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NOTICE

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THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR? By *H. Richard Uviller*. New Haven: Yale University Press. 1999. Pp. ix, 314. $30.

INTRODUCTION

Rules of criminal procedure, like all rules of legal procedure, exist to advance the goals of the corresponding substantive law.[1] To ask whether American criminal justice — pursued through the operation of these procedural rules — is fair is to engage in a debate that has persisted since the Founding.[2] More recently, the early twentieth century witnessed a revolution against the procedural formalism of preceding decades.[3] Whether justified or not, the perception flourished

* Many thanks to Professors Richard D. Friedman and Joan A. Larsen.

1. *See* Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 725 (1942) ("The substantive criminal law determines the kind of questions we must ask; rational procedure, embodying legal principles, prescribes what steps we must take and how we shall take them to secure the necessary answers."); Roscoe Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926) ("Legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action.").

2. At least one Framer identified the birth of the American Revolution in the colonists' resistance to English customs officers' indiscriminate use of writs of assistance to enter buildings to search for and seize smuggled goods:

> In 1761, James Otis, Jr., representing 68 Boston merchants, opposed in court the issuance of new writs. He did not prevail, but this does not detract from the impact of Otis' oratory. As John Adams, a youthful spectator, was later to recall: "[H]e was a flame of fire!" * * * Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. * * * Then and there the Child of Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free.

WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a), at 4 (3rd ed. 1996) (quoting 10 C. ADAMS, THE LIFE AND WORKS OF JOHN ADAMS 247-48 (1856)) (alterations in original).

3. *See* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1198 (1960) ("The 'procedural revolution' of the twentieth century followed inevitably from the legal realists' attack upon the procedural formalism of the prior century.").

that the legal system's dogmatic adherence to process[4] allowed many criminals to escape punishment, and endangered society. The public statements of the era's most prominent jurists were marked by a common theme: the rules of criminal procedure were unjustifiably skewed in favor of the defendant.

This conventional wisdom was most famously advanced by Judge Learned Hand, who in 1923 wrote:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is at least fair doubt in the minds of any one of the twelve. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[5]

Soon after, Judge (later Justice) Benjamin Cardozo wrote his legendary criticism of the exclusionary rule, decrying as absurd that "[t]he criminal is to go free because the constable has blundered."[6] A former president of the American Bar Association complained "society is too ready to intervene in behalf of the guilty, to shield him by unwritten law, or by sentimental nonsense to prevent adequate punishment."[7]

Furthermore, this harsh rhetoric was by no means limited to the leading lights of the bench and bar, as members of the academy likewise issued alarmist warnings. According to Robert Millar of Northwestern University Law School, "[m]ost of the faults of the ex-

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4. *See* Rollin M. Perkins, *Absurdities in Criminal Procedure*, 11 IOWA L. REV. 297, 324-25 (1926) ("We have been so deeply engrossed for so long a period of time in the effort to see that all of the rules of the game are duly observed under our 'sporting theory of justice,' that we have to an alarming degree lost sight of the real purpose of the investigation, which should be to determine whether the defendant is innocent or guilty."). *See generally* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

5. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). Judge Hand's position has been described as "perhaps the most frequently quoted statement opposing liberal defense discovery." WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 20.1(b), at 819 (2nd ed. 1999).

6. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926). Professor Yale Kamisar has characterized Judge's Cardozo's words as "the most famous criticism of the [exclusionary] rule and surely the best one-sentence argument ever made against it." Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 39 (1995).

7. Moorfield Storey, *Some Practical Suggestions for the Reform of Criminal Procedure*, 4 J. CRIM. L. & CRIMINOLOGY 495, 501 (1913). At one time "[i]t may have been necessary . . . to protect the innocent, but to-day the innocent are in no appreciable danger. Society watches with too much care the proceedings of courts, the press is always on the lookout for a sensation, and any abuse of a witness is too promptly condemned to leave an innocent man in any danger of being browbeaten into an admission of guilt, or being convicted by a perversion of his answers."

