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PANEL 1: Addressing Declining Rights in an Era of Declining Crime

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ADDRESSING DECLINING RIGHTS IN AN ERA OF DECLINING CRIME

Professor Steiker

We have an extremely distinguished panel with a diversity of views. In introducing this panel, I should note that one of my colleagues, who shall remain nameless, sent around a memo to the rest of the faculty saying that there are two conferences at the law school this weekend, this conference and the conference of the Federalist Society. He offered a free lunch to the first faculty member who could identify the salient difference between the conferences based on their participants.

Knowing the source of the question, many faculty members got it right, and the correct answer was that there was a greater diversity being represented at the Federal Society conference than here.

But I would like to say in defense of this terrifically organized conference that the answer is completely untrue at least of this panel, where we have quite a diversity of views being represented from some very interesting speakers. So without further ado, I am going to introduce the panel by going down the line. I will just do a brief introduction of the four speakers now, so you can know who you will be hearing from.

Our first speaker will be Professor William Stuntz who is currently a chaired professor at the University of Virginia Law School. He is a very eminent scholar in the area of criminal law and procedure, and we are lucky enough to have him as a member of the Harvard Law School faculty starting in the fall. He is the author of wide ranging works on the criminal justice system, and in particular, on the role of defendants' rights in the criminal justice system, and he will have some provocative things to say about that.

Professor Stuntz also teaches FBI agents about criminal procedure at Quantico each year. Thus, he has taught not only students at the University of Virginia and other students on his

visits to schools like Yale and Harvard, but he has also taught FBI agents as well. We are very lucky to have him with us.

After Professor Stuntz, we will hear from Professor Tracey Maclin from Boston University Law School, also one of the pre-eminent authorities on criminal justice issues, particularly on the Fourth Amendment. Professor Maclin has also taught here at Harvard and at Cornell, among other places. He is not only the author of a number of widely read and cited books and articles on the criminal justice system, but he also participates frequently as a brief writer in important criminal procedure cases that go before the Supreme Court.

Next, just so that you would not think that this is only a panel of ivory-towered academics, we have a real lawyer to come and speak to you. We have a very accomplished criminal defense lawyer from Washington, D. C., a former colleague of mine from the Public Defender Service of the District of Columbia ["PDS"]. Robert Wilkins has been with PDS now for ten years, and in addition to working on hundreds of cases in the criminal justice system, he is also on the Commission that is working on sentencing guidelines for the District of Columbia. He is also working on a new project that I think is very exciting. In addition to being a public defender, and a very accomplished one, Mr. Wilkins is also the president of the National African American Museum and Cultural Complex - a private, non-profit corporation that started four years ago and incorporated last year with the purpose of establishing a complex and exhibition space, conference center, banquet hall, library, genealogy research center, cultural center and model school in Washington, D. C., to celebrate, preserve and communicate the record of the experiences of people of African descent in the United States and throughout the world. It is a very exciting project, and one that if anyone can bring it to fruition, Robert Wilkins can.

So this is an incredibly accomplished, exciting, diverse and interesting group of panelists who will speak to you about declining rights in an era of declining crimes, and without further ado, Professor Stuntz will start.

Professor Stuntz

I want to make two claims in my remarks this morning. The first claim goes to the title of this session, which seems to suggest that a central problem in the American criminal justice system is declining rights. I think that's a mistake. I'm not sure that rights are in fact declining; actually, I think the scope of criminal defendants' rights is fairly stable. But even if I'm wrong about that, it's not much of a problem. The truth is, the debates of the last forty years about criminal defendants' rights, and the doctrinal pull and tug about how those rights are defined, are vastly less important than Supreme Court opinions or law review articles or, for that matter, conferences like this one would suggest.

The second claim I want to make is that there *are* fundamental problems with the American criminal justice system — I want to list four, though alternative lists are certainly possible. But those fundamental problems have very little to do with defendants' rights, and very little to do with constitutional law as it's conventionally understood. For most of the past several decades, we've been arguing about the wrong thing. The left has argued for more and stronger rights, the right has argued for fewer and weaker rights, but both have agreed on the battleground — the battleground has been rights. It's the wrong battleground.

Let me say a little bit about each of those two points. First, the claim that the scope of defendants' rights is not that important, certainly not worth the attention people in my line of work have devoted to it, and not worth the attention the courts have devoted to it. Let me give you some examples of what I mean. In the 1970s and 1980s Fourth Amendment debate was dominated by the question whether we should have a broad warrant requirement, one that applied to most searches and seizures, or a narrow one that applied only to searches of homes. The narrow warrant requirement won out. Suppose it had been otherwise. How much difference would that have made? The answer is, very little. If police had to get warrants more often, states would make it easier to get them, by having more magistrates and making them more available for quick telephonic warrants — what we would see is a warrant process that consists of thirty-second radio or telephone conversations. And magistrates would no doubt approve the overwhelming majority of applications, as they do now in most jurisdictions.

Searches and seizures would probably look pretty much the same as they do now.

Police interrogation is another example. In the run-up to the *Dickerson*[1] decision, a great many people expressed a great deal of concern over whether the Supreme Court would use that case as a vehicle for undoing *Miranda*.[2] That concern is hard to understand, since there is no reason to think that *Miranda* is offering any meaningful protection to suspects now; doing away with it would probably change very little. The data on police interrogation show that suspects who invoke their rights — suspects who call a halt to questioning, who utter the magic words, "I don't want to talk, I want to see a lawyer" — virtually always do so *before police questioning even begins*; almost no one invokes once questioning is under way.[3] Think about what that means. The theory behind *Miranda* is that police will carefully regulate their questioning, will avoid tactics that are too coercive, in order to avoid having suspects say, "No more questions — I want to see a lawyer." But if suspects never say that once questioning begins, there is no incentive for police to avoid coercive interrogation tactics. In other words, there is no reason to think *Miranda* is having any effect on police questioning. My friend Mike Seidman[4] suggests that suspects might actually be slightly better off under a voluntariness standard than under the current set of rules, and Seidman may well be right.

Another example comes from the law of jury selection. In the 1980s and 1990s defendants won the right to be free from the discriminatory use of peremptory challenges, which makes it harder for prosecutors to engage in jury-stacking.[5] That sounds like a good thing, and on balance it probably is. But that victory made jury selection, and hence trials, more costly, and we have a system in which very, very few cases go to trial as it is — 92 percent of

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[1] Dickerson v. United States, 530 U.S. 428 (2000).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

[3] *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996).

[4] *See* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 744-46 (1992).

[5] The leading case is *Batson v. Kentucky*, 476 U.S. 79 (1986).

felony convictions nationwide are by guilty plea; the number is more like 96 or 97 percent in most large cities.[6] In a system like that, jury selection rules are not that important, because trials are not that important. More to the point, by making trials more expensive, the law of jury selection has probably made trials even more rare. That is not a good thing for criminal defendants.

One sees this effect again and again. Fourth, Fifth, and Sixth Amendment rules purport to offer a kind of global protection; expansions in defendants' rights seem to advance the welfare of criminal defendants as a whole. The real picture is always different, and always more complicated. Any new constitutional guarantee helps some defendants, hurts some, and leaves most about where they were before. The basic quality of American criminal justice is not dramatically affected by these rules.

