

Winter 1981

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### Recommended Citation

David L. Bazelon, Foreword--The Morality of the Criminal Law: Rights of the Accused, 72 J. Crim. L. & Criminology 1143 (1981)

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# SUPREME COURT REVIEW

## FOREWORD—THE MORALITY OF THE CRIMINAL LAW: RIGHTS OF THE ACCUSED

DAVID L. BAZELON\*

### I. INTRODUCTION

Recent developments in the criminal law have occurred against a background of mounting public anxiety about violent street crime. Leading politicians have proclaimed crime a priority rivaling even inflation and defense.<sup>1</sup> As the sense of urgency intensifies, the desperate search for answers quickens. Virtually every day, a politician, editorial writer, or criminal justice professional offers a new prescription for ending crime.

I believe the discussion currently raging over criminal justice issues can best be understood by focusing upon a central question: *Must we compromise the most basic values of our democratic society in our desperation to fight crime?* I have elsewhere considered the implications of this question for issues of criminal responsibility and for policy choices in the administration of justice.<sup>2</sup> In this article, I will examine the ways in which different answers to this fundamental question can affect the development of legal doctrine, particularly with respect to the constitutional rights of those accused of crime.

First, I will describe two polar positions on the question of morality

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<sup>1</sup> See, e.g., *Control of Violent Crime is 'Chief Priority,' Smith Says*, JUST. ASSISTANCE NEWS, June/July 1981, at 1; *A Talk With Edwin Meese*, Washington Post, July 7, 1981, at A15, col. 2. *U.S. Developing Plans to Combat Violent Crimes*, N. Y. Times, Feb. 11, 1981, at A1, col. 5.

<sup>2</sup> Bazelon, *Crime: Toward a Constructive Debate*, 67 A.B.A.J. 438 (1981); Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) [hereinafter cited as *The Morality of the Criminal Law*]. See also Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976); Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275 (1976).

in criminal law. I will then outline the ways in which each position defines the goals of criminal procedure. Finally, I will consider the implications of each position with respect to the fourth, fifth, and sixth amendments.

## II. TWO VIEWS OF THE CRIMINAL LAW

I have suggested that there are two distinct approaches to the criminal law.<sup>3</sup> Both begin with the notion that establishing some sort of order is a moral imperative in civilized society. There can be no moral development in a world in which the mighty prey on the weak. What separates the two positions are the means they would employ to achieve order and, ultimately, the types of order they seek.

The first view, which enjoys the greatest currency in the political arena today, holds that order can best be achieved through the imposition of strong external constraints. It demands that the criminal law punish disorder and make the cost of violating the law so great that few will dare to do so. This view, and the cluster of beliefs associated with it, I have called the "law-as-external-constraint" thesis.<sup>4</sup>

The alternative thesis is that the law's aims must be achieved by a moral process which recognizes the realities of social and economic injustice. This philosophy sees externally imposed order—repressive order—as suffering from the same basic defect as "disorder": both lack moral authority. Furthermore, this philosophy asserts that an order built on fear of punishment cannot long endure. To be truly moral and lasting, according to this second philosophy, order must derive from the internalization of control, that is, on the members of society obeying the law because they personally believe that its commands are justified. Thus, this view demands that the law facilitate the internalization process by becoming a moral force in the community. Lest there be any doubt, I should state at the outset that I associate myself with this view.

### A. GOALS OF THE CRIMINAL PROCESS: THE EXTERNAL CONSTRAINT VIEW

The "externalists" premise their analysis of criminal procedure on the assumption that most criminal acts are the products of the actor's free choice. Professor Ralph Slovenko summarized this view in a recent letter to *The New York Times*:

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<sup>3</sup> Bazelon, *The Morality of the Criminal Law*, *supra* note 2, at 386-87. Two somewhat different models of the criminal justice system are elaborated in Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). See also Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238 (1966). Like Packer's, my models are intended to exemplify polar theoretical positions; in practice, of course, elements of both are important.

<sup>4</sup> Bazelon, *The Morality of the Criminal Law*, *supra* note 2, at 386.

Crime has gotten out of control because criminal activity is attractive. It's easy. Profits are tax-free and penalties are minimal. . . . The offenders who are making life miserable for us are criminals by choice. They have chosen to be burglars or robbers, just as one may choose to be a lawyer or a doctor.<sup>5</sup>

The externalists contend that the criminal justice system can deter these "rational" actors by assuring "swift and certain consequences" for unlawful behavior. As Professor James Q. Wilson explains, "if the expected cost of crime goes up without a corresponding increase in the expected benefits, then the would-be criminal—unless he or she is among that small fraction of criminals who are utterly irrational—engages in less crime."<sup>6</sup>

In order to achieve the deterrent effect, the criminal process must identify and punish the guilty with speed and surety. The late Herbert Packer compares the process to an assembly line.<sup>7</sup> For the externalist, then, the measure of the process lies in its *efficiency* and *finality*. The efficiency principle demands that waste and delay be reduced. Criminals must be identified, apprehended, tried, convicted, and punished as rapidly as possible. The finality principle places a premium on the assurance "that there will at some point be the certainty that comes with an end to litigation. . . ."<sup>8</sup> Once we are reasonably sure we have identified the guilty, the need for certainty demands that we cut off opportunities to challenge the process.

In this model, attention to procedural niceties—before, during, and after trial—must be carefully restrained, lest they clog up the system. The externalists believe that the primary purpose of constitutional safeguards is "to insure that the innocent are not wrongly convicted. . . ."<sup>9</sup> Thus, procedures are important mainly as a *means* of accomplishing the overriding goal of the criminal law: swift and certain separation of the guilty from the innocent.

This is not to suggest that the externalists have little solicitude for the rights of the accused; rather that in the externalist model, the "costs" of procedural safeguards (delay and uncertainty) cannot outweigh their "benefit" (protecting the innocent). When an expansion of constitutional requirements advances the determination of guilt only marginally, "belief in the efficacy of the system of justice declines."<sup>10</sup> At that

<sup>5</sup> Slovenko, *They Are Criminals by Choice*, N. Y. Times, Jan. 23, 1981, at 22, col. 4.

<sup>6</sup> J. Q. WILSON, THINKING ABOUT CRIME 197 (1977).

<sup>7</sup> Packer, *Two Models of the Criminal Process*, *supra* note 3, at 13.

<sup>8</sup> *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

<sup>9</sup> Letter from Nicholas deB. Katzenbach to David L. Bazelon (June 24, 1965), *reprinted in* Kamisar, *Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 KY. L. J. 464, 491 (1966).

<sup>10</sup> M. FLEMING, THE PRICE OF PERFECT JUSTICE 6 (1974).

point of "diminishing returns," the externalists contend, procedures must give way to efficiency and finality.

Thus, externalists believe that convictions should not be reversed for "procedural irregularities" if the defendant-appellant was "guilty anyhow." Collateral attacks on unfair procedures should not be entertained unless the petitioner makes a colorable claim of innocence.<sup>11</sup> In short, the *goal* of an ordered society—which it is thought will be achieved through deterrence—must transcend procedural *means*. Recently Mayor Koch of New York expressed this view concisely:

"The rights of defendants have to be protected," he said, "but the rights of society are paramount. I believe in the old-fashioned standard, which is that if it is to have any meaning, justice requires that when you have a defendant who is apprehended and convicted, there is the expectation and the realization of punishment."<sup>12</sup>

#### B. GOALS OF THE CRIMINAL PROCESS: THE LAW AND MORALITY VIEW

Unlike Mayor Koch, those of us who believe the law must encourage internalization of control do not view questions of criminal procedure as requiring a choice between the rights of defendants and the "rights of society." In the long run, society requires a genuine, *lasting* order. That kind of order, I am convinced, can better be built on respect for the law than on fear of punishment. Professor Anthony Amsterdam summarized this notion in a letter he wrote to me more than fifteen years ago:

For the most part, encouraging obedience and punishing disobedience are mutually consistent, even mutually supporting means. They cease to be consistent when the powers given officials to apprehend and punish the disobedient are so unconstrained that their exercise arouses citizen resentment and contempt for law.<sup>13</sup>

By "trading-off" the rights of the accused in favor of the needs of immediate safety, the externalists may embrace procedures that cannot command, and do not deserve, voluntary compliance. In that event, ever-increasing repression may be necessary to maintain a fragile order based on fear.