isting system inure to the benefit of the defendant."[8] As a result, said University of Michigan Law School Professor Edson Sunderland, "[t]he criminal defendant is given so much protection that victims of crime — those of us who are law-abiding and rely upon the state's assurance of protection, get almost none at all."[9] Echoing his colleagues, Charles Kellogg Burdick, Dean of Cornell University Law School, cautioned that "[a]t present time our danger is not that under the guise of criminal prosecution a tyrannical government will threaten the lives and liberties of its citizens, but that government will be a made a laughing stock by the increasing numbers of criminals who prey upon society and go unpunished."[10]

Today, alliances in the criminal procedure debate have shifted, as legal academics are generally more prone to believe that the accused are disadvantaged. The Warren Court may have incorporated nearly all of the criminal provisions in the Bill of Rights against the States,[11] significantly expanding defendants' protections under the Fourth,[12] Fifth,[13] Sixth,[14] and Eighth Amendments,[15] but contemporary scholars see ample cause for concern. Stated broadly, the "rights revolution" of the 1960s was followed by a movement in the Burger and Rehnquist Courts away from a criminal justice model focused on due process to one concerned primarily with crime control.[16] Coupled with omnipresent fears that America faces a "crime crisis," there is little popular sentiment for reforming the rules of criminal procedure in favor of defen-

8. Robert W. Millar, *The Modernization of Criminal Procedure*, 11 J. CRIM. L. & CRIMINOLOGY 344, 366 (1920).

9. Edson R. Sunderland, *Cooperation Between the Bar and the Public in Improving the Administration of Justice*, 1 ALA. L.J. 5 (1925).

10. Charles Kellogg Burdick, *Criminal Justice in America: Possibility of Improvement by Statutory Changes and Constitutional Amendments Affecting Procedure*, 11 A.B.A. J. 510, 515 (1925).

11. *See generally* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 18-34 (1993).

12. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure).

13. *See* Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination).

14. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confront witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel).

15. *See* Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

16. *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 PITT. L. REV. 393 (1992); Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 32 (1988) ("It is simply tragic that all of the Supreme Court's recent energies have been directed to the search for new ways to escape the thrust of the Warren Court innovations. We need to be moving in precisely the opposite direction. . . . The future of individual liberties in this country depends on reinvigorating the system of vigorous checks and balances built into our Bill of Rights.").

dants.[17] In other words, modern criminal defendants enjoy far greater rights than their forebears, but legal academics are generally convinced that our system is unfairly imbalanced against the accused.[18]

In his book *The Tilted Playing Field: Is Criminal Justice Unfair?*, Professor H. Richard Uviller[19] displays an independence among his colleagues by answering the question of his subtitle in the negative — although his is a rather tentative no:

> [A]ll in all, when day is done, I must say it seems to me that the American system for the delivery of criminal justice, while tilted in many respects, is not out of balance in that, in the main, it embodies a fair distribution of license and limits to the parties, an allocation that closely corresponds to their differing functions. It is, in other words, tolerably fair. [p. 307]

As the multiple qualifiers of his conclusion indicate, Uviller's book is neither a ringing endorsement nor a damning critique of the American criminal justice system. Uviller does not deny that multiple disparities may be found in the respective positions of prosecutor and defendant in a criminal trial. But he rejects as an "unfortunate metaphorical transposition" the contention that the playing field must be level to be fair, instead arguing that examples of unequal distribution of power between adversaries are often "not only tolerable, but valued components of a fair system of adjudication."[20] In other words, rather than condemn the tilted playing field as unfair, Uviller recognizes the disparate allocation of advantages as crucial to protecting the integrity of the process.

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17. "According to the media, the claims of law enforcement officials and the statements of politicians, we have *always* been experiencing a 'crime crisis' — *at no time* in our recent, or not-so-recent, past has there *been a time* when 'society' *could afford* a strengthening or expansion of the rights of the accused." Kamisar, *supra* note 6, at 46; *see also* Yale Kamisar, *When the Cops Were Not "Handcuffed,"* N.Y. TIMES, Nov. 7. 1965, *reprinted in* CRIME AND CRIMINAL JUSTICE 54 (Donald R. Cresey ed. 1971) (demonstrating that successive generations have always claimed to be in the midst of a "crime crisis").