Which leads to my second point. The real cost of our system's focus on rights is that we miss the criminal justice system's larger problems. Again, let me offer some examples, four problems the system faces that have little or nothing to do with the issues that dominate the law of criminal procedure as it now stands.

The first is funding of indigent criminal defense. We fund indigent defense at levels that preclude effective representation for most defendants — and it *is* most defendants; right now about eighty percent of defendants receive appointed counsel, and the figure is higher in most cities.[7] That has to be a large part of why guilty plea rates are so high. Consider this statistic: in the 1980s and 1990s guilty plea rates rose substantially in large cities, even while the conviction rate in cases going to trial was falling. That shouldn't have happened — a falling conviction rate should have meant more trials, not fewer. The reason we have seen ever more guilty pleas is because we fund criminal defense at levels that preclude more than a very small number of trials — and also at levels that preclude more than a very small amount of pretrial investigation. And if defense counsel don't have the resources to

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[6] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1, 24 & n.83 (1997), and sources cited therein.

[7] *See* STEVEN K. SMITH & CAROL J. DEFRANCES, INDIGENT DEFENSE 4 (Bureau of Justice Statistics, Selected Findings No. NCJ-158909, Feb. 1996).

investigate cases and mount a defense, then defendants' rights really don't matter. And, we should understand, a world with inadequately funded defense counsel will be a world with a lot of wrongful convictions, a lot of innocent people behind bars.

A second problem is overbroad criminal law. We criminalize lots of things police and prosecutors don't wish actually to enforce; this gives law enforcers a degree of discretion in choosing whom to go after, and a degree of power once they've decided whom to go after, that can only be called frightening. We see this problem most vividly, I think, in the federal system. We have a federal criminal code with more than three thousand prohibitions; and those three thousand-plus prohibitions cover an enormous amount of territory — mail and wire fraud alone, as they're currently defined, make felons out of a large portion of the adult population. The result is that U.S. Attorneys' offices are usually able to get just about anyone they want to get. This may be the most important thing that's happening in the criminal justice system today, and it's about criminal law, not criminal procedure — about the scope of liability rules, not the scope of defendants' rights. In any decent system, criminal law serves to separate people who've done very bad things from people who haven't. Our criminal law doesn't do that separating anymore; it leaves the separating to law enforcers.

A third problem is race. We now have an enormous prison and jail population — more than two million people[8] — half of which is black.[9] That disproportion is a social disaster. And the disaster is not the result of violations of Fourth, Fifth, or Sixth Amendment law, and it isn't the result of equal protection violations either, at least not according to conventional equal protection standards. Instead, it's because of things like the way drug markets operate and the way police tend to attack them, because of the fact that poor white people tend to be dispersed and poor blacks tend to be concentrated, which has real implications for how police deal with those two groups. Tinkering with criminal procedure rules — in the

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[8] The two million mark was passed in 1999. Fox Butterfield, *Number in Prison Grows Despite Crime Reduction*, N.Y. TIMES, Aug. 10, 2000, at A10 (citing a Justice Department report).

[9] *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1795 & n.1 (1998), and sources cited therein.

words of the title of this panel, "addressing declining rights" — is not going to have any appreciable effect on this problem.

My fourth example is perhaps a little idiosyncratic; it isn't the subject of much popular or academic discussion, though I think it ought to be. The problem is the incredible difficulty the system has in responding to changes in crime. Let me give you some statistics. In the 1960s serious crime tripled. One would expect the prison population to increase sharply. Instead, it actually declined — continuing a trend from the 1940s and 1950s, when crime was going down, not up. By the 1980s, the prison population was skyrocketing, and it has continued to do so throughout the 1990s — today, we have two million people incarcerated, compared to 1970, when the figure was a little over 300,000.[10] But crime is falling now, and it's falling fairly steeply, suggesting that the prison population ought to be falling as well. That isn't happening.

To think about what this means, it helps to think about the price of crime. You can get a good rough measure of the price of crime by comparing the number of serious felonies — FBI index crimes (homicide, rape, arson, kidnapping, assault, robbery, burglary, and auto theft) — with the prison population; those two figures allow you to calculate the number of days served in prison per serious felony in any given year. In 1960, we had about 40 days in prison per index crime. By the early 1970s, that number had fallen to less than 14 days; in 1980 it fell to less than 13 days. By 1999 the same number was nearly 63 days.[11] In one twenty-year period, the price of serious crime fell by two-thirds. In the next twenty years, it nearly quintupled.

Those wild swings in the price of crime are the result of a wild disjunction between what is happening in the world of crime and

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[10] MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984 (Bureau of Justice Statistics 1986).

[11] These figures are calculated by taking the total incarcerated population in any given year, multiplying by 365 to get the number of "prisoner days" served that year, then dividing by the number of FBI index crimes. For the incarcerated population figures as of 1980 and earlier, I rely on CAHALAN, *supra* note 10. For the number of index crimes, I rely on the annual volumes of FBI, *Crime in the United States: Uniform Crime Reports*. For the incarcerated population in 1999, I use the 2,000,000 figure. *See* Butterfield, *supra* note 8.

what is happening in the criminal justice system. Right now, we are locked into a half-century-old pattern of fighting yesterday's war. Crime falls in the 1940s; prison populations fall in the 1960s. Crime skyrockets in the 1960s; prison populations skyrocket in the 1980s and 1990s. Prison populations will probably fall again — eventually, the public will get tired of paying to incarcerate millions of people — but by the time that happens, crime will probably be rising again, and one lesson of the 1960s is that a falling prison population probably aggravates a rising crime rate. This is a truly terrible system if the goal is to control crime at acceptable social cost, or to decide in some sensible way just how much criminal punishment we ought to have. And, once again, this problem has nothing to do with, and is wholly unaffected by, changes in the scope of defendants' constitutional rights.

There is, I think, a common theme in these four problems. All four are really problems of institutional design. Legislators' incentive is to reduce funding for criminal defense and broaden criminal liability rules. Police departments are structured in a way that exaggerates the tendency to focus too much attention on poor urban neighborhoods, and perhaps too little on other sorts of neighborhoods. And law enforcement bureaucracies are not set up in ways that allow them to react quickly to changes in crime, which leads to the wild swings in the prison population we've seen during the course of my lifetime. We have, over the course of roughly the past century, designed a criminal justice system that can only be called pathological. But current constitutional law, with its relentless focus on defendants' rights, does nothing to address the pathologies.

None of that is in itself an argument for weakening defendants' rights; the truth is, some rights probably ought to be strengthened, some weakened, and some done away with. But this is an argument for a change in focus. In the past forty years, we have remade the law of criminal procedure, the law that defines criminal defendants' rights. In the next forty years, we need to engage in a much, much harder task. We need to redesign the criminal justice system.

Professor Steiker

As promised, provocative comments. Thank you very much. I will now ask Professor Maclin to comment.