In contrast, I believe the criminal process must strive to attain a moral force that *entitles* it to respect. With Judge Elbert Tuttle, I believe

<sup>11</sup> See, e.g., Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). See also *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 217-18 (1979).

<sup>12</sup> *Koch Seeks Policy Role to Toughen Administration of Criminal Justice*, N. Y. Times, Nov. 16, 1980, at 42, col. 1.

<sup>13</sup> Letter from Anthony G. Amsterdam to David L. Bazelon, July 2, 1965, reprinted in Kamisar, *supra* note 9, at 498.

“the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts. . . .”<sup>14</sup> In my view, a truly moral criminal law must be guided by three fundamental principles:

- First, the criminal process must always remain sensitive to the social realities that underlie crime.
- Second, it must make meaningful the claim of “equal justice under law.”
- Third, it must, through a process of constant questioning, force the community to confront the painful realities and agonizing choices posed by social injustice. I call these the principles of *reality*, *equality*, and *education*.

### 1. *The reality principle*

Former Justice Arthur Goldberg, writing in these pages nearly ten years ago, stated that the Supreme Court’s criminal procedure decisions should be judged, in part, by asking “whether the Court has dealt in realities, and not in legal fictions.”<sup>15</sup> My experience of thirty-two years on the bench has confirmed the importance of this reality principle. Truly moral judgments cannot rest on philosophical abstractions, but must be derived from the facts which generate human behavior in the real world.

An effort to understand these realities must begin by precisely identifying the problem that terrifies Americans. The emotionalism and near-desperation that attend contemporary discussions about criminal justice do not, after all, derive from a generalized concern about all types of crime. White-collar crime, for instance, costs society untold billions of dollars—far more than street crime. Yet it does not instill the kind of fear reflected in the recent explosion of “get-tough” proposals. Those sorts of crimes, committed by the middle- and upper-classes, by “[p]eople who look like one’s next-door neighbor,”<sup>16</sup> do not, by and large, threaten our physical safety or the sanctity of our homes.

Nor does organized crime instill fear in most Americans. Hired guns largely kill each other. The common citizen does not lock his doors in fear that he may be the object of gang warfare. Organized crime unquestionably does contribute to street crime, most obviously through drug trafficking. The solution to organized crime lies in exposing its links with the political and financial worlds. But as much as it should,

<sup>14</sup> *Novak v. Beto*, 453 F.2d 661, 672 (5th Cir. 1971) (Tuttle, J., concurring and dissenting), *cert. denied*, 409 U.S. 968 (1972).

<sup>15</sup> Goldberg, *Foreword—The Burger Court 1971 Term: One Step Forward, Two Steps Backward?*, 63 J. CRIM. L.C. & P.S. 463, 464 (1972).

<sup>16</sup> C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 41 (1978).

organized crime has certainly not produced the recent hysteria over crime. Similarly, crimes of passion, however celebrated they may be, do not cause people to bolt their doors at night. To do so would be to lock the fox *inside* the chicken coop.

Rather, it is the random assault of *violent street crimes* that Americans fear. The muggings, the rapes, the purse snatchings, and the knifings that plague city life have put us in mortal fear for our property and lives.

Having focused on exactly the kind of crime we fear, the reality principle requires identification of the offenders. This is not a pleasant task. The real sources of street crime are associated with a constellation of suffering so hideous that society cannot bear to look it in the face. Yet, as Emerson said, "God offers to every mind its choice between truth and repose." However painful it may be, we cannot aspire to a genuinely moral society unless we choose truth.

Nobody questions that street criminals typically come from the bottom of the socioeconomic ladder, from among the ignorant, the ill-educated, the unemployed and the unemployable.<sup>17</sup> A recent study of ex-offenders revealed that "experimentally induced unemployment does increase arrests for both property and nonproperty crimes" and concluded that "[p]overty is apparently causally related to crime at the individual level."<sup>18</sup> The National Institute of Justice recently confirmed that America's prison population is disproportionately black.<sup>19</sup> The offenders at whom the current "get tough" programs are aimed come from an underclass of brutal social and economic deprivation. Urban League President Vernon Jordan calls them America's "boat people without boats."<sup>20</sup>

The aggregation of circumstances that leads some of these people to crime is no mystery. They are born into families struggling to survive—if they have families at all. They are raised in deteriorating, overcrowded housing. They lack adequate nutrition and health care. They are subjected to prejudice and educated in unresponsive schools.<sup>21</sup> They

<sup>17</sup> See generally *id.* at 86-116.

<sup>18</sup> Berk, Lenihan & Rossi, *Crime and Poverty: Some Experimental Evidence from Ex-Offenders*, 45 AM. SOC. REV. 766, 784 (1980). See also NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, TWELFTH REPORT: CRITICAL CHOICES FOR THE 80'S 58-59 (1980).

<sup>19</sup> I U.S. DEP'T JUST., NAT'L INST. JUST., AMERICAN PRISONS AND JAILS 159 (1980).

<sup>20</sup> *City Strategies*, Washington Star, Feb. 18, 1981.

<sup>21</sup> A graphic set of pictures of America's "underclass" emerges from two recent reports, NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, *supra* note 18, and M. EDELMAN, PORTRAIT OF INEQUALITY, BLACK AND WHITE CHILDREN IN AMERICA (1980). The former concluded:

The official poverty population, approximately 25 million, has remained fairly constant since 1969. Moreover, . . . the change in the ratio of poor to nonpoor has come almost entirely through the expansion of "income transfer" and Federal antipoverty programs.

are denied the sense of order, purpose, and self-esteem that makes law-abiding citizens. With nothing to preserve and nothing to lose, they turn to crime for economic survival, a sense of excitement and accomplishment, and an outlet for frustration, desperation, and rage.

The Washington *Post* recently profiled one of the young armed robbers who has made our capital a city of fear.<sup>22</sup> I will certify, based on my experience on the bench, that he is sadly typical. Elton Smith, black and 18 years old, lives—when he's not in jail—in a public housing project wedged between the Anacostia River and an interstate highway in a part of Washington few tourists ever visit. Most of his fellow residents are on welfare. *Post* reporter Thomas Morgan described Smith's home this way:

The hallway to his family's two-bedroom apartment, a pastiche of soul food smells, mildew and trash, bustles with activity. Two teenagers, seeking privacy from noisy overcrowded apartments, huddle in a corner sharing secrets. A girl with pigtails sprawls across the stairway using a step as a desk to do homework as stereos inside several apartments blast music into the hall.<sup>23</sup>

Elton Smith's mother explains that the family lives in these surroundings because they cannot afford to go anywhere else. She tells the reporter that her boy has had problems with the law ever since she and his father separated when he was thirteen years old. He has no skills, other than as a robber, and has been unable to retain a steady job. In his neighborhood, Elton Smith is a hero and a role model to kids who regard academic achievers as "sissies." And Smith himself offers a simple explanation for his criminal activities: "I know the money does not belong to me," he says. "But the only way I can survive is [by] taking

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[And] those who have moved out of poverty . . . hover just above the official poverty line and, with the combination of spreading unemployment, soaring prices for life's necessities and cutbacks in human services budgets, many are falling back into poverty every day.

NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, *supra* note 18, at 147. The Council also detailed the effects of unemployment. "There are clear correlations," it summarized, "between the rates of unemployment and increases in major social pathologies—ill health, psychological impairment, psychiatric ailments, alcoholism, drug addiction, divorce, infant mortality, child abuse, crime and suicide." *Id.* at 153.

Edelman's book reported some startling statistics. Among them:

A Black baby is three times as likely as a white baby to have a mother who dies in childbirth and is twice as likely to be born to a mother who has had no prenatal care at all. A Black infant is twice as likely as a white infant to die during the first year of life. . . . A Black child is more than two-and-one half times as likely as a white child to live in dilapidated housing and twice as likely to be on welfare. . . . A Black child is twice as likely as a white child to live with neither parent, three times as likely to be born to a teenaged mother, seven times as likely to have parents who separate, and three times as likely to see his father die.

M. EDELMAN, *supra*, at 7-8.

<sup>22</sup> *Youth Speaks No Remorse*, Washington Post, Dec. 14, 1980, at A1, col. 4.

<sup>23</sup> *Id.* at A11.

money from someone else."<sup>24</sup>

These are the ugly facts about so very much of American street crime. A criminal process that ignores the social realities that underlie crime is, at the least, amoral.

