to an attempted seizure.²⁶ The State admits as much. Why then doesn't the Fourth Amendment mean that the police may not *attempt* an illegal seizure? When someone attempts bank robbery, we do not excuse their actions entirely simply because they are unsuccessful. We convict them of attempt and, as a matter of fact, today the penalty for attempted robbery is, in most states, roughly the same as for robbery. The police can, under the Court's rule, prompt all sorts of reactions from citizens by scaring them and then engaging in what the dissent calls a "sufficiently slow chase." To have a seizure, holds the Court, there must either be the application of physical force which sticks (*i.e.*, the suspect does not break free and run) or there must be a governmental show of authority to which the suspect submits.²⁷

The irony of that "sufficiently slow chase" prediction came to full flower this past term in *County of Sacramento v. Lewis*.²⁸ Officer Smith and partner hailed a motorcycle driver to pull over because the driver had been speeding.²⁹ The driver (Willard), who carried a passenger (Lewis), maneuvered away from police and took off at high speed with Officer Smith now in high-speed pursuit.³⁰ The chase consumed 75 seconds, 1.3 miles, and achieved speeds in excess of 100 miles per hour (mph), whereupon the motorcycle tipped over and deposited Lewis on the roadway where Officer Smith (accidentally) ran over him and killed him.³¹ Lewis' heirs brought an action against the County under section 1983 claiming, *inter alia*, that the death was caused during an unreasonable arrest—an unreasonable "seizure." The theory of plaintiff's Fourth Amendment case here is not that the police had no right to arrest Willard—he had been speeding—but that effectuating the arrest of a minor traffic violator by engaging him in a 100-mph chase is unreasonable. It does not really matter how you, I, or the Court would come out on this question because, as one sees from *Hodari*, the Court isn't about to get it. No seizure had as yet taken place while the chase was on, only an attempted seizure. Well, when the officers slammed into Lewis, surely that was a seizure,

²⁶ *Id.* at 629-48.

²⁷ Interestingly enough, if the suspect does submit, this opens the way for an argument that the suspect is consenting to the confrontation and is not really "seized" but is voluntarily complying with a police request. See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991). If you or I, for example, stop to have a friendly conversation with a policeman, we are not "seized" under the Fourth Amendment.

²⁸ 118 S.Ct. 1708 (1998).

²⁹ *Id.* at 1712.

³⁰ *Id.*

³¹ *Id.*

right? "No," said the Court. The chase was only an attempted seizure, and the physical slamming into him was *unintentional*. To have a "seizure," there must be physical force "intentionally applied." So the police had slammed into Lewis at 100 mph and killed him, but they had not "seized" him. Lewis died a free man.

Now what is the effect of taking the early phase of police-suspect confrontation out of the Fourth Amendment's view? For one thing, it means the Court cannot reach important social/legal questions such as what the limits of high-speed police chases should be. That debate is controversial, to be sure, but it is a debate worth having. Perhaps it can be argued that the debate should go on in forums other than a constitutional court. Perhaps the legislatures should take this question up and prescribe limits. Legislatures, if they function properly, will probably resolve this question consonant with majoritarian impulses. But why isn't this precisely the kind of question that the Framers had in mind for the counter-majoritarian branch when they committed the question of "unreasonable seizures" to it under the Fourth Amendment?

The second effect of the *Hodari-Lewis* doctrine, of course, is to leave the issue in the hands of the police. Does the Court do that with any mystery whatsoever as to how the police will resolve close questions? Is it really judicial passivism or is it really judicial activism with a dodge? If I am asked to arbitrate a dispute between x and y and my decision is: "I choose to be passive and to accept the decision that x will announce," I have in fact decided the case. And the special bonus I receive is that I do not have to appear to have a position on the merits of a very touchy dispute. I can still claim to have the "passive virtues."

The earliest stages of police-suspect confrontation are the most important. If there is one eternal reality we learn from defense counsel it is that a criminal case is often lost well before the lawyer gets involved. Yale Kamisar many years ago wrote an influential article about the "gatehouse" of the criminal justice system and the "mansionhouse."³² The gatehouse was the police station where suspects were coerced, tricked, and sometimes even brutalized into confessing. Then the trial was conducted in the mansionhouse and had all the trappings of fairness, formality, equality, and even elegance, except that the star witness in this courtly event was the confession extracted back at the gatehouse. Indeed, this reality led the

³² YALE KAMISAR ET AL., *CRIMINAL JUSTICE IN OUR TIME* 19-36 (Howard ed. 1965).

Warren Court to pronounce the *Miranda* rule to bring a modicum of control over the gatehouse. The more the Court takes its eye off the initial stages of police-suspect confrontation, the less likely any renovations to the mansionhouse will make any real difference. And the Court that takes its eye off is not passive—it is driving outcomes.