Professor Maclin

Thank you. I am not going to respond to all of Bill's points. He makes some very good points. He also makes some points that I disagree with, but I do want to say right from the start that I agree with him about the incarceration numbers he speaks of, and I would just like to emphasize, though I am not going to talk about that, that the incarceration of black defendants is particularly troubling.

We have in the audience Paul Butler, who has spoken about this. Professor Butler is a professor at George Washington University, and as I was reading one of his pieces last night, I was not shocked, but troubled to read that one in seven blacks between the age of eighteen and forty is in some form of criminal sanction: punishment, parole, or prison. If current trends continue, by the year 2010, ten years from now, a majority of black males will be in this same situation of prison, parole, or punishment. I just want to thank Professor Butler for bringing that to my attention. That is something we should all be concerned with, because as he points out and others have pointed out, most of the people in prison right now, most of the black men in prison are not there for violent offenses. They are there on drug charges, and in my view, they are no threat to society as a whole. But I just want to say I am not going to talk about that, although that is very important.

I want to try and maybe give you a little counter to Professor Stuntz's views. I think rights are important, and I do not think the problem here is that defendants have too many rights, although I agree with Professor Stuntz that too little has been done to obtain resources.

I want to start with a quick comparison of two cases that were decided last year by the U.S. Supreme Court,[12] one of which you

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[12] Flippo v. West Virginia, 528 U.S. 11 (1999); Wyoming v. Houghton, 526

probably have heard about: *Wyoming v. Houghton.*[13] In that case, the Supreme Court said that the police can search a person's purse found inside an automobile, even though there was no specific or individual probable cause that there were drugs inside the purse. Justice Scalia said that, if the police have probable cause to search the whole car, they can search the purse as well, even though there is no probable cause with respect to that purse itself.[14]

The second case did not get much press attention: *Flippo v. West Virginia.*[15] In fact, it was a *per curiam* decision. It basically involved a 911 report in which the police responded and saw Reverend Flippo outside of a cabin. He was pretty bruised up and told the police that his wife was inside, after which the police went inside and found his wife dead of fatal wounds to the head. They took Mr. Flippo to a hospital. They then secured the scene. They came back later and searched a briefcase inside the cabin. Inside that briefcase were photographs of a man taking off his pants. The police later discovered that Mr. Flippo and this man were having a relationship and used these photographs at the trial to suggest that this relationship had caused actual problems with Mr. Flippo and his wife, and that may have been one of the reasons why he was motivated to kill her.

The West Virginia Supreme Court said this was fine. The U. S. Supreme Court, however, unanimously, in a *per curiam* decision, held that such activity was an illegal search, because it was done without a warrant. The Court reaffirmed that there is no murder scene exception to the warrant requirement, which was established in a 1978 case called *Mincey v. Arizona.*[16] Now certainly there is nothing novel in these decisions, and you did not come here today to hear me talk about inconsistencies in the Court's Fourth Amendment doctrine.

I do want to suggest, however, that the problem here is not so much the inconsistencies, because if you are aware, as I am sure many in this room are, of the Court's framework for Fourth

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U.S. 295 (1999).

[13] 526 U.S. 295 (1999).

[14] *Id.* at 305-07.

[15] 528 U.S. 11 (1999).

[16] 437 U.S. 385 (1978).

Amendment cases, these cases are perfectly rational. If contraband is suspected inside a car, the police can search the car; if contraband is inside a home, even though a homicide occurred and most people would consider the search of the briefcase in *Flippo* more reasonable under the circumstances than the search of Sandra Houghton's purse, police cannot search the home without a warrant.

I have argued in other places that a reasonableness model is the wrong way to approach Fourth Amendment cases. Instead of asking whether or not this is reasonable, which basically involves a balancing model, which as we all know depends on which side of the scale the judicial thumb is going to be placed on, I think, certainly since the 1970s, the thumb has been mostly on the law enforcement side of the scale, because under a balancing approach, of course, we ask whether the law enforcement interest is substantial.

Well, when are we going to see a criminal procedure case in which the law enforcement interest is insubstantial? It rarely happens. So the thumb is usually placed on the scale of the prosecution-effective law enforcement side.

However, my point is that instead of having a balancing approach, what the Court ought to be asking is how we can control police discretion. In my view the control and distrust of police discretion is the central purpose of the Fourth Amendment.

The Supreme Court itself, in a case that looked an awful lot like a Fourth Amendment case, recognized the same point in *City of Chicago v. Morales*.[17] That case did get a lot of press attention. The Court struck down Chicago's anti-gang congregation statute, and in a rather splintered opinion, six of the Justices agreed that the Chicago statute gave police too much discretion to enforce the law, and of course, underneath the concern about police discretion was the concern that the law would be enforced in an arbitrary and discriminatory manner.

It seems to me that the same framework that the Court applies in its vagueness cases should apply when interpreting the Fourth Amendment. And *Morales* is not an aberration. There was a case

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[17] 527 U.S. 41 (1999).

back in the 1980s called *Kolender v. Lawson*,[18] in which Justice O'Connor wrote an opinion holding that a California stop and identify statute also gave the police too much discretion.

So I think the framework is there in terms of the law. The problem is that the Court is applying the wrong framework when it comes to the Fourth Amendment.

Morales was not a unanimous opinion. In fact, Justice Thomas, in his dissent, argued that what the Chicago statute did was nothing more than what the Court routinely does in its Fourth Amendment cases, and that is give the police discretion. I think that Justice Thomas was both right and wrong, and only in a rare instance will I say that Justice Thomas was right in the criminal procedure area, but he was right in that what the Chicago statute did was authorize the police to do things that the Court routinely authorizes in the Fourth Amendment context.[19]

I think Thomas was wrong, however, in saying that that was okay. Instead of having vagueness law shaped by Fourth Amendment law, we should have our Fourth Amendment law at least take note of and acknowledge the same concerns as the Court raises when it decides cases dealing with police discretion under the Fourth Amendment. Put simply, checking police discretion should be the central inquiry of the Court when deciding Fourth Amendment cases.[20]

Now, I want to make three quick points in the time that I have remaining in light of the subject of today's conference, which is what will happen in the twenty-first century.

I think the same problems that we saw with respect to individuals' rights in the 1960s and throughout the twentieth century, will also be here in the twenty-first century. I do not want to say defendants' rights, because all these individuals that the police confront, whether they be on the street or in the police station, are individuals, and they only become defendants once they get enmeshed in the criminal justice society, or criminal justice system.

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[18] 461 U.S. 352 (1983).

[19] *Morales*, 527 U.S. at 109-10 (Thomas, J., dissenting).

[20] *See* Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 J. CONST. L. 398 (Feb. 2001).

I want to discuss three issues that I think are particularly relevant here: police discretion, police perjury, and finally, a phenomenon that we saw in the 1960s and unfortunately I think we still see today, which is the notion that police associated particular black men with crime and with being dangerous.

Regarding police discretion, it was a problem in the 1960s. It is still a problem today. When the U. S. Supreme Court decides, for example, whether or not someone should be detained, or whether or not someone should be frisked, it speaks of a reasonable suspicion standard, an articulable suspicion.