## 2. *The equality principle*

The *equality principle* follows logically from the reality principle. Once we acknowledge the squalid conditions that breed street crime, we can tolerate inequities in the criminal process only by donning moral blinders. Of course, the *ideal* of "equal justice before the law" is as old as the Republic itself. But the reality principle requires us to recognize how far short we fall of the ideal. Reginald Smith's comments of more than sixty years ago remain disturbingly accurate:

The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.<sup>25</sup>

Adherents of the "law-as-external-constraint" model regret, even deplore, these inequities. But under that model, the criminal law must punish the guilty with a maximum of efficiency and finality; social and economic inequality is simply irrelevant to that process. Thus, even President Johnson's Attorney General, who enthusiastically and admirably administered many of the civil rights and anti-poverty programs of the mid-sixties, characterized as "ridiculous" my suggestion that criminal procedures should take steps to compensate for the disparities that produce unequal access to constitutional rights.<sup>26</sup>

The criminal law is, of course, closer to the ideal of equal justice now than it was in Reginald Smith's day. At one time, the law, in its majestic equality, permitted the rich as well as the poor an "equal opportunity" to retain private counsel, to hire investigators and expert witnesses, to purchase trial transcripts, and to pay fines. We put a set of rights at our own eye level but ignored the fact that the growth of others had been stunted by many circumstances, including the accident of birth. Gradually, however, we have come to realize that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>27</sup> With this reminder from Justice Black, we

<sup>24</sup> *Id.* at A1.

<sup>25</sup> R. SMITH, *JUSTICE AND THE POOR* 8 (3d ed. reprint 1972).

<sup>26</sup> Letter from Nicholas deB. Katzenbach to David L. Bazelon, *reprinted in* Kamisar, *supra* note 9, at 490.

<sup>27</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (opinion of Black, J.).

have sought to give the stunted the assistance of a box on which to reach our own eye level.

Yet, for many, the criminal process, while promising "Equal Justice Under Law," continues to deliver only "Justice For Those Who Can Afford It."<sup>28</sup> The deprived know from bitter experience that when a crime is committed, any one of them in the neighborhood might be suspected and arrested. And once they have entered the criminal justice system, they are unlikely to receive the considerate treatment and light punishment so frequently enjoyed by the well-to-do. For example, a group of sociologists studying Florida criminal courts recently found "that whites have an 18 percent greater chance in the predicted probability of receiving probation than blacks when all other things are equal."<sup>29</sup> The powerful, but not the weak, have effective assistance of counsel from the earliest stages of the process. The powerful, but not the weak, enjoy freedom from confinement pending their trials and appeals. The powerful, but not the weak, receive respectful treatment from judges, prosecutors, policemen, and probation officers. The powerful, but not the weak, undergo incarceration in the least restrictive prisons available.

Charles Silberman has stated that, "[t]he double standard that lower-class people see applied produces a deep-rooted cynicism about government, business, and indeed, American society as a whole."<sup>30</sup> There can be no doubt that this conviction on the part of the disadvantaged that "the system" is against them contributes substantially to the sullen, defiant hostility which flashes out in urban crime. The rules which govern the relationship between the disadvantaged and the official power of the state cannot perpetuate this unfairness. Criminal procedures should be a haven of equality for those whose life history—of poverty, discrimination, callous disregard—teaches them that they are not equal. Without a meaningful commitment to the equality principle, we cannot begin to aspire to a moral order grounded in the will and hearts of the people rather than in fear of punishment.

In short, a criminal process worthy of moral respect must always follow Learned Hand's "commandment": "Thou shalt not ration justice."<sup>31</sup>

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<sup>28</sup> *United States v. Decoster*, 624 F.2d 196, 264 (D.C. Cir. 1976) (*Decoster III*) (Bazelon, J., dissenting), *cert. denied*, 444 U.S. 944 (1979).

<sup>29</sup> Unnever, Frazier, & Henretta, *Race Differences in Criminal Sentencing*, 21 *Soc. Q.* 197, 204 (1980).

<sup>30</sup> C. SILBERMAN, *supra* note 16, at 108.

<sup>31</sup> Hand, "Thou Shalt Not Ration Justice," 9 *LEGIS. AID BRIEF CASE 3* (1951).

### 3. *The education principle*

Without a vigorous dedication to the equality principle, the rules of criminal procedure cannot earn the moral respect of those who now suffer inequities in the administration of justice. But the reality principle demands that we acknowledge that sole reliance on the criminal law, however nobly conceived, will not "solve" violent street crime. In the end, the institutions of criminal justice act as mere janitors, tidying up the human and social wreckage that happens to end up in a courtroom. They cannot begin to cure the conditions that drive people like Elton Smith to crime.

But these institutions *can* help society pursue a moral order by pushing those conditions into high public visibility. By probing the sordid realities that underlie its cases, the criminal justice system can force the society to confront and address the facts about street crime. And by articulating constitutional rights in ways that clearly and constantly reaffirm our fundamental values, the criminal law can keep those values at the forefront of social consciousness—thus encouraging humane and intelligent responses to the crime problem. I call this the *education principle*.

I differ fundamentally with the externalists in what I expect from the criminal law. The exclusionary rule, *Miranda*, and aspects of habeas corpus have all come under attack in the name of "swift and certain" punishment.<sup>32</sup> But in relying on "reform" of the criminal process to deter crime, the externalists, in my view, travel a superhighway leading to a cow path. A relatively small percentage of street crimes are reported to the police and thus enter the criminal justice system.<sup>33</sup> Of that group, only a small portion results in arrest.<sup>34</sup> It is utter folly to expect

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<sup>32</sup> See, e.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441 (1963); Kaus, *Abolish the 5th Amendment*, WASHINGTON MONTHLY, Dec. 1980, at 12; Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 JUDICATURE 214 (1978).

The recent report of the Attorney General's Task Force on Violent Crime included several proposals for changing the criminal justice system. Among other things, the Task Force recommended building more prisons, denying bail to "dangerous" offenders, modifying the exclusionary rule to permit "good faith" claims by the police, and limiting habeas corpus petitions. See CRIMINAL JUST. NEWSLETTER, Aug. 31, 1981, at 5. I have commented elsewhere on what we might expect from similar proposals. See Bazelon, *Crime: Toward a Constructive Debate*, *supra* note 2.

<sup>33</sup> U.S. DEP'T JUST. LAW ENFORCEMENT ASSISTANCE AD., CRIMINAL VICTIMIZATION IN THE UNITED STATES 7-9 (1976).

<sup>34</sup> See C. SILBERMAN, *supra* note 16, at 259. See also *Police in N.Y. Cut Back, Arrest Fewer as Crime Rises*, N. Y. Times, July 5, 1981, at 1, col. 3. Of course, the difficulty of accurately measuring crime is well known. See C. SILBERMAN, *supra* note 16, at 447-55; Kamisar, *How to Use, Abuse—and Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972).

changes in the procedures that govern those cases meaningfully to affect the crime rate.

More importantly, even if the criminal process could achieve the threat of certain punishment, it would have little impact on the people at the bottom of society's ladder. As Diana Gordon, Executive Vice President of the National Council on Crime and Delinquency, has noted, prison must pose an empty threat to one whose urban environment is itself a prison.<sup>35</sup> Elton Smith candidly admitted that punishment would not stop him from committing future robberies. "They can't keep me in jail forever," he told the *Washington Post*. "If they let me out tomorrow, I might be tempted to do the same thing all over again to survive if I don't have a job. I really believe that."<sup>36</sup>

Thus we court disaster if we persuade ourselves that changing the criminal process will provide the "answer" to street crime. Moreover, if we expect miracles from such reforms, we may put far more important tasks on the back burner. Repairing the machinery of criminal procedures cannot substitute for a substantial attack on the uninhabitable housing, insufficient food, medieval medical care and inadequate educations suffered by the people who commit street crimes. No matter how we modify criminal procedures, we cannot rely upon the criminal justice system as the primary agency to solve these problems. Other institutions, better adapted to broadscale programs and more responsive to changing conditions, must address the grinding oppression around us. These conditions cannot be ignored simply because the great majority of those who endure them do not disturb our sleep and threaten our lives.