IV. THE "TOTALITY OF THE CIRCUMSTANCES" TEST

Students in Criminal Procedure learn quickly that while the term "totality of the circumstances" is a product of an earlier Court, the current Court has turned it into an art form. Often the Court is confronted with important questions such as these: (1) When does police coercion reach the point where it produces "involuntary" confessions?; (2) When does a delay in bringing a defendant to trial violate his right to a "speedy trial?"; (3) When does police conduct become overreaching so as to vitiate a person's "consent" to search?; (4) When does the method of conducting a police lineup reach the point when it produces not an accurate identification from a witness but a mere ratification by the witness of the police's predetermined result?; and many, many others like these. The Warren Court's approach was to take firm control over questions like these by pronouncing single-factor, prophylactic rules such as *Miranda*. You want to interrogate a suspect?—First give him these warnings. No exceptions. "But," a prosecutor might say in a subsequent case before the Court, "in this particular case, your Honors, the suspect had authored a five-volume treatise on the Fifth Amendment, so we feel that giving the warnings would have been silly and redundant." The Warren Court simply said, "Sorry, the rule admits no exceptions. Not up to you, not up to the trial court, not up to the police, not up to the states or lower federal courts, up to us." The Rehnquist Court, on the other hand, has answered *all* of the critical questions recited above and many others like them by saying that the answer "depends." It depends, specifically, on an analysis of a "totality of the circumstances."

Initially, of course, this sounds quite sensible. None of us when confronted with an important life choice would want to resolve it with reference to, say, "sixty-five percent of the circumstances." Yet, when Supreme Court justices propound a multi-factor balancing test, they are in reality paving the way for a commitment of the question's answer to someone else. **When this Court propounds balancing tests, it never tells us what anything weighs!** That is left to someone else. And so the critical decisions now rest in the sound discretion of whom? Not the highest court in the land, but, initially in the police, then in the lowest courts. Every day, trial judges, both state and federal, make these determinations which are often invulnerable to appeal because of cost and delay, because of the

"harmless error" doctrine, and because decisions made under an underdefined balancing test are almost always impossible to prove wrong.

Is this judicial passivism? Is this the product of a liberal, democratic ideal which wants to spread the discretion around? Of course, it could be, but one suspects that the Court knows very well how trial judges will usually resolve these questions. Most of those judges are in state courts with a watchful local audience. Many of them are elected for relatively short terms by a population sold on both the fact and fear of crime. All of them are confronted by "repeat players" from the prosecutor's office, and many feel great pressure to avoid alienating the local police. Some trial-court judges view themselves as guardians of local police morale. And, in their defense, these trial judges know one more thing that often gets overlooked. When an error is made to a criminal defendant's disadvantage, there is at least theoretically a cure for it through appeal. When an error is made to the prosecutor's disadvantage, the Double Jeopardy Clause renders it permanent. Most of us prefer to make the least dangerous mistake. It is particularly cruel that these volatile questions are forced upon local trial judges by a Court itself ingeniously and carefully insulated from public clamor through life tenure and through residence in a place and *milieu* about as accessible to most Americans as Neptune.

V. CONCLUSION

The net effect, if not the motivation, of all of the Court's recent action which I have presented today is to add bricks on the crime control side of the scale (or to take bricks away from the due-process side, if you want--it amounts to the same thing). Many would applaud this result. We are, admittedly, all concerned with the havoc wrought by crime. Many crave greater crime enforcement. And if an initiative for tougher crime enforcement came from the executive or legislative branches, although we might personally think it a wise or unwise initiative, we would all understand that the political branches were designed to consider all like suggestions and to act in what they discerned was the majority's best interest. When the majority doesn't like what the political branches do or don't do, they can, after all, "kick the rascals out." When the majority does like what they do, APPLAUSE, APPLAUSE!

But when results applauded by the majority because they elevate crime control over interests underlying constitutional guarantees are traceable not to a political branch but to the one institution designed to be counter-majoritarian, to the one institution designed to defend enduring ideas from

the transient opinion of the day, to the one institution designed to stand with the accused and often despised individual against the awesome power of the state and its clamorous people, we had better hope that the applause does not become an ovation.

A Postscript

The paper that I have just read seemed to me when I finished it one better read on the last day of last term for it constitutes a looking back. And not a particularly happy look either. But today we look ahead as well. First Monday is to courtwatchers as Spring Training is to Cub fans, except that, perhaps unfortunately, the Court doesn't decide any "exhibition cases" that do not count in the standings. And just as Cub fans are ennobled by their ability to discount all the tragicomedies of the past and shaky prospects for the future and imagine unimaginable ecstasy in the coming year, we too would do well to remember that on any given day, the Court can, and still sometimes does, make us proud of the Constitution, proud of the team. Cub fans can trace their indomitable spirit at least as far back as the beloved Ernie Banks. And while none of us saw him play, all Americans can trace their constitutional lineage back to that great little scrapper, Jimmy Madison.