Yet, if you read a Supreme Court case called *Ornelas v. United States*,[21] the Court itself says we cannot articulate what this standard means. We cannot define what reasonable suspicion is. In fact, it comes from common sense.

Well, what does "common sense" mean? What it means, I would suggest to you, is that it is not a reasonable suspicion standard, it is a police suspicion standard. You can see that in the Court's recent decision in *Illinois v. Wardlow*,[22] in which I filed a brief, so I am a little biased. I represented the ACLU and the National Association of Criminal Defense Lawyers. There, the Court was confronted with the question of whether or not flight from the police in a high crime neighborhood — and that is all you have — justifies a detention. I pointed out, and the Solicitor General also acting as amicus for the other side conceded, that there was no empirical evidence to support Illinois' claim that whenever anyone flees from the police, whatever the context, that is suspicious. I argued to the Court in that case that there is no empirical data for this, and the Solicitor General conceded that point. The Chief Justice's opinion for the Court said that neither empirical data nor scientific certainty is really needed. What is required in this situation is common sense: we must defer to the police.[23]

The problem with this standard is not that all police are bad, although a lot of them are. The problem is the fact that to the

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[21] 517 U.S. 690 (1996).
[22] 528 U.S. 119 (2000).
[23] *Id.* at 124-25.

police any type of flight or evasion is suspicious. For that matter, refusing to give consent when you are asked to give it and when the police do not have reasonable suspicion, is suspicious in the eyes of the police. So what we have now is not a reasonable suspicion standard because the Court refuses to articulate what reasonable suspicion might be. The Court has also refused to articulate what probable cause is as far as legal rules are concerned. The Court has decided that we do not want legal rules, bright lines, or guidance in this area. As a result, what we end up with is a police suspicion standard that, of course, should not be the standard and is not the standard that the Constitution calls for.

One other case in this area, which was argued this week, is *Florida v. J.L.*[24] The question there is whether the police, based on an anonymous tip that a black person standing at a bus stop, wearing a certain type of clothing, supposedly was carrying a weapon, can stop and frisk that individual and two other persons found at the scene, if that is all they have.

Some of you may know that in a case called *Alabama v. White*,[25] the Court held that detentions of individuals would be permissible on an anonymous tip so long as the tip itself can predict the future actions of third parties.[26]

In *J.L.*, however, all we have is three black persons standing on the street — by the way it was in the middle of the day, I believe it was in Tallahassee, Florida, and they were not doing anything illegal. An officer came up to them within a few minutes, told one individual to put his hands over his head, and frisked him.[27]

I will submit to you that the Court will uphold this for one reason: police safety.[28] Again, we do not have articulable rules

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[24] 529 U.S. 266 (2000).

[25] 496 U.S. 325 (1990).

[26] *Id.* at 331-32.

[27] 529 U.S. at 268-69.

[28] This prediction, consonant with the dissenting opinion of the Florida Supreme Court justices, has proven erroneous. *J.L.*, 529 U.S. at 269, 271-72, *rev'g* 727 So. 2d 204, 214-15 (1998) (declining to corroborate the Florida court's dissenting view that police and public safety created a "firearm exception" to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips, the Supreme Court on appeal unanimously ruled that the frisk in *J.L.*, which resulted from an anonymous tip providing insufficient indicia of

here. We do not even have articulable suspicion. What we have is a police suspicion standard. The police allege they need to be able to frisk in a situation such as that in *J.L.*, not because they can prove this type of situation is indeed a threat to them, but instead, because they need to do this based on their own common sense.

With respect to police perjury, recent illustrations are the Abner Louima case in New York City,[29] which I am sure many of you have heard about, and the recent Los Angeles Police Department scandal.[30] Both these cases bring up the issue of police perjury. When you read Supreme Court cases in the area of police perjury, it is as if the Court had been asleep for the last thirty years. The Court never discusses police perjury at all. It is, however, a pervasive problem. It was already a pervasive problem when *Mapp v. Ohio*[31] was decided. The Court acts as if it cannot discuss it. The only time you will see the issue mentioned in a current Supreme Court opinion is usually in a dissenting opinion, most often by Justice Stevens. This is a problem that the Court needs to, at a minimum, send a signal on. Certainly, state courts and defense counsel should not be prevented, when they see the same sorts of police testimony in case after case, from acknowledging that there is at least a problem in terms of whether we really believe this sort of police testimony.

A recurring situation is one similar to that in Los Angeles, where police are now admitting, not only to have planted evidence

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reliability, violated the Fourteenth Amendment).

[29] *See* Mike Claffey, *Sixth Cop is Guilty in Louima Charges*, DAILY NEWS, June 22, 2000, at 4 (explaining that the trials involved the brutal beating and sodomy, with a broken broomstick, of Abner Louima, a Haitian immigrant, outside of a Brooklyn nightclub after a scuffle, by two officers of the New York Police Department); Alan Feuer, *Officer Convicted of Lying, In Last of the Louima Cases*, N.Y. TIMES, June 22, 2000, at B3 (noting that subsequent perjury trials resulting in the conviction of several officers in their attempts to cover up the brutality stem from the fierce impulse of police to protect their own).

[30] *See* Los Angeles Police Department, *Executive Summary, Board of Inquiry into the Rampart Area Corruption Incident*, Intradepartmental Correspondence from Chief of Police to Board of Police Commissioners (Mar. 1, 2000) at 1-2, *at* http://www.lapdonline.org (describing numerous corruption scandals surrounding the L.A.P.D. personnel from 1997 through 1999).

[31] 367 U.S. 643 (1961).

and lied in their testimony, but to have shot people and placed weapons on persons. That should draw, I think, the public's attention, and of course the Supreme Court's attention.

The final issue I want to address is police mistrust in situations where black persons are defendants, and this of course touches on the Diallo case.[32] It does suggest that some defendants or some suspects might be better off with fewer rights. I suggest to you that Mr. Diallo might still be alive if he had had more rights, and that would be the case if the Court had gone the other way in *Terry v. Ohio*.[33] I think *Terry* was wrongly decided from the start in 1968, even when probable cause had more teeth to it. The problem with *Terry* is not that there was reasonable suspicion there, but that a police suspicion standard was used.

What were the grounds for the police — if we believe their testimony, because of course that was all we had — for approaching Mr. Diallo? If the police had approached Mr. Diallo and frisked him, as they typically do in New York City, and found drugs on him, my guess is that most courts in New York would have upheld that stop and frisk, because he was acting suspiciously. How do we know he was acting suspiciously? Well, the police said there was a black man out at midnight, albeit in front of his own vestibule, looking up and down the street suspiciously. That is generally enough to justify a stop and frisk.