What the criminal process *can* do is bring the submerged realities of crime to the surface so that the responsible institutions will address them.<sup>37</sup> By incessantly asking questions, courts can do a substantial amount to ensure that the agencies which are supposed to be dealing with a particular problem are actually looking for answers, instead of simply taking action out of prejudice or ignorance. And courts, by constantly reminding society of the constitutional values that underlie specific decisions, can help ensure that the responsible institutions take action consistent with our best moral instincts. Like Justice Douglas, I believe "[t]he judiciary plays an important role in educating the people as well as in deciding cases."<sup>38</sup>

Our best hope of achieving a truly moral social order lies in seeking

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<sup>35</sup> D. GORDON, TOWARD REALISTIC REFORM: A COMMENTARY ON PROPOSALS FOR CHANGE IN NEW YORK CITY'S CRIMINAL JUSTICE SYSTEM 5 (1981).

<sup>36</sup> *Youth Speaks No Remorse*, *supra* note 22, at A11, col. 1.

<sup>37</sup> See Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653, 654-57 (1971).

<sup>38</sup> W. DOUGLAS, WE THE JUDGES 443 (1956).

out the causes of the criminal act. The criminal process—from arrest to sentencing—resembles a post-mortem: A post-mortem cannot revive the dead, and the criminal process cannot undo a heinous act. But in each procedure we can attempt to discover the cause of failure. Of course, eliciting the information necessary to understand the forces that drive people to commit crime will not “cure” the disease. Once we improve our understanding, we will still need to decide whether the costs of grappling with the roots of crime are more than we are willing to pay. But society can never hope to achieve a just and lasting solution to crime without first facing the facts that underlie it. For, as Justice Cardozo once wrote, “[t]he subject the most innocent on the surface may turn out when it is probed to be charged with hidden fire.”<sup>39</sup>

The education principle measures the quality and morality of the criminal justice system by how well it searches for and reveals those realities and by how forcibly it reminds society of our basic moral and constitutional values. A criminal law that makes these efforts, constantly and faithfully, can “mark and measure the stored up strength of a nation, and [stand as] sign, and proof of the living virtue within it.”<sup>40</sup>

### III. ISSUES IN CRIMINAL PROCEDURE: THE TWO VIEWS

In my view, many of the pervasive issues of modern criminal procedure can be analyzed in terms of the two contrasting philosophies outlined above. By assigning very different purposes to the criminal process, these two approaches offer distinct ways of resolving some of the recurring dilemmas posed in the adjudication of constitutional rights. In this part, I will try to show how doctrinal choices in fourth, fifth, and sixth amendment cases often reduce to tensions between the values of efficiency and finality, on the one hand, and the principles of reality, equality, and education, on the other.

#### A. THE FOURTH AMENDMENT

At the end of last term, Justice Powell called the fourth amendment<sup>41</sup> a “benighted area of the law.”<sup>42</sup> Some might think this characterization too kind. Perhaps more than in any other aspect of criminal procedure, the complexity and confusion surrounding the rules of search and seizure persistently cloud understanding. I have no desire to usurp the Court’s unenviable struggle to develop a body of sound and stable doctrine in this area. Rather, I wish to demonstrate the ways in which

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<sup>39</sup> B. CARDOZO, *LAW AND LITERATURE* 130 (1931).

<sup>40</sup> Statement of Winston Churchill, *quoted in* Goldberg, *supra* note 15, at 464.

<sup>41</sup> U.S. CONST. amend. IV.

<sup>42</sup> *Robbins v. California*, 101 S. Ct. 2841, 2851 (1981) (Powell, J., concurring).

that struggle reflects a conflict between the two philosophies I have described.

Much of the bewildering quality of fourth amendment jurisprudence derives from the necessity of drawing lines that give content to the prohibition against "unreasonable searches and seizures." For example, does the use of a telescope constitute a "search" but not the use of binoculars?<sup>43</sup> Can the police enter the hallway of an apartment building uninvited but not the hallway of a one-family home?<sup>44</sup> Under any view of the purposes of criminal law, these lines must be drawn with enough clarity to permit comprehension by citizens, police, and lower courts. Thus, I take as common ground the importance of establishing relatively "bright lines."

But there are bright lines and bright lines. The externalists seek lines that will further the goals of efficiency and finality and thus advance the cause of swift and certain punishment. Law enforcement, they fear, will be slowed or inhibited if policemen must wrestle with vague and unpredictable constitutional requirements at the scene of each search and seizure.<sup>45</sup> For those who see the law as encouraging the internalization of control, on the other hand, bright lines can enhance the morality of the criminal process to the extent that they reflect the reality, equality, and education principles. These different approaches will, in many cases, produce differences in determining how to draw the line.

Two companion cases decided at the very end of the Supreme Court's last Term illustrate this point. Both *Robbins v. California*<sup>46</sup> and *New York v. Belton*<sup>47</sup> involved a familiar fact pattern. In each case, patrolmen stopped a car on the highway, detained the occupants, smelled marihuana, and searched the car. The California officers found "two packages wrapped in green opaque plastic" in the trunk of the automobile; upon unwrapping them, the police discovered fifteen pounds of marihuana subsequently used to convict Robbins.<sup>48</sup> The New York patrolmen went no further than the back seat where they found, in a zippered pocket of Belton's leather jacket, some cocaine.<sup>49</sup> Both defendants

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<sup>43</sup> Compare *People v. Ciochon*, 319 N.E.2d 332 (Ill. App. 1974) with *United States v. Kim*, 415 F. Supp. 1252 (D. Hawaii 1976).

<sup>44</sup> See *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976); *State v. Crider*, 341 A.2d 1 (Me. 1975).

<sup>45</sup> See *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979); LaFave, "Case-by Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142, cited in *New York v. Belton*, 101 S. Ct. 2860, 2863 (1981).

<sup>46</sup> 101 S. Ct. 2841 (1981) [Robbins].

<sup>47</sup> 101 S. Ct. 2860 (1981) [Belton].

<sup>48</sup> Robbins, 101 S. Ct. at 2844 (opinion of Stewart, J.).

<sup>49</sup> Belton, 101 S. Ct. at 2862.

asked the Court to order suppression of the drugs. Robbins won; Belton lost.

The two cases badly divided the Court, together producing ten opinions.<sup>50</sup> Justice Stewart wrote the prevailing opinion in both decisions. In *Robbins*, writing for himself and Justices Brennan, White, and Marshall, he held that the "automobile exception" to the fourth amendment's warrant requirement does not justify a warrantless search of a closed container found inside an automobile.<sup>51</sup> Justice Stewart reasoned that the basis of the automobile exception—the inherent mobility of cars and the lesser expectation of privacy in their contents—does not apply to "closed pieces of luggage."<sup>52</sup> He further decided, principally in order to establish a bright line, that the fourth amendment protects closed containers of whatever sort and wherever found.<sup>53</sup>

In *Belton*, Justice Stewart wrote for a majority consisting of himself, Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist. This time the question concerned the "arrest exception" to the warrant requirement. Here, Justice Stewart concluded that the purposes of that rule—the need to prevent arrestees from escaping, harming or destroying evidence—applied to the passenger compartment of an automobile since that area generally falls within the immediate control of the arrestee.<sup>54</sup> Once again seeking to articulate a bright line, Justice Stewart determined that the fourth amendment does not protect anything found within that area, including closed containers.<sup>55</sup>

For the externalist, cases like these pose a conflict between the needs of law enforcement and the freedom of *innocent* citizens. Thus, the line should be drawn at a point that will maximize efficient police work

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<sup>50</sup> See note 55 *infra*.

<sup>51</sup> *Robbins*, 101 S. Ct. at 2844-46.

<sup>52</sup> *Id.* at 2845.

<sup>53</sup> *Id.* at 2846.

<sup>54</sup> *Belton*, 101 S. Ct. at 2864.