18. *See, e.g.*, Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) ("To a mind-staggering extent . . . the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect."); Gershman, *supra* note 16, at 394 (arguing that a "vast accretion of prosecutorial power . . . has resulted in a radical skewing of the balance of advantage in the criminal justice system in favor of the state"). *But see* Christopher A. Bracey, *Truth and Legitimacy in the American Criminal Process*, 90 J. CRIM. L. & CRIMINOLOGY 691 (2000) (reviewing WILLIAM PIZZI, TRIALS WITHOUT TRUTH (1999) (noting "[a] new perspective on the criminal process, premised on the belief that the social and political conditions that necessitated liberal reform of the criminal process no longer exist, or that the normative structure that protects these reformist measures from erosion has been drained of its vitality, is quickly gaining currency in . . . the theoretical halls of academe").

19. Arthur Levitt Professor of Law, Columbia Law School.

20. Pp. 6, 18. Uviller cites the presumption of innocence and the burden of proof as prominent examples of valuable disparities.

Although the confrontational setting of the courtroom naturally promotes the metaphor of criminal trials as sporting events, Uviller argues the comparison is inapt. Fairness in a sporting contest, after all, requires opponents who are evenly matched. Fairness in a criminal trial, on the other hand, should not be understood to mandate literal parity of resources and prerogative among parties. Rather, Uviller asserts, "what we must mean is balanced empowerment," or a commitment to assigning privileges to the prosecution and defense on the basis of their dissimilar roles in the criminal trial (p. 16). Whether the respective entitlements promote or inhibit fairness depends on the "rationality of the connection between the supposed advantage and the principle it serves" (p. 19).

Thus, Uviller writes, it is "inescapable" that fairness is related to function (p. 19). And this premise, once accepted, forms the logical basis for Uviller's arguments. Unlike two parties to a civil proceeding, prosecutor and defender have little in common. Accordingly, "it should be obvious that to talk about a 'balance of advantage' as though it were a simple comparison of armament, without taking account of the differing functions of the parties, is foolish" (p. 21). The prosecutor is a government agent representing the public, possessed with the duty to assess evidence of criminal activity unearthed by investigation, the discretion to initiate charges where appropriate, and the obligation to prove these facts at trial. Defense counsel, on the other hand, is a private advocate for an individual client, responsible only for discrediting the prosecution's presentation of the case. Therefore, "[t]he best way to assess fairness in these circumstances is to . . . consider the implements accorded by law for the accomplishment of these differing objectives" (p. 21). A disadvantage is unfair if it is a "disabling impediment inappropriate to the task of the party suffering it" (p. 21).

With this distinction — that prosecutor and defender differ in both role and objective — in mind, Uviller sets out to examine several areas of comparative disadvantage, and to measure disparities "to determine their congruence with a communal sense of fairness in public law" (p. 6). In performing this task, Uviller writes, it would be far easier to "flee to the illusory safety" of "process-enhancing alternative[s]," i.e., to promote fairness by "maintaining a smooth and level playing field with no concern for the outcome of the games played upon it" (p. 31). This would, however, avoid hard questions of substantive fairness, questions which Uviller has no intention of ducking.

That said, the ultimate impact of Uviller's project may be seen as somewhat modest. Because his intent is more informative than prescriptive, Uviller has not offered a blueprint for systemic reform. Rather, he has developed a model for gauging fairness in an area of law perceived to be manifestly unfair. To the extent that Uviller debunks reflexive notions that justice requires a level playing field, his

efforts are undeniably valuable. But the inherent subjectivity of Uviller's analytical method limits its utility, and in the end, any conclusions about the fairness of the criminal justice system will turn on the values of the individual asking the hard questions.

Uviller, to his credit, makes no attempt to gloss over this feature of his inquiry. When ascertaining which tenets of fairness are fundamental, "[s]omebody's preferences are going to have a big part in drawing up that list of the essential basics" (p. 18). Although controversial, relying on personal biases is an unavoidable element of Uviller's task. "I have no choice. I am ill-equipped to propose any set of incontrovertible first principles and then to develop a just criminal system from them" (pp. 21-22). Unlike other "intrepid jurisprudents [who] have made attempts at such grand schemes,"[21] Uviller is "not optimistic that a unified, value-free field theory will emerge" (p. 22). Thus, "to talk about the subject of fairness at all, I must risk the distortion of personal perspective" (p. 22).