The reason why it does not seem to be enough to some people is because Diallo was shot at forty-one times and hit nineteen times. I would suggest that the police would not have shot Mr. Diallo if he had been white. The reason why he was shot is

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[32] Elizabeth Kolbert, *The Perils of Safety: Did Crime-Fighting Tactics Put Amadou Diallo at Risk?*, THE NEW YORKER, Mar. 22, 1999, at 50; *see also* William K. Rashbaum, *U.S. Says City Has Failed to Release Data on Frisks*, N.Y. TIMES, Jan. 31, 2001, at B4 (noting that Amadou Diallo, an unarmed West African immigrant, was shot by four plainclothes members of the Street Crime Unit, who fired forty-one bullets, striking him nineteen times, after mistaking Diallo's wallet for a gun). All four officers were cleared of criminal charges in the shooting, but the incident prompted a federal investigation intensely scrutinizing the aggressive tactics of the unit, previously commended for sweeping hundreds of guns off the street and winning record crime reductions, and the department's stop-and-frisk practices generally. *Id.*

[33] 392 U.S. 1 (1968).

because the police associate black men with crime, and as the officers testified, they believed Diallo was dangerous. Why was he dangerous? Because he was in his own neighborhood? Because he was out in front of his own house? No, because he was black.

And that is the problem that the Court must confront, not only with respect to individuals who are eventually charged with a crime or interrogated in connection to crimes, but even with someone like Mr. Diallo, who of course committed no crime.

These are the three issues that I think we had back in the 1960s, 1970s, 1980s and 1990s, and unfortunately, I think we will still have in the twenty-first century. Thank you very much.

Professor Steiker

Thank you, Professor Maclin.

Professor Steiker

Thank you. And now, Mr. Robert Wilkins. One thing I neglected in my introduction is that while Mr. Wilkins is well known as a Public Defender, one of the things he is probably best known for is a lawsuit that he and his family brought against the Maryland State Police, which resulted in an innovative and telling consent decree. Mr. Wilkins will discuss the origins of that lawsuit today.

Mr. Wilkins

Thank you, Carol. I would like to thank the CR-CL Law Review for inviting me to speak today. I am an alumnus of the CR-CL Law Review and love the journal. I am proud to be here representing the alumni faction of the Law Review and to be a part of today's event.

I agree with much of what Professor Stuntz said; more than I anticipated I would before today's symposium began. The key point that I take issue with is that rights do not matter very much in the overall system of criminal justice, or that rights do not affect how many people go to prison or how many cases plea bargain, etc.

Rights do have some effect on the criminal justice system, but not as much effect as people think.

However, the scrutiny that the courts place on individual rights has a tremendous effect on the quality of life of millions of people on the street and those who interact with police officers on the street every day.

I am going to tell a little story and integrate into that story why I think that this is the case — why the enforcement of individual rights is important to our quality of life. I wish I could say that the following story is a hypothetical, but unfortunately, it is not. Indeed, it is a true story, and it happened to me.

On May 8, 1992, I was with my uncle, his wife and his son, as we were returning from my grandfather's funeral in Chicago. I live in Washington, D. C. and the rest of my family who lives in the D. C. area decided to drive with me to Chicago for the funeral. As we were returning to Washington in a car that my uncle had rented for the trip, we were stopped by the police.

It was just before dawn on a Monday morning. We had driven all night from Chicago, as we had stayed much longer than we had expected. We had actually planned to leave Chicago early Sunday afternoon so that we could get back to Washington by Sunday night, but it was a very emotional trip.

My grandmother buried her husband of fifty-eight years and it was just a time to tarry and take a little bit of extra time with family, which is why we decided to drive all night. I had to be in court on Monday morning for a case, and the rest of my family members had to be back at work on Monday morning, so we were just trying to get back home in time for the start of the work week.

My cousin was behind the wheel as we were stopped by a Maryland State Trooper, allegedly for speeding on Interstate 68 in western Maryland. The trooper stated that he had paced my cousin going twenty miles over the speed limit, at a speed of sixty miles per hour in a forty mile per hour speed trap. The trooper asked my cousin to step out of the car and had him outside the car for a few minutes, and we sat inside the car trying to figure out what was going on. Eventually, my uncle and I also stepped out of the car, and at that time my cousin said: "Daddy, they want to search the car."

I immediately identified myself as a lawyer and a Public Defender, and I explained to the trooper that I knew what our rights were, and asked him what was going on. He showed me a Consent to Search form that he had been attempting to get my cousin to sign without success.

At that point, I explained to the officer that if he were placing my cousin under arrest for some reason, he could certainly search the car incident to the arrest. But other than that, he would need permission from the group to search the car and we did not want to give him permission. Alternatively, if he wanted to issue the driver, my cousin, a ticket, he should proceed to do so and allow us to be on our way.

The officer's response was: "if you've got nothing to hide, then what's your problem?" I was quite shocked and explained that the problem was that we have rights not to be detained, seized and searched, and we wanted to exercise those rights. The officer stated that this was a routine procedure, and that nobody ever objected to it. I responded: "Sir, I can't speak for what other people do or do not do, but we do not want you to search our belongings, we just want to be left alone and go on our way." The officer stated: "Well, if you're not going to sign this form, you are going to have to wait here until a drug sniffing dog can be brought to the scene."

I explained to the officer that there was a 1985 Supreme Court case called *United States v. Sharpe*,[34] where the Supreme Court reaffirmed the *Terry* standard in traffic stop cases - that you could not detain people on the side of the road during a traffic stop unless there was reasonable or articulable suspicion that they had drugs or were committing some other crime for this kind of investigatory purpose.[35] The officer's response was that he did not

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[34] 470 U.S. 675 (1985).

[35] *Id.* The question presented in this case was "whether an individual reasonably suspected of engaging in criminal activity may be detained for a period of 20 minutes." *Id.* at 676-77. The Court divided this question into two issues: (1) whether the investigatory traffic stop was based on reasonable suspicion of drug possession or drug activity; and (2) whether the twenty-minute detention was reasonable within the scope of the stop. *Id.* at 682-83. With respect to the first question, the Court applied the *Terry* standard, and found that the record abundantly supported the assumption of the court below that there was a

know anything about the case and that this was just procedure. I then asked him what his explanation was: why did he think we were suspicious? What had we done? The officer replied that there were many problems with rental cars and drugs on the highway. I then asked him whether that meant he was stopping everyone in a rental car and asking to search their car just because it is a rental. He replied: "Well, look, look, look, this is procedure, you know, are you going to sign the form or not?" I told him that we would not sign the form. My uncle wanted to determine exactly what the search meant, because if the search was just going to be something really quick and not too intrusive, perhaps we would just let the officer do it, so that we could be on our way.

When we asked the trooper to define the intrusiveness of search, he said: "look, you know, what I want to do is open up the trunk, take out your suitcases and look through them here." Remember that it was raining and we were standing on the side of the highway.

At that point, my uncle said: "well then you'd better go get your damn dog." I really did not want a confrontation, nor did I want to initiate a lawsuit. I just wanted to be able to get home and beat the morning rush hour traffic into Washington and not be late for my court appearance. Thus, I asked the trooper if I could open the car trunk to retrieve my grandfather's funeral program from my suitcase to justify why we were on the highway at this hour and prove to him that we were not on a trip to transport drugs. My hope was that the program would satisfy him, and he would let us go. The officer responded that he did not want to see any funeral program and that he wanted to search our car.