<sup>55</sup> *Id.* In separate opinions, the other Justices expressed a variety of views on Justice Stewart's two bright lines. Justice Powell agreed that the "practical necessity" of arrest situations justified the clear rule in *Belton*, 101 S. Ct. at 2848 (Powell, J., concurring), but, concurring in *Robbins*, contended that the privacy interests in containers searched pursuant to automobile stops should be evaluated on a case-by-case basis. *Id.* Justices Blackmun and Rehnquist also joined the opinion in *Belton* but dissented in *Robbins*, arguing that the automobile exception should permit searches of all effects found within the car. *Id.* at 2851 (Blackmun, J., dissenting), 2851-55 (Rehnquist, J., dissenting). Justice Stevens agreed with this latter view and would have employed it to uphold the searches in both cases. *Id.* at 2855-59 (Stevens, J., dissenting). Finally, Justices Brennan, White, and Marshall, who helped form the plurality in *Robbins*, dissented in *Belton*, contending that the arrest exception should be strictly limited to searches of the area in the defendant's immediate control. *Belton*, 101 S. Ct. at 2865-70 (Brennan, J., dissenting), 2870 (White, J., dissenting). Thus, all of the Justices who wrote opinions but one approved bright lines in both cases; yet only Justice Stewart adopted the lines which prevailed in each.

without seriously threatening “legitimate” privacy interests. Searches that produce marijuana or cocaine are clearly “efficient” means of identifying drug offenders. And there can be little “legitimate” privacy interest in contraband—or in evidence of a crime for that matter. Thus, in those situations where warrants are not required, if the police have “probable cause” to believe the defendant is guilty of something, there should be virtually no limit to the scope of the search. The officer should be allowed to inspect everything on the scene, “including the glove compartment, the trunk, and any containers in the vehicle that might reasonably contain the contraband.”<sup>56</sup>

The *innocent* have nothing to fear, on this view. Subsequent judicial review of “probable cause” determinations will discourage indiscriminate invasions of privacy, permitting searches only of the possessions of people who are probably guilty. Thus, a line drawn far from the original purposes of the rule serves both efficient law enforcement and the externalist goals of the Bill of Rights. This appears to be the analysis adopted by the Justices who would have sustained the searches in both cases.<sup>57</sup> Indeed, Justice Rehnquist advocated the next logical step. Since there need be no relationship between the reason for the warrant exception and the scope of the search, he argued, there is no need for a warrant at all once the police reasonably suspect guilt.<sup>58</sup>

The line-drawing efforts of internalists, in contrast, do not focus exclusively either on promoting the efficiency principle or on protecting only the “probably” innocent. Instead, internalists seek “bright lines” which exert moral force—and therefore encourage compliance with the law both by officers and citizens—because they reflect the realities of police-suspect confrontations, promote equality in the treatment of suspects of all types, and speak clearly to the community of the values at stake in such confrontations. Since those who wish to encourage internalization of control have little faith in the ability of the criminal justice system to “cure” crime, they are relatively unconcerned if the lines produced by these standards somewhat retard the efficiency of the police in procuring damaging evidence.

The three Justices who would have struck down the searches in both *Robbins* and *Belton* seem to have been guided by some of these considerations. They recognized that rules of criminal procedure worthy of moral respect must be based on the facts which generate behavior in the real world. In *Robbins* they observed that luggage simply does not exhibit the characteristics of cars that justified the automobile exception:

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<sup>56</sup> *Robbins*, 101 S. Ct. at 2855 (Stevens, J., dissenting).

<sup>57</sup> *See id.* at 2851-55 (Rehnquist, J., dissenting), 2155-59 & n.5 (Stevens, J., dissenting).

<sup>58</sup> *Id.* at 2854 (Rehnquist, J., dissenting).

While both cars and luggage may be 'mobile,' luggage itself may be brought and kept under control of the police. . . . [Furthermore, no] diminished expectation of privacy [such as attends cars] characterizes luggage; on the contrary, luggage typically is a repository of personal effects, the contents of closed pieces of luggage are hidden from view, and luggage is not generally subject to state regulation.<sup>59</sup>

Similarly, in *Belton*, Justices Brennan and Marshall rejected as "fiction" the majority's assumption that everything inside a car lies within the control of an arrestee and thereby falls within the intent of the arrest exception.<sup>60</sup> As Justice Brennan's opinion put it,

[u]nder the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car.<sup>61</sup>

These three Justices refused to adopt fictitious portraits of police-suspect confrontations as a means of "providing police officers with a more workable standard for determining the permissible scope of searches. . . ." <sup>62</sup> As Justice Brennan noted, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."<sup>63</sup> The warrant requirement itself reflects a constitutional choice to sacrifice some degree of efficiency in law enforcement in favor of strong protection for individual privacy. The education principle requires that exceptions to that requirement be constructed in a way that reaffirms the underlying policy. Thus, Justices Brennan, White, and Marshall drew the necessary line nearest to the "core" of the relevant exception; the purpose of the doctrine defined its reach.<sup>64</sup> This approach announces clearly that autos and arrests are special cases. Limiting those exceptions to situations where they are strictly justified therefore reminds society of the fundamental rule: searches must ordinarily be authorized by warrants.

*Robbins* also posed a question implicating the equality principle, although none of the Justices wrote about it in those terms. California argued that the two plastic bags of marihuana deserved less protection than, for example, "sturdy luggage, like suitcases."<sup>65</sup> The plurality rejected this contention on two grounds. First, the fourth amendment protects people's "effects whether they are 'personal' or 'impersonal.'" When items are placed in "a closed, opaque container," the owner has

<sup>59</sup> *Id.* at 2845 (opinion of Stewart, J.).

<sup>60</sup> *Belton*, 101 S. Ct. at 2866-70 (Brennan, J., dissenting).

<sup>61</sup> *Id.* at 2868.

<sup>62</sup> *Id.* at 2869.

<sup>63</sup> *Id.* at 2869 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

<sup>64</sup> *Id.* at 2869.

<sup>65</sup> *Robbins*, 101 S. Ct. at 2845-46 (opinion of Stewart, J.).

“manifested an expectation that the contents would remain free from public examination.”<sup>66</sup> Secondly, there is no principled basis for distinguishing the variety of containers people use to hold their belongings.<sup>67</sup>

Before *Robbins* was decided, our court confronted a case involving a similar question.<sup>68</sup> Like *Robbins* and *Belton*, Albert Ross was properly asked by police to stop his car. After spotting weapons on the front seat, the officers arrested and handcuffed Ross and then searched the rest of his car. In the trunk, they found “side by side a closed brown paper sack about the size of a lunch bag and a zippered red leather pouch.”<sup>69</sup> The paper bag, police discovered, contained heroin; the leather pouch contained \$3200 in cash. The contents of the two receptacles helped convict Ross of a federal narcotics offense.

Under the Supreme Court’s decision in *Arkansas v. Sanders*,<sup>70</sup> a precursor to *Robbins*, the police may not constitutionally search “luggage” found in properly stopped and searched automobiles without a warrant. Regarding Ross’s red leather pouch as a form of luggage, all of the judges who originally heard the case agreed that the \$3200 in currency must be suppressed<sup>71</sup> because the police had not obtained a warrant. The court divided, however, on whether the paper bag fell within the *Sanders* rule. The panel majority concluded that Ross did not have a reasonable expectation of privacy in his paper bag, partly because “a reasonable man would [not] identify a paper bag as a normal place to entrust his intimate personal possessions.”<sup>72</sup> My dissent,<sup>73</sup> and the subsequent opinion of the court en banc,<sup>74</sup> concluded that the paper bag was equivalent to the red leather pouch for fourth amendment purposes.

*Ross* thus posed a classic fourth amendment line-drawing problem. The amendment clearly protected luggage. The panel majority drew the line there and excluded paper bags from that protection. While this line can be faulted for lack of precision, I felt its greater difficulty lay in its failure to reflect reality and insure equality.

The simple fact is that in some of our subcultures paper bags are often used to carry intimate personal belongings. And, the sight of some of our less fortunate citizens carrying their belongings in paper bags is too famil-

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<sup>66</sup> *Id.* at 2846.

<sup>67</sup> *Id.*

<sup>68</sup> *United States v. Ross*, No. 79-1624, slip op. (D.C. Cir. en banc March 31, 1981) (*Ross II*), cert. granted, 50 U.S.L.W. 3278 (Oct. 13, 1981).

<sup>69</sup> *Ross II*, slip op. at 5.

<sup>70</sup> 442 U.S. 753 (1979).

<sup>71</sup> *United States v. Ross*, No. 79-1624, slip op. at 2 (D.C. Cir. April 17, 1980) (*Ross I*); *id.* at 1 (Bazelon, J., concurring and dissenting), vacated and *rev'd*, *Ross II*.

<sup>72</sup> *Ross I*, slip op. at 14.

<sup>73</sup> *Ross I*, slip op. at 10 (Bazelon, J., concurring and dissenting).