The product of Uviller's efforts is a provocative and engaging book. Uviller's pro-prosecutorial leanings (he spent fourteen years as a District Attorney in New York County earlier in his career[22]) occasionally emerge, but he forthrightly acknowledges them and avoids any appearance of pursuing a hidden ideological agenda.[23] Indeed, it would be difficult to characterize his views as politically liberal or conservative.[24] Rather, Uviller is largely a pragmatist, committed to a

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21. Uviller's list of those who found themselves well-equipped to propose a set of incontrovertible first principles is not short. "Bless them, the postmodern utilitarians, the secular theists, post-Marxist republicans, the gender-role feminists, the neorealist critical theorists, and the rest." P. 22.

22. *See* http://www.law.columbia.edu/faculty/huviller.html (last visited May 1, 2001).

23. For example, in Chapter 4 Uviller discusses the so-called "White-Hat Factor," or the theory that the overt presumption of innocence enjoyed by defendants is undermined by juries that are predisposed to identify with crime victims, and to assume that the prosecutor would not have brought charges unless the defendant is probably guilty. Uviller unrepentantly writes that:

> I know that when I was trying cases for the prosecutor, I relied heavily on the white hat factor to which I thought myself entitled. . . . Before the jury I would contrive in a dozen small gestures and inflections to reinforce what I assumed to be the inclination of my twelve stalwarts to favor truth and decency over brutality, deceit, and self-interest. I cannot imagine any prosecutor worthy of carrying the public pennant who would do otherwise.

Pp. 113-14.

Nevertheless, Uviller goes on to note that while the vast majority of prosecutors are honorable, there inevitably are those who are "unworthy servants." Therefore, "[g]overnment claims on the white hat are precarious. Where one can conscientiously doubt the attribution of goodwill, the entitlement collapses — as it should." P. 139.

24. The use of such labels may be problematic, but a few conventional definitions are possible. "The liberal perspective recognizes the necessity of enforcing the criminal law," but "qualifies that necessity by affirming the values of individual autonomy and equality among persons, values that frequently compete with law enforcement." Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 591-92 (1990). On the other side, the

functional design of the criminal justice system, but also prone to occasional bursts of idealism.[25] Uviller's prose, save a few distracting idiosyncrasies,[26] is logical and clear. He is unafraid to speak forcefully and honestly, often making claims that seem designed to invite harsh criticism, such as his repeated statements that most criminal defendants are guilty,[27] and his admitted inability to identify with defense counsel.[28] Whether readers agree or disagree with Uviller, they are unlikely to find him boring.

The most notable feature of Uviller's work is how his examination of the asymmetrical nature of the American criminal justice system results in a book that is both restrained and daring. This Notice will demonstrate that although Uviller is largely inclined to defend the status quo, he also advocates proposals that would require a sweeping reconceptualization of a significant portion of modern constitutional criminal procedure. Part I shows how Uviller is, for the most part, a pragmatist, persuaded that fairness in criminal adjudication does not mandate equality among the parties. Part II explains how Uviller's more ambitious proposals, involving profound modification of the exclusionary rules, offer at best only uncertain advantages over current doctrine. This Notice will conclude that the Uviller's inquiry (subjective as it may be) is a useful contribution to the ongoing debate about fairness in criminal trials.

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conservative "perspective's fundamental premise is that rational criminal procedure should have the primary object of determining the truth of a criminal charge," and thus "oppose freeing the guilty as a remedy for government violations of autonomy or equality." *Id.* at 592-93.

25. "Even those of us who reject the criminal process as a vehicle for fighting social wrongs, even those of us who believe that the Constitution is not offended by the conviction of a guilty person because he is poor, talkative, and not too shrewd concerning his own best interests, we find we must explore the purposes of the functions that we would like to consider essentially neutral." Pp. 17-18; *see also* Robert Weisberg, *(Almost) The Best of All Worlds of Criminal Law*, 2 BOOKS-ON-LAW 8, ¶ 1 (Oct. 1999), *at* http://www.jurist.law.pitt.edu/lawbooks/revoct99.htm#Weisberg (reviewing H. RICHARD UVILLER, THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR? (1999) (noting that Uviller "switches tone from disappointed idealist to wizened pragmatist").