At that point, I went back to the car, retrieved a pad and paper, and started taking down badge numbers, license plate numbers and everything about the event. A second trooper had joined us by this time. He did not have a badge, just a nameplate, so I asked for his

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reasonable suspicion. *Id.* at 682. The Court found that "it is not necessary to decide" the second question because there was no causal relationship between the detention and discovery of the marijuana by the police. *Id.* at 683. Then, the Court rephrased the issue of the case as "whether it was reasonable under the circumstances facing [the police] to detain [the petitioner], whose vehicle contained the challenged evidence, for approximately 20 minutes." *Id.*

badge number. He said: "aw, you do not need it. 'Syracuse,' make sure you spell it right, I am the only Syracuse in the State Police." It was all a big joke to the police officers, who implied that there was not much we were going to be able to do with pen and paper.

I want to stop for a moment and explain the implications of this incident as I think about individual rights and their lax enforcement by the Supreme Court and lower courts.

Was this reasonable or articulable suspicion? And what does this incident say about rights when you have a situation where police officers know that they are dealing with a lawyer who cites a Supreme Court case to them and is taking down notes and they have absolutely no fear of scrutiny regarding their actions? What does this incident say about the effectiveness of our civil justice system or the exclusionary rule in dealing with enforcing the rights that we are supposed to have and that are guaranteed by the Constitution?

After we filed the lawsuit, we learned that the trooper, Brian Hughes, was actually following procedure, because a document, a "criminal intelligence report," had been distributed about two weeks before we were stopped.[36] The document states that there was a crack cocaine problem in the area, and the people who were transporting the drugs were predominantly male and female black traffickers. The document went on to state that these traffickers like to use rental cars, particularly from the D. C. area with Virginia registration, and travel early in the morning or late at night. The report also carried the ominous warning "Caution: Several of these people are armed and dangerous and have commented that they'll shoot a police officer if necessary. Be careful, because they will hide, they're often armed and they will hide guns in different places, etc."[37] We were black, coming from the Washington, D.C. area, in a rental car with Virginia registration, and traveling early in the morning. Therefore, we fit the profile, and I guess the trooper was telling the truth when he said that he was just following procedure.

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[36] Criminal Intelligence Report, State of Maryland, Maryland State Police (Apr. 27, 1992) (on file with the *Journal of Law and Policy*).

[37] *See id.*

Let us stop here and talk about a couple of issues. First, this profiling document sets the stage for potentially dangerous confrontations because it encourages troopers to stop black people, and then warns them that they are generally considered to be armed and dangerous. In such a climate, it is no wonder that incidents like the Amadou Diallo shooting occur.[38]

What about consent? I could not believe that my cousin, who was by himself outside of the car, withstood the barrage of questioning and suspicion by saying no to this trooper when he was outside alone. And then, when my uncle and I joined the discussion, as much as we did not want to, we came close to giving our consent. It was only because we understood that the scope of the search was going to be so intrusive and so unreasonable as to invade our privacy rights, that we did not give up our rights to consent, as much as we wanted to hold on to them.

That raises the question whether any court would have held that our consent was involuntary if we had given it under those facts. I do not believe so. Is there a problem with that? Is the involuntariness standard too high to judge fairly these situations? Additionally, what about the fact that the officer suggested that if we had nothing to hide, then we should not have a problem with being searched? What does such a accusation say about whether the decisions of the Supreme Court and lower courts are correct when they hold that there is no obligation on behalf of the police to advise citizens that they have a right not to consent?[39] Such

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[38] *See generally* Kolbert, *supra* note 32, at 50; *see also* Rashbaum, *supra* note 32, at B4 (noting that Amadou Diallo, an unarmed West African immigrant, was shot by four plainclothes members of the Street Crime Unit, who fired forty-one bullets, striking him nineteen times, after mistaking Diallo's wallet for a gun). All four officers were cleared of criminal charges in the shooting, but the incident prompted a federal investigation intensely scrutinizing the aggressive tactics of the unit, previously commended for sweeping hundreds of guns off the street and winning record crime reductions, and the department's stop-and-frisk practices generally. Rashbaum, *supra* note 32, at B4.

[39] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 231-32 (1973) (holding that though consent must be voluntary in order to be constitutionally valid, the police's failure to inform the subject of search of his or her right to refuse consent does not necessarily render the search invalid because such requirement "has been almost universally repudiated by both federal and state

decisions create a situation where law enforcement officers fail to advise people of their right to refuse consent, in an environment where the police affirmatively tell people who want to assert their rights that they are suspicious or doing something wrong.

In a moment I am going to show you the actual report that the trooper wrote after he learned that we were going to file a lawsuit. The officer lied in the report and said that he informed us of our right not to sign the consent form. The abstract problem of police perjury is infuriating enough by itself. It is even more frustrating, though, when it happens to you and you see how officers lie about events in reports, and you wonder whether your credibility is going to be able to prevail over the police officer's credibility to allow a favorable result in your case.

Returning to the story, after waiting for the search dog to arrive, which took about half an hour, we were told that we had to exit the car and stand along the side of the road in the rain while the German shepherd jumped on top of the car so it could smell the area around the windshield wipers, trunk, headlights, tail lights, hub caps, and the area where the window recedes down into the door panel. Essentially, every inch of the exterior of the car would be inspected by the dog. It took about two to three minutes for the handler to walk the dog completely around the car and over every inch of the exterior surface.

All this time, we were standing in the rain, and by then three or four police cars were parked nearby with their lights flashing. People were driving past and slowing down, looking at the flashing lights, the police officers, the German shepherd, and at us, and clearly concluding that we must have done something wrong. I truly felt that everyone driving past must have been thinking that the police had apprehended some more criminals.

I distinctly remember one particular car driving past very slowly. There were two young white children, a boy and a girl, in the car attempting to view the scene, with their noses pressed up against the window and their eyes focused on me. I stood there wondering what they were thinking. What message, what kind of miseducation did they get about me because of this incident? I

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courts").

have never even smoked a joint or taken any kind of drugs in my life, and although I have done many things that I am not proud of, for various reasons, I have never had any interest in taking drugs. There are Presidents of the United States and members of Congress who cannot make that claim, yet I was standing on the side of the road in the rain like a suspect.

When the Supreme Court looks at these issues, it concludes that these detentions, searches and frisks are minimal intrusions when balancing the interests of public safety and law enforcement.[40] Yet these detentions, frisks and seizures, particularly when they are unjustified and unreasonable, really have a serious detrimental impact on the quality of life of African Americans and other minority groups, a large segment of our population.

I believe that "real world perspective" is missing in today's jurisprudence. I went to the arguments of *Maryland v. Wilson*,[41] the case that held ultimately that it was okay to order passengers out of a car during a routine stop, even where there was no suspicion of those passengers,[42] and I really felt as if I were an outsider looking in, even though I watched as a member of the Supreme Court bar. The Court was talking about the issues, but it

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[40] *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding the brief and easily avoidable detention, for purposes of observing signs of intoxication, of all motorists approaching a roadblock); *see also* United States v. Place, 462 U.S. 696 (1983) (discussing various U.S. Supreme Court cases holding that brief detention of persons during the police search of cars is constitutional); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding brief interrogative stops of all motorists crossing certain border checkpoint as reasonable without individualized suspicion).