<sup>74</sup> *Ross II*, slip op. at 4.

iar to permit such class biases to diminish protection of privacy.<sup>75</sup>

In *Robbins*,<sup>76</sup> Justice Stewart also rejected a “‘worthy container’ rule encompassing bags of leather but not of paper.”<sup>77</sup> Yet, consistent with his general approach in both *Robbins* and *Belton*, he seemed to base this conclusion more on the efficacy of a bright, formal line than on questions of reality and equality:

[The] Amendment protects people and their effects, and it protects those effects whether they are ‘personal’ or ‘impersonal.’ . . . Once placed within [a closed, opaque] container, a diary and a dishpan are equally protected.

[Moreover,] it is difficult if not impossible to perceive any objective criteria by which [a distinction between suitcases and other containers] might be accomplished. What one person may put into a suitcase, another may put into a paper bag. . . . And as the disparate results in the decided cases indicate, no court, no constable, no citizen, can sensibly be asked to distinguish the relative “privacy interests” in a closed suitcase, briefcase, portfolio, duffle bag, or box.<sup>78</sup>

Thus, proponents of the two philosophies of criminal procedure can arrive at the same bright line for very different reasons. For Justice Stewart, a “worthy container” rule would simply be incapable of sensible application. It would, in short, violate the efficiency principle. For me, a fourth amendment line, however bright, that makes “the level of constitutional protection available to a citizen dependent on his ability to purchase a fancy repository for his belongings,”<sup>79</sup> cannot earn moral respect.

## B. THE FIFTH AMENDMENT

Some of the most difficult issues in modern criminal procedure concern the privilege against self-incrimination. In particular, *Miranda v. Arizona*<sup>80</sup> continues to spawn a series of complicated questions. When is interrogation “custodial”?<sup>81</sup> What is the “functional equivalent” of questioning?<sup>82</sup> What constitutes sufficient waiver?<sup>83</sup> Again, my purpose is not to plumb the details of these questions. Rather, I hope to demonstrate the ways in which the continuing controversy about *Miranda* implicates choices between the two philosophies of criminal law I have described.

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<sup>75</sup> *Ross I*, slip op. at 13-14 (Bazelon, J., concurring and dissenting).

<sup>76</sup> 101 S. Ct. at 2846 (opinion of Stewart, J.).

<sup>77</sup> *Ross II*, slip op. at 3.

<sup>78</sup> 101 S. Ct. at 2846 (opinion of Stewart, J.).

<sup>79</sup> *Ross I*, slip op. at 10 (Bazelon, J., concurring and dissenting).

<sup>80</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>81</sup> *See, e.g.*, *Edwards v. Arizona*, 101 S. Ct. 1880 (1981).

<sup>82</sup> *See Rhode Island v. Innis*, 446 U.S. 291 (1980).

<sup>83</sup> *See Tague v. Louisiana*, 444 U.S. 469 (1980).

Critics of the criminal justice system often reserve their sharpest attacks for the "*Miranda* revolution." In an article entitled "Abolish the 5th Amendment," one writer contended that the Amendment's "natural constituency" consists of sex murderers, "assorted mafiosi, drug smugglers, tax cheats, and labor racketeers."<sup>84</sup> For him, *Miranda* and its progeny "seem to have as their hidden purpose the maximizing of the number of times when the Fifth Amendment will be employed by the guilty to frustrate the police."<sup>85</sup>

The writer's comments are consistent with the "law-as-external-constraint" hypothesis. An externalist might argue as follows: confessions provide the police with a fast and easy way of obtaining reliable evidence of crimes. "Innocent" people have nothing to confess and therefore cannot be harmed by the practice. *Miranda* inhibits the acquisition of this valuable evidence without any compensating benefit to the truly innocent. Therefore, the decision diminishes the threat of "swift and certain punishment" without advancing the guilt-determining process.

For many years, this approach governed the Supreme Court's evaluation of confession cases. Physical torture obviously offends due process as the Court recognized early on.<sup>86</sup> Beyond that, the Court's principal concern seemed to be the risk that confessions derived from questionable police methods might be unreliable.<sup>87</sup> Out of this concern arose the standard which prevailed for many years: if the "totality of the circumstances" indicated that the suspect's admission was not "voluntary,"<sup>88</sup> then the confession might be *false*. In that event, the interrogation frustrated the externalist goal of separating the guilty from the innocent. If it were demonstrated that a particular police practice did not reliably identify the guilty, and caused suffering among the innocent, it would be prohibited.

Beginning in 1961, however, the Court excluded coerced confessions "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system."<sup>89</sup> Indeed, in one case from that period, the Court excluded a confession obtained after the suspect had swallowed a truth

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<sup>84</sup> Kaus, *supra* note 32, at 19.

<sup>85</sup> *Id.* at 18.

<sup>86</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>87</sup> *See Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Ward v. Texas*, 316 U.S. 547 (1942); *Chambers v. Florida*, 309 U.S. 227 (1940).

<sup>88</sup> An example of the application of the "voluntariness" test is *Haynes v. Washington*, 373 U.S. 503 (1963).

<sup>89</sup> *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

serum.<sup>90</sup> The shift in emphasis effectively placed a higher priority on the internalist goal of giving moral force to criminal procedures. This paved the way for *Miranda*.

There may be no better example of a criminal procedure decision that follows the reality, equality, and education principles than *Miranda v. Arizona*. Until then, the law, like people generally, simply ignored the "grim facts" about the "gatehouse" of American criminal procedure—the police station "through which most defendants journey and beyond which many never get. . . ."<sup>91</sup> This violation of the reality principle made the law of confessions fundamentally amoral:

[S]ociety, by its insouciance, has divested itself of a moral responsibility and unloaded it on to the police. Society doesn't want to know about criminals, but it does want them put away, and it is incurious about how this can be done provided it is done. Thus, society in giving the policeman power and wishing to ignore what his techniques must be, has made over to him part of its own conscience.<sup>92</sup>

In *Miranda*, the Court confronted the grim facts. In order to arrive at an "understanding of the nature and setting of . . . in-custody interrogation,"<sup>93</sup> the Court undertook an extensive examination of reports, cases, and police manuals.<sup>94</sup> Based on its assessment of the facts, the Court "concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crimes contain inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."<sup>95</sup>

*Miranda* also reflected the equality principle. Those most likely to suffer coercive police practices behind closed station-house doors are the poor and uneducated perpetrators of street crime. Educated, "respectable" suspects ordinarily know of their rights to be silent and to retain a lawyer. By insisting that the disadvantaged be informed of those rights, by demanding that all suspects be treated with dignity, and by refusing to admit confessions extracted through police tactics usually reserved for the deprived, *Miranda* promised genuine "equal justice before the law."

Finally, the *Miranda* decision conformed to the education principle.

<sup>90</sup> *Townsend v. Sain*, 372 U.S. 293 (1963).

<sup>91</sup> See Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *CRIMINAL JUSTICE IN OUR TIME* (1965), reprinted in Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 31 (1980).

<sup>92</sup> MacInnes, *The Criminal Society*, in *THE POLICE AND THE PUBLIC* 101 (C. Rolph ed. 1962), quoted in Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS*, *supra* note 91, at 32.

<sup>93</sup> *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

<sup>94</sup> *Id.* at 445-56.

<sup>95</sup> *Id.* at 467.

As Professor Kamisar has noted, before that case the salient features of stationhouse confessions were

the invisibility of the process—"no other case comes to mind in which an administrative official is permitted the broad discretionary power assumed by the police interrogator, together with the power to prevent objective recordation of the facts"—and the failure of influential groups to identify with those segments of our society which furnish most of the raw material for the process.<sup>96</sup>

*Miranda* recognized that "[p]eople are willing to be complacent about what goes on in the criminal process as long as they are not too often or too explicitly reminded of the gory details."<sup>97</sup> The decision forced the previously hidden world of the "gatehouse" into the open. It thus reminded society both of the importance of meaningful constitutional guarantees and of the fact that the people most in need of those rights are most often denied them. *Miranda*'s success as an instrument of education is marked by the fact that every television viewer is familiar with the required litany of stationhouse rights.

*Miranda*, then, represents the potential of the law of criminal procedure to exert moral force. Today, the challenge is to ensure that its promise is fulfilled. There is evidence that many defendants do not understand the *Miranda* warnings.<sup>98</sup> Externalists might regard this as proof that *Miranda* is "inefficient," that its "costs" to aggressive law enforcement outweigh its "benefits" in protecting the innocent. But I believe that this evidence only requires us to work harder at making *Miranda* effective. In this endeavor, the standards for finding waivers of the right to counsel and the right to remain silent have become crucial.