26. Most disconcerting is Uviller's periodic lapses into an odd informal tone: "[W]ith all respect to the ghost of Justice Thurgood Marshall, discovery is not a two-way street. Sorry, Thurgood, it just does not run in this direction." P. 106. "[F]reed of the confines and group pressure that finally overcame his better judgment, the former juror may find himself looking for a way to scuttle the verdict of his peers, or at least have the last word. What better way than Uviller's Dandy Impeachment Gambit (acronym pronounced You Dig)?" P. 272.

27. "In those relatively rare instances in which the client is truly innocent" (p. 20); "nearly all defendants are in fact guilty" (p. 119); "not all criminal defendants are guilty, but most are" (p. 138).

28. *See infra* Section I.C.

I. PRAGMATIST: MAINTAINING THE STATUS QUO

The central theme of Uviller's book — that absolute parity between prosecution and defendant is neither a necessary nor warranted feature of a criminal trial — is not particularly radical.[29] In fact, Uviller's belief that "symmetry is only the dullest form of balance and inappropriate when roles differ sharply," should not instinctively be understood as a threat to the rights of criminal defendants (p. 106). Indeed, Uviller's thesis finds support in the words of no less a civil libertarian than Justice William Brennan: "[r]ules of fairness in a criminal trial must derive not from some effort evenly to match the sides — the government and the accused — but from careful attention to the trial's internal truth-finding function."[30]

What does appear unique about Uviller's project is his application of the asymmetry lens to every stage of the criminal justice process, from investigation to appeal.[31] Most often he advocates only minor adjustments to existing procedure, but occasionally urges major revision. This Part looks at four of the criminal procedure issues discussed by Uviller: prosecutorial discretion, discovery, ethical license, and bail. For different reasons, in each of these areas Uviller demonstrates a commitment to the status quo, concluding reform is either unnecessary or unlikely.

A. *Prosecutorial Discretion*

Uviller's project begins with prosecutorial discretion to initiate charges. Although this power is exclusive and largely unreviewable, Uviller maintains that the one-sided advantage is unfair only if two conditions are met: first, evidence must be presented of actual, not potential, abuse; and second, there must be some demonstration that sharing the charging authority is feasible. Addressing this latter point, Uviller logically demonstrates why it would be unwise for this official discretion to be extended to private parties. Permitting defense-

29. *Cf.* Richard D. Friedman, *An Asymmetrical Approach to the Problem of Peremptories?*, 28 CRIM. L. BULL. 507 (1992); Richard D. Friedman, Comment, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816 (1994). Nor does Uviller claim original ownership of the proposition, noting that "[t]he more sophisticated among scholars dismiss the idea that justice requires an equal distribution of power between adversaries, preferring to consider the success of our criminal justice system either in terms of the truth of the verdicts produced, sensitivity to abuse of authority, or civic approval ratings. And we will, of course, take this enlightened path." Pp. 5-6.

30. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 18 (1990).

31. Uviller does not examine these steps in chronological order, but in a summary chapter at the close of his book he does put the pieces together, and offers a step-by-vision of the "just prosecution." Pp. 281-304.

initiated prosecution is obviously unworkable. A stronger argument can made that victims of crime should be allowed to instigate charges, but their remaining options of civil redress, as well as the notion that prosecutors seek to bring criminal accusations to vindicate the interests of all of society, not just victims, is enough for Uviller to conclude it is fair that prosecutorial authority remain solely in the hands of government officials (pp. 42-44).

This is not to say that Uviller disavows all checks as unnecessary; the presence of grand juries and preliminary hearings, for instance, perform important screening functions. But to the extent any external guidance is warranted, the articulation of standards, similar to those promulgated by the Department of Justice for U.S. Attorneys' offices, would help internally focus enforcement priorities and reinforce prosecutorial values. Uviller cautions, however, that such standards would have to remain confidential, lest they assume the status of a mere public relations ploy, or create enforceable rights.[32]

Ultimately, "[t]he best protection against facile or biased accusation is the prospect of trial, and the embarrassment potential of the unwinnable case" (p. 64). Although this "advantage" inures solely to the benefit of the government, widespread reform is unnecessary because, "with pockets of dissent here and there, I think most people approve of the prosecutorial choices being made — as do I" (p. 67).