[41] 519 U.S. 408 (1997).

[42] *Id.* at 414-15. In this case, after lawfully stopping a car speeding above the legal limit, a police officer ordered the passenger out of the car because he noticed that both the driver and the passenger appeared to be "extremely nervous." The passenger was arrested and charged with possession of cocaine and intent to distribute when a quantity of cocaine fell to the ground upon his exiting the car. *Id.* at 410-11. The majority relied on the "public v. private interest" balancing test approach. *Id.* at 411-15. The dissent, however, emphasized that the level of suspicion based on the police officer's observation of the passenger's nervousness did not amount to anywhere close to that of "reasonable suspicion" standard established in *Terry v. Ohio*. *Id.* at 415-18 (Stevens, J., dissenting).

was not talking about me, and the Court did not seem to know anything about what it was like for me to stand outside during our Maryland traffic stop.

Frisks involve police officers feeling and touching the private parts of citizens. Police officers are inspecting your groin area when they frisk you. They are groping women's breasts and everything else while frisking them. And sometimes, the police want you to be lying spread-eagled, face down on the wet, dirty ground when they frisk you. You are often handcuffed during these and quite often guns are pointed at you.

Yet, I do not think that these aspects of an individual's dignity and quality of life are deemed of any real importance in most court decisions. The Supreme Court and lower courts routinely dismiss arguments seeking more scrutiny of the police because these encounters are simply temporary, momentary, minimally intrusive actions.

We were able to get a favorable settlement in our lawsuit. I had access to the courts, unlike most people. I was the perfect client for a lawyer wanting to bring a case: a Harvard Law School graduate, I had cited the Supreme Court case that was on point to the trooper during the detention. We had good facts, good case law, and there were no arrests or convictions on my record. We also had a "smoking gun," a written profile that illegally targeted blacks for drug searches that we could link to the trooper's explanation that he was searching us "because of problems with rental cars and drugs on the highway."[43] Thus, we were able to get a favorable settlement that required the police to adopt a non-discrimination policy, to retrain every single one of their troopers, but most importantly to document every search. They have to document every time they search someone based on consent or a drug sniffing dog, and they have to document the race of each person searched and the reasons for performing the search. They also have to give that information to the ACLU and the federal judge monitoring the case on a quarterly basis.

The scary thing about this case is what we learned from that documentation. We saw that especially on I-95, there was a huge

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[43] *See* Criminal Intelligence Report, *supra* note 36, at 1.

disparity in blacks and whites who were being searched. About seventy to seventy-five percent of the persons being searched were African Americans, but we found that only seventeen percent of the drivers and seventeen percent of the traffic violators on I-95 were African American. So, how do you go from seventeen percent to seventy-five percent?[44] We learned from the Maryland State Police's own data that if you searched one hundred whites and one hundred blacks on I-95, you found drugs the same number of times.[45] Most people were innocent and had no drugs or contraband, but the percentage of people who had drugs was the same, exactly, among blacks and whites. The problem was that for every hundred whites who were searched, 400 or 500 blacks were searched, which resulted in this disparity if you looked at the arrest statistics or the statistics of those who had drugs.[46] Without the data from our lawsuit, all you would have known from the Maryland State Police was that seventy-five percent of people arrested were African Americans and that African Americans were seventy-five percent of the people who had drugs. But with our data you could go behind those numbers to see that the disparity was completely accounted for by the use of police discretion to search African Americans at a much higher rate.

Obviously, that was not what we were hoping for with the settlement. Thus, we are now back in court to try and institute further sanctions such as installing video cameras in the police cars and taking other measures to deal with and hopefully eradicate this problem.

But even with all of these facts, it is still difficult to prove a Fourteenth Amendment violation. We have a system that generally provides that if you cannot prove intentional discrimination, you will have difficulty proving an equal protection violation. We had a statistician look at this disparity of searches in Maryland, and he concluded that there was only a one in a quintillion chance that the disparity could be described by coincidence — and a quintillion is

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[44] DEBORAH RAMIREZ ET AL., A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED, 6-7 (Nov. 2000), *at* http://www.ncjrs.org/pdffiles1/bja/184768.pdf.

[45] *See id.* at 10.

[46] *See id.* at 7.

one with eighteen zeroes behind it.[47] Despite the statistics, the State of Maryland made a very spirited argument and we did not prove a Fourteenth Amendment violation because statistical disparity alone is not sufficient. In the court's view, we had to prove that the cause of the particular searches of African Americans was intentional discrimination and we did not do so, because we did not have another smoking gun.

I think that my experience of being searched, dealing with the courts, achieving a landmark settlement and then seeing how difficult it is to enforce the settlement, helped move me towards the project of creating a national museum dedicated to African American history. I, quite frankly, have almost given up hope that the lower courts, the Supreme Court and the legal system generally will have any real commitment or any real capacity under the current political culture in this country to deal with these problems, and I have turned my attention elsewhere.

I think that is a sad state of affairs, because if such frustration can happen to me, someone with my opportunities, in my position and my education, having attended Harvard Law School, what do you think the average young black male living in a poor, urban area experiencing the same frustration thinks about the system? Do you think that he believes that he should respect that system or the people who, to him, represent that system?

I leave you with those thoughts and thank you very much.

Professor Steiker

Thank you very much. We have only about ten to fifteen minutes left, so instead of asking members of the panel to respond to one another, I would like to open it up to the audience to ask a question of a particular panel member or the panel generally. We have had quite a variety of points of view and ideas. Any comments or questions? Great, come to the microphone.

Audience Member

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[47] *See Report of John Lamberth, Ph.D.*, ACLU SUPREME COURT WATCH, *at* http://www.aclu.org/court/lamberth.html (last visited Feb. 21, 2001).

My name is John Snyder. I am a first-year law student here. Just having heard these stories and knowing the powers of a prosecutor, it seems to me that people seeking to reform the system and to make it respect the rights of the defendants might be more drawn to being prosecutors. By being prosecutors, they can have the power, if there is police abuse, to ensure that suspects arrested as a result of police misconduct are not prosecuted, and they can take a look at police testimony or police perjury more closely and very carefully.

On hearing Mr. Wilkins' story, if I were a prosecutor, I would be very ashamed of the police. And I am wondering whether there is any organization of prosecutors who are concerned with this problem and are taking an active role working with people who are interested in reforming the system. And that question is for anyone who is interested in answering it. I also see what is happening with the Los Angeles Police Department, and this has been going on for years. We are talking about four convictions that have been overturned so far. Were the police officers so ingenuous that they were able to pull the wool over the prosecutors' eyes, or was it that the prosecutors were not careful and did not scrutinize enough?

Professor Stuntz

Can I make a comment? Part of the problem is that prosecutors are enormously powerful, and though it is true that if you want to do something to make some pretty important corner of the world a little better, there are few better options than to prosecute with the kind of training that you guys are getting, what I think is not true is the misperception of how the organization chart works, that police officers are subordinates of prosecutors. The relationship is not superior to subordinates. It is much more complicated than that.