A number of years ago, a case in our court underscored the importance of effective *Miranda* warnings.<sup>99</sup> The police arrested Eugene Frazier for the robbery of Mike's Carry Out. After they advised him of his rights and let him read a copy of the *Miranda* warnings, Frazier signed a "Consent to Speak" form and told an officer that he understood his rights and did not want a lawyer. When an officer started questioning him about Mike's Carry Out, Frazier interrupted and admitted to rob-

<sup>96</sup> Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 85 (1966) (quoting Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L.C. & P.S. 21, 44 (1961)).

<sup>97</sup> Kamisar, *id.* (quoting Packer, *Two Models of the Criminal Process*, *supra* note 3, at 64).

<sup>98</sup> See, e.g., Leiken, *Police Interrogation in Colorado: The Implementations of Miranda*, 47 DENVER L.J. 1, 15-16, 33 (1970); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1969); Zeitz, Medalie & Alexander, *Anomie, Powerlessness and Police Interrogation*, 60 J. CRIM. L.C. & P.S. 314 (1969). See also O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* 165-200 (1973).

<sup>99</sup> *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (*en banc*) (*Frazier II*), *cert. denied*, 420 U.S. 977 (1975).

bing High's Market. The policeman started to transcribe Frazier's remarks, but the defendant stopped him, saying, "Don't write anything down. I will tell you about this but I don't want you to write anything down."<sup>100</sup>

The officer put down the pad and continued listening in silence as Frazier went on about the High's Market robbery. After about five minutes of this, Frazier confessed to the robbery of the Meridian Market. Two hours or so later, Frazier ended the questioning, stating "That's it; that's all I know and that's all I am going to tell you." When the police asked the defendant to write out his confession or to sign a typed summary, Frazier refused. "No, I'm not going to sign anything," he said.<sup>101</sup>

When the case first came to us on appeal from Frazier's conviction for the Meridian Market robbery, we were troubled by "[t]he strong implication . . . that appellant thought his confession could not be used against him so long as nothing was committed to writing."<sup>102</sup> We therefore doubted whether the government had carried its "heavy burden" of establishing that the defendant had "intelligently and knowingly" waived his rights.<sup>103</sup> We remanded, in order to give the Government an opportunity to present evidence that the waiver was nevertheless valid. On remand, the trial court concluded that the government had carried its burden. On a second appeal, the court en banc affirmed.<sup>104</sup>

I dissented. I emphasized *Miranda's* teaching that a confession made in the absence of counsel "can stand if, but only if, the accused *affirmatively* and *understandingly* waives his rights."<sup>105</sup> The evidence developed on remand suggested that, far from admonishing Frazier that an oral confession could be as damaging as a written one, the police "elected not to risk any clarification for fear [Frazier] would stop talking."<sup>106</sup> The majority recognized that the defendant might not have understood his rights but held, nonetheless, that the government can meet its burden by showing that the warnings were given and, "if the issue is raised [,] that the person warned was capable of understanding the warnings."<sup>107</sup>

In my view, the majority's approach made of *Miranda* a "preliminary ritual."<sup>108</sup> By ignoring the realities of police interrogation, it de-

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<sup>100</sup> *Id.* at 892-93.

<sup>101</sup> *Id.* at 894 & n.4.

<sup>102</sup> *Frazier v. United States*, 419 F.2d 1161, 1168 (D.C. Cir. 1969) (*Frazier I*).

<sup>103</sup> *Id.*

<sup>104</sup> *Frazier II*, 476 F.2d 891.

<sup>105</sup> *Id.* at 904 (Bazelon, J., dissenting) (appendix).

<sup>106</sup> *Id.* at 900.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 906 (appendix) (quoting *Miranda v. Arizona*, 384 U.S. 436, 476 (1966)).

nied people like Frazier genuinely equal treatment before the law:

Of course, the problem posed by this case would not exist if the warnings were so clear that no one possessing even minimal intelligence could possibly misunderstand them. But capacity to understand the warnings does not by any means guarantee that they will actually be understood. The available empirical evidence clearly indicates that many, if not most, defendants do not understand the warnings, even where the defendants are intelligent and well-educated. The likelihood of understanding is necessarily reduced where, as here, the 28-year old defendant has been afflicted with sickle cell anemia for many years and used narcotic drugs to mitigate his pain.

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Where the police officers are dealing with ill-educated and uncounseled suspects, they have a special obligation to be alert for signs of misunderstanding or confusion.<sup>109</sup>

*Miranda* continues to pose substantial challenges to the development of a moral criminal law. For many poor and uneducated people, for example, a variety of confrontations outside of "custodial interrogation" are inherently coercive.<sup>110</sup> Indeed, state investigations conducted by officials other than the police—such as psychiatrists examining defendants for sanity<sup>111</sup>—may pose some of the same dangers. To fulfill the promise of *Miranda*, we must always be guided by the reality, equality, and education principles that formed the foundation of that decision. I continue to believe what I wrote in my *Frazier* opinion:

[T]he *Miranda* rule reflects a principle fundamental to a democratic society. The Fifth Amendment protects *all* persons; it ensures that no individual need incriminate himself "unless he chooses to speak in the unfettered exercise of his own will." *Miranda* is designed to make that protection meaningful for the man who has neither the education, the experience, nor the counsel that would enable him to make an informed decision. Far from being a mere technicality, it touches the heart of a system of justice that purports to treat all of its citizens equally under the law.<sup>112</sup>

### C. THE SIXTH AMENDMENT

More than a hundred and seventy years after the adoption of the sixth amendment, *Gideon v. Wainwright*<sup>113</sup> breathed life into the right to counsel by assuring representation for indigents in state trials. *Gideon* recognized the *reality* that, for the poor and uneducated who need lawyers the most, the sixth amendment had offered only barren rhetoric. The decision promoted genuine *equality* by requiring the state to furnish

<sup>109</sup> *Id.* at 900, 906 (appendix).

<sup>110</sup> Compare *United States v. Gallagher*, 430 F.2d 1222 (7th Cir. 1970).

<sup>111</sup> See, e.g., *United States v. Byers*, No. 78-1451 (D.C. Cir. Dec. 24, 1980). See also *Estelle v. Smith*, 101 S. Ct. 1866 (1981).

<sup>112</sup> *Frazier II*, 476 F.2d at 906 (Bazelon, J., dissenting) (appendix).

<sup>113</sup> 372 U.S. 335 (1963).

counsel to those who could not afford it. It served the *education* principle by alerting society both to the importance of legal representation in our adversary system and to the plight of the disadvantaged. Like *Miranda*, *Gideon* stands as a statement of our highest moral aspirations.

Yet, as with *Miranda*, the legacy of *Gideon* continues to demand further effort. What I wrote more than five years ago remains sadly true: "[A]lthough we generals of the judiciary have designed inspiring insignia for the standard, the battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* . . . goes unfulfilled."<sup>114</sup> Time and again, the cases that come before my court reveal that too often the indigent's lawyer is unequipped to provide even the most basic protection for the defendant's rights. Too often, the lawyer is either unaware of, or totally indifferent to, the client's fate.

The reality principle demands that we acknowledge the woefully inadequate representation received by the poor. The equality principle requires that we lift the burden of defective advocacy that falls largely on a single subclass of society. The education principle insists that the courts stimulate a renewed commitment to equal justice by the bar and by the public. In short, the fundamental sixth amendment challenge today is to ensure *effective* representation of counsel for all members of society.<sup>115</sup>

Externalists might offer a variety of reasons why a serious effort to remedy ineffective assistance of counsel should not be undertaken. Too broad a reading of the right to counsel might impair our ability to assure "swift and certain punishment." Justice Frankfurter, for instance, feared that recognizing certain claims of ineffective assistance "would furnish opportunities hitherto un contemplated for opening wide the prison doors of the land."<sup>116</sup> Furthermore, guaranteeing all defendants diligent advocates might so impede the courts that the criminal justice system would grind to a halt.<sup>117</sup> And, at bottom, externalists might believe that ineffective assistance is unimportant unless it resulted in the punishment of an innocent person. This may be why many appellate courts require claimants to show not only that their constitutional right to effective counsel was denied but also that the denial was prejudicial.<sup>118</sup>

A recent ineffective assistance of counsel case divided our court very

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<sup>114</sup> Bazelon, *The Realities of Gideon and Abersinger*, 64 GEO. L.J. 811, 811 (1976).