Regarding Uviller's first consideration, his demand for hard proof of actual abuse seems reasonable enough, but the Court's 1996 decision *United States v. Armstrong*[33] made the requirements for a defendant to obtain discovery so strict as to render the success of a selective prosecution claim practically impossible.[34] Uviller notes that "selective prosecution is a long-shot defense, a very long shot," but he is untroubled, as he does not want "courtrooms tied up with the contentious pursuit of imponderable questions," preferring instead that abuses be corrected with political and administrative remedies (pp. 52-53).

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32. P. 68. Courts have thus far been reluctant to do so. *See, e.g.*, Nichols v. Reno, 931 F.Supp. 748 (D.Colo. 1996), *aff'd* 124 F.3d 1376 (10th Cir. 1997) (holding that the United States Attorneys' Manual does not provide any judicially enforceable rights to Oklahoma City bombing defendant Terry Nichols where Attorney General Janet Reno stated at a press conference three days before any suspects had been apprehended that the death penalty would be sought, although the Manual set forth a detailed process to be followed before making an ultimate determination).

33. 517 U.S. 456 (1996).

34. The *Armstrong* Court held that "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.' " *Id.* at 465. In other words, "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* In addition, the Court held that FED. R. CRIM. P. 16, which governs discovery in criminal cases, "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." *Id.* at 463.

Uviller's claim, when considered alone, certainly is not indefensible. The problem, however, is that selective prosecution claims are brought most often in the context of suits alleging racial discrimination[35] (as was the case in *Armstrong*), a topic Uviller conspicuously omits from his book. At the outset Uviller acknowledges, "I do not, in these pages, examine the impact of race on fairness" (p. 25). Why? "I know little about it. I cannot answer the most troublesome questions with any confidence" (p. 25). While Uviller can at least be credited for including his "apologetic disclaimer" (p. 24), as opposed to engaging the topic only superficially, much of what follows inevitably provokes important questions that remain unanswered. "If racial bias permeates the system and the way we think about it, I have necessarily put it on hold as I discuss other sources of unfairness" (p. 25). It seems plausible to assert, however, that racial bias cannot be cleanly extricated from "other sources of unfairness," and thus it may be futile to examine the latter independently of the former.[36] In any event, the absence of any extended substantive discussion on this point is glaring, and undermines some of Uviller's comments in this and subsequent contexts as rather glib.[37]

B. *Discovery*

Advocates for greater parity between prosecution and defense offer their arguments in the belief that a balance of entitlements will result in criminal trials more fair to defendants generally, and guard against the conviction of innocent persons specifically. In other words, given the government's information-gathering advantages, (e.g., the power to subpoena evidence, grant immunity to witnesses, etc.), a commitment to symmetry requires the state to share fully the fruits of

35. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) ("Courts have consistently upheld and sanctioned prosecutorial discretion, and make it increasingly difficult to mount legal challenges to discretionary decisions that have a discriminatory effect on African American criminal defendants and crime victims. These challenges are usually brought as selective prosecution claims. . . .").

36. *Cf.* Kamisar, *supra* note 6, at 6 ("As the late A. Kenneth Pye observed in the closing years of the Warren Court era, '[t]he Court's concern with criminal procedure can be understood *only* in the context of the struggle for civil rights.' ") (quoting A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968) (emphasis added)).

37. A few examples of the "imponderable questions" Uviller does not want courtrooms "tied up with" include:

> Was this, the third consecutive prosecution of a Sicilian for mob-related racketeering, the manifestation of an impermissible ethnic bias on the part of some federal prosecutor? Does some government drug buster harbor a private conviction that Latinos of Central America are the major exporters of cocaine to the United States? And does that belief result in excessive concentration of prosecution energy on Spanish-speaking people? Did a Los Angeles detective express hostility to African Americans in unrelated circumstances?

Pp. 52-53.

its investigative labors. As Uviller demonstrates, however, the opposite may in fact be true, that leveling the playing field may, in some respects, actually undermine the position of the accused.