I think this is a difference between our legal system and the legal system of some other developed countries, and it is a very, very important one. It is one of the most important features that may also be one of the worst features of the system. Basically, police departments do not have any other entity in the legal system over and above them. They are autonomous. The politicians are over them in places where police chiefs are in some measure

politically accountable. In Los Angeles, no one was over and above them because that was a large part of what has gone wrong in Los Angeles.

Los Angeles has a tradition of police departments where the police department is essentially a civil service entity. It is not subject to local political control. It is not subject to the control of the local prosecutor's office. It is not really subject to anybody's control. It was subject to Darryl Gates' control[48] for a long time, and that is really what produced the current situation in Los Angeles.

I think one of the best things we could do for the system is to try and restructure the relationships between various institutions in the system so that something or someone is over and above police departments. I think that would also be effective in curbing the kind of abuses that Mr. Wilkins was talking about.

Audience Member

I would like to ask Professor Stuntz about his skeptical attitude towards rights or their effectiveness. Isn't the problem the way rights are defined now? I mean the problems you have identified are absolutely the most important problems. But can't those problems be solved if we define the rights differently?

I will just give two examples. One is the problem of indigent defense. So, if the courts will define assistance of counsel differently than now, would we not approve as ineffective assistance of counsel, for example, defense attorneys who have impossible case loads or defense attorneys who fall asleep in court? Second, with

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[48] *See History of the LAPD, at* http://www.lapdonline.org/ (last visited Feb. 6, 2001) (explaining that Daryl F. Gates served as Chief of Police in the Los Angeles Police Department from March 28, 1978 to June 27, 1992). Gates was well regarded for his aggressive anti-narcotics campaign that resulted in his creation of the Drug Abuse Resistance Education and Special Weapons and Tactics teams programs. *Id.* However, Gates received wide criticism for his protection of the police department in the Rodney King incident and, in the wake of the federal investigation of police corruption following the Rodney King riots, he surrendered his post to Willie L. Williams, the first black Chief of Police of the Los Angeles Police Department. Seth Mydans, *Era in Los Angeles Ends as Chief Quits*, N.Y. TIMES, June 27, 1992, at 6.

regard to the problem of race, if we define or the Court defines equal protection challenges differently, or at least the discovery issue differently than it did in *United States v. Armstrong*,[49] wouldn't that make a change?

Professor Stuntz

I guess the short answer is sure, and we would have very different kinds of rights than the ones we have now. You're absolutely right. What I am trying to suggest is that rights the way that we traditionally think of them are a lot less important than I think we tend to think.

Look, a good way to capture this issue might be in the following manner. If you divide criminal procedure into two, think about the policing sphere and the adjudication sphere. In the policing sphere, the central idea of rights, the way that we have developed them, is some sort of zone of privacy or autonomy that neither the government nor the police can penetrate without sufficient reason. What rights do not mean in that sphere is protection against improper selection. That is, against misuse of the kind of discretion that substantive criminal law gives police officers.

My argument would be that this second part is the larger problem. I do not mean the first problem is not a significant problem, but that is the much larger problem.

In the adjudication sphere, what do rights mean? Rights typically mean procedural hoops that the government gives defendants if defendants choose to avail themselves of them. What rights do not mean is resources to make use of those procedural hoops. Once again, that is the larger problem.

Defendants would be, I think, much better off with fewer procedural hoops and more resources. That's all.

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[49] 517 U.S. 456, 463 (1996) (holding that "Rule 16(a)(1)(C) [of the Federal Rules of Criminal Procedure] authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case in chief, but not to the preparation of selective-prosecution claims").

Of course, you could reconfigure the law to emphasize those things that are now de-emphasized, and I would not be making the argument that I am making.

Professor Maclin

Bill Stuntz rightly suggests that the substantive criminal law is too wide or at least that is implied. I agree with him there, but that to me is not an argument that we should reduce rights, or that defendants have too many rights.

To me, a rights-based regime, and that is what we have under the Constitution by the way, can certainly co-exist with a criminal justice system. Bill is certainly right when he talks about the resources, if you even get to a trial, because as we all know most defendants plea bargain out. But I do not see any inconsistency with a strong rights-based regime and more resources.

Now, Bill might say that there is a limited pie. We only have a certain amount of resources, so you have to choose where you want to go. But I do not see an inherent conflict between a strong rights-based regime, which I do not think we really have, and a regime that says that defense counsel who have more than 150 cases, more than what the ABA recommends for criminal defense, cannot be effective.

So I think your question, the gentleman's question is a fair question, but I do not think it has to be an either/or choice.

Professor Steiker

Let me take one more question. Yes.

Audience Member

I am a second-year law student here. My question is one of practical implementation. I have an intuition that all of us have an understanding that there are certain procedural abuses. So, to a certain extent, we are preaching to the choir. Has any of the panelists given a thought to how we can transform this intuition that is held within this group here into the broader public consciousness?

Professor Maclin

Obviously, I disagree slightly with the premise of the question if the premise is that the broad public wants to hear what I am saying, because what I am saying is very different from what Bill has said. The public does not want to hear about restricting the police, and certainly the public does not want to hear what Bill is saying. What I agree with him on is restricting the substantive criminal law.

We have seen, for example, Bill Clinton. Bill Clinton has been successful because he has basically run as a Republican when it comes to criminal justice matters, and he has been very popular in that.

So I am not so sure the public wants to hear this, or if it were to hear this, it would respond in a way that you or I might respond.

Professor Stuntz

I would say two things. One is about the development of public opinion and the other is about the police.

Regarding public opinion, the picture may be a little more positive than is being painted here. There are natural cycles, natural tendencies that work in these things, and those cycles sometimes take a long time. It takes a long time for the pendulum to swing, but these pendulums do swing. You see a kind of public response, a public conversation about racial profiling and incidents like the one that you heard about, that we all heard about a few minutes ago, that is substantially different and substantially more sympathetic than anything you would have heard five or ten years ago. Those things were going on five or ten years ago.

Public opinion has moved, and is still moving. I think one of the reasons public opinion is moving on the sides of the prison population is just because of the sheer expense of the prison population.

Finally, I think that the independent counsel statute has been a gift for criminal justice in highlighting prosecutorial overreaching. These are salient examples of prosecutorial overreaching, and the public responds in ways that I think over time will cause some reining in of prosecutorial overreaching by other prosecutors.

With respect to the police, I think the only source of change, the only change that is going to be really and truly productive, is not going to be changes in Fourth Amendment or Fifth Amendment law. It is going to be changes in police cultures. I have a slightly more depressing message regarding the police culture. I am not sure how you can change the police culture. I think that would be very, very difficult. I think the truth of the matter is that police departments are like good schools or bad schools.

At least in my experience with my own children, as you get to know the principal, you have just gotten to know the school. Good principals produce healthy cultures, which in turn produce good schools. Good police chiefs produce healthy cultures, which in turn produce good departments. How you get the right sort of police chiefs in place — that is hard. I think that is the challenge.

Professor Steiker

Thank you all very much for a very interesting discussion.