<sup>115</sup> See generally Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973). See also Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752 (1980).

<sup>116</sup> *Foster v. Illinois*, 332 U.S. 134, 139 (1947).

<sup>117</sup> See Bazelon, *supra* note 115, at 24.

<sup>118</sup> *Id.* at 26 & n.70.

much along these lines.<sup>119</sup> In 1971, Willie Decoster was convicted of assault with a deadly weapon and aiding and abetting an armed robbery. Decoster's court-appointed counsel neither filed a timely application for bond review nor obtained a transcript of the preliminary hearing. Furthermore, he failed to interview a single witness—including three prosecution witnesses—before the trial.<sup>120</sup>

In a 1973 panel decision, *Decoster I*,<sup>121</sup> we remanded for rehearing on the issue of defense counsel competency, and granted Decoster's appellate counsel leave to move for a new trial. In our decision, we set forth a revised standard to govern appellate review of ineffective assistance claims: "A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."<sup>122</sup> To give practical content to this rule, we employed specific guidelines based on the American Bar Association's Standards for the Defense Function as the minimal components of "reasonably competent assistance":

(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . . Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, when appropriate, to make motions for a pretrial psychiatric examination or for the suppression of evidence.

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . [I]n most cases, a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.<sup>123</sup>

We expressly recognized that these requirements provide only a "starting point for the court to develop, on a case by case basis, clearer guidelines for courts and for lawyers as to the meaning of effective assistance."<sup>124</sup>

Recognizing that merely specifying the requirements for defense counsel will not alone give force to the sixth amendment, we further

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<sup>119</sup> *Decoster III*, 624 F.2d 196 (1979).

<sup>120</sup> *Id.* at 211-13. See also *id.* at 268-75 (Bazelon, J., dissenting).

<sup>121</sup> *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973) (*DeCoster I*).

<sup>122</sup> *Id.* at 1202.

<sup>123</sup> *Id.* at 1203-04 (footnotes omitted).

<sup>124</sup> *Id.* at 1203 n.23.

held that once a substantial and unjustified violation of any of defense counsel's duties is shown, the court must reverse the conviction unless the Government can demonstrate that the defendant was not prejudiced.<sup>125</sup> We thus established a three-step inquiry: "(1) Did counsel violate one of the articulated duties? (2) Was the violation 'substantial?' (3) Has the government established that no prejudice resulted?"<sup>126</sup>

On remand from our decision, the District Court denied the motion for a new trial. In 1976, in *Decoster II*,<sup>127</sup> we again reversed the lower court, concluding that Decoster had been denied the effective assistance of counsel. The full Circuit Court vacated the decision and reopened the matter for rehearing en banc. In *Decoster III*,<sup>128</sup> the court upheld Willie Decoster's conviction. The plurality held that for a conviction to be reversed for ineffective assistance, the defendant must demonstrate "a serious incompetency [falling] measurably below the performance ordinarily expected of fallible lawyers."<sup>129</sup> It further held that the sufficiency of defense counsel's pretrial investigation must be judged on a case-by-case basis and may be viewed in the light of the strength of the government's case.<sup>130</sup> The plurality thus rejected the application of categorical standards, characterizing the ABA criteria as partially "aspirational."<sup>131</sup> With respect to prejudice, the plurality required the defendant to show that his counsel's performance was likely to have affected the outcome.<sup>132</sup>

I dissented, adhering to the standards I had developed in my opinion for the court in *Decoster I*. In my view, the court's new standards violated the reality and equality principles:

Because my colleagues in the majority divorce their analysis from the economic and social reality underlying the problem of ineffective assistance of counsel, their decision leaves indigent defendants nothing more than an empty promise in place of the Sixth Amendment's commitment to adequate representation for all defendants, rich and poor. At best, the majority's approach might help to rectify a few cases of blatant injustice. But their standards do nothing to help raise the quality of representation provided the poor to a level anywhere approaching that of the more affluent. On the contrary, my colleagues condone callous, back-of-the-hand representation by dismissing the basic duties of competent lawyering as "aspira-

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<sup>125</sup> *Id.* at 1204.

<sup>126</sup> See *Decoster III*, 624 F.2d at 275 (Bazelon, J., dissenting).

<sup>127</sup> United States v. Decoster, No. 72-1283 (D.C. Cir. Oct. 19, 1976) (*Decoster II*) (vacated and *rev'd.*, *Decoster III*).

<sup>128</sup> 624 F.2d 196.

<sup>129</sup> *Decoster III*, 624 F.2d at 208 (opinion of Leventhal, J.).

<sup>130</sup> *Id.* at 210.

<sup>131</sup> *Id.* at 203, 205.

<sup>132</sup> *Id.* at 208.

tional." The majority thus provides no incentive or structure to improve the caliber of defense advocacy.<sup>133</sup>

I argued that the sixth amendment right to counsel should be understood not simply as a means of assuring "a fair trial in the case of any particular defendant," but as a way of minimizing the disparity in the quality of representation afforded indigents and nonindigents.<sup>134</sup> The guarantee of effective assistance of counsel cannot be accomplished unless courts assure competent representation for *all* criminal defendants.<sup>135</sup>

Ultimately, as I noted in *Decoster*, "the problem of inadequate representation of the indigent cannot be solved by the courts alone."<sup>136</sup> No amount of rhetoric from appellate courts will assure defendants effective representation unless trial judges, the bar, and the public at large recognize the fundamental importance of enforcing the sixth amendment. The Supreme Court has stated that trial judges must zealously "maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."<sup>137</sup> And, as I commented in *Decoster*, "[t]he bar certainly must increase its efforts to monitor the performance of its members and to take appropriate disciplinary action against those attorneys who fail to fulfill their obligations to their clients."<sup>138</sup> In the end, of course, there can be no substitute for legislative action. Money is needed to attract more experienced appointed lawyers and public defenders, to make public defender positions economically viable career posts, to provide initial and ongoing training for inexperienced lawyers both in and out of defender offices, and to create more defender positions.

The fact that the ultimate solution may not be within the powers of the criminal law, however, "does not justify our ignoring the situation nor our accepting it as immutable."<sup>139</sup> In the sixth amendment, as elsewhere in criminal procedure, the law must be guided by the education principle. It must alert the public to "the sordid reality that the kind of slovenly, indifferent representation provided Willie Decoster is uniquely the fate allotted to the poor."<sup>140</sup> It must constantly impress upon the society the importance of effective assistance of counsel. For as Justice Schaefer of Illinois has written, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most perva-

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<sup>133</sup> *Id.* at 266 (Bazelon, J., dissenting).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 299.

<sup>137</sup> *McMann v. Richardson*, 397 U.S. 759, 771 (1970). See Bazelon, *supra* note 114, at 830.

<sup>138</sup> *Decoster III*, 624 F.2d at 299 (Bazelon, J., dissenting).

<sup>139</sup> *Id.* at 300.

<sup>140</sup> *Id.* at 264.

sive, for it affects his ability to assert any other rights he may have."<sup>141</sup>

#### IV. CONCLUSION

As the public's understandable terror of street crime grows, the pressure to adopt ever-harsher measures will increase. Many such measures have been offered in recent months in the name of efficiency and finality. These programs may or may not achieve "swift and certain punishment." But any order they produce is likely to be brief and violent. For, as I have argued, criminal procedures can be neither moral nor effective unless they at least encourage people to internalize the commands of the law.

Ultimately, however, no amount of tinkering with the criminal justice system will provide a meaningful and lasting solution to the nightmare of street crime. As long as the conditions that breed that kind of crime continue, the nightmare will continue. A genuine attack on the roots of crime would not, of course, be cheap or easy. It might force us to reconsider the entire structure of our society. And it might conflict with other deeply-held values such as privacy and autonomy. Indeed, after fully examining the realities of street crime, we may find ourselves faced with an agonizing choice: continued crime or social and economic revolution.

Our alternatives are no less agonizing, however, because we ignore them. Unless we summon the courage to face the painful realities of street crime, our efforts to "solve" the problem amount to a tragic charade. The criminal law cannot change social conditions but it can force those conditions onto the public consciousness. By remaining constantly sensitive to the realities of social and economic deprivation, to the promise of genuine equality, and to the fundamental values underlying the Bill of Rights, the law can help society see the imperative of linking criminal justice with social justice. Society might then pursue an *enduring* social tranquility worthy of our highest moral aspirations.

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<sup>141</sup> Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).