In 1970, the U.S. Supreme Court upheld a Florida statute that required a defendant to provide the prosecution, in advance of trial, notice of any alibi he intended to introduce.[38] In exchange, the state was required to disclose to the defendant a list of any witnesses it planned to offer to attack the alibi. Three years later the Court voided an Oregon notice of alibi rule that mandated similar disclosure requirements of the defendant, but imposed no corresponding duties on the prosecution.[39] "[D]iscovery must be a two-way street," wrote Justice Marshall, holding that unilateral defense disclosure was fundamentally unfair.[40]

But, as Uviller points out, in reality discovery is not (and should not be) a two-way street, and any imbalance must favor the accused. "It may be that where the defense must disclose, the prosecution must do likewise; but it is not the case that where the prosecution must disclose, the defense must reciprocate" (p. 106). Moreover, those who would fashion rules of discovery to effect equivalent obligations fail to anticipate the ultimate consequences of reform. According to Uviller, "[t]he idea that full mutual discovery, or even augmented discovery, offers a significant shield for the innocent is not readily apparent" (pp. 110-11). The truly innocent accused has little to gain by learning the prosecution's case ahead of trial. "Unlike his culpable counterpart, who has little hope beyond discrediting prosecution evidence, the innocent defendant is probably busy assembling an independent scenario proving his innocence. And revealing his case in advance to the prosecutor is just asking for trouble" (p. 111). At least in this context, asymmetry operates to promote fairness.

C. *Ethical License*

Uviller finds similar pro-defendant disparity in the "tolerable deceptions" permitted defense counsel, but not the prosecution (p. 236). The unequal entitlements are multiple: a prosecutor may not charge a defendant she believes is innocent, ask a jury to believe a witness that she believes is lying, nor impeach a witness she believes is telling the truth. Defense counsel, on the other hand, "suffers no such constraints" (p. 238). Whatever their personal beliefs, "[t]hey owe an equally vigorous defense to the defendant they believe is guilty and

38. *See* Williams v. Florida, 399 U.S. 78 (1970).

39. *See* Wardius v. Oregon, 412 U.S. 470 (1973).

40. 412 U.S. at 475.

the one they think is totally innocent."[41] In the context of comparative disadvantage, the "sharply different license to distort puts a rhetorical weapon of major caliber in the hands of the defense only" (p. 242).

As to whether this is unfair, Uviller uncharacteristically equivocates. "No, to the extent that the license to distort is founded on prerogatives themselves supportable by important social values, it is fair. Yes, insofar as the supposed basis is rotten, or the license exceeds the dictates of the underlying values, it is unfair" (p. 242). For Uviller, discerning these values requires contrasting the functions of the participants. The prosecution is the party appropriately charged with the directive to uncover and present the truth. Defense counsel's role in our adversarial criminal justice system is to steadfastly challenge government efforts to impair the liberty of its citizens. "While the government's pursuit of a verdict reflecting the historic truth is a virtuous undertaking, it is also fraught with dangers of arrogance and oppression, to say nothing of error" (p. 242).

While Uviller could not bring himself to defend the guilty, he is thankful that others are willing to do so.[42] After all, "this specially commissioned challenger, this amoral privateer, serves a wholesome public purpose. And a certain amount of deception may well be within that useful ambit of tolerance" (p. 243). In sum, the dissimilar ethical imperatives of prosecutor and defender present for Uviller a "logical anomaly," but one that must be grudgingly accepted to ensure the fair treatment of the accused (p. 253).

D. *Bail*

Despite his general belief that the tilted playing field does not disadvantage criminal defendants, Uviller recognizes that pockets of injustice do exist. When it comes to the subject of bail, Uviller is adamant that the system is plagued by unfairness. Although, as with race, Uviller generally avoids contentious issues about the effects of wealth

41. Pp. 238-39.

> Whether [defense] counsel chooses to arrive at a conclusion on issues that will be submitted to the jury is a matter of personal style. Some lawyers probably become convinced by their own efforts, and fight with a sense of personal conviction. Others doubtless maintain an attitude of general skepticism, committing themselves to no one's story. But whatever their inclination, whatever belief they may have achieved or succumbed to, the lawyer's performance and the ethical obligations behind it are unaffected.

Id.

42. "Frankly, I don't know how they do it. I don't think that I could dedicate my professional life to the pursuit of undeserved breaks for the undeserving. It's hard to imagine taking pride in those cases when my efforts frustrated the demands of justice. Maybe they have a different notion of justice. But however they do it, I'm glad they are there, energetically, year in and year out, fighting for a contrary interpretation." P. 243.

on fairness,[43] in this context he writes "even I must concede that there is one aspect of our criminal justice system where financial disparities are manifest and deeply troublesome" (p. 166). The problem, as Uviller sees it, is that "[t]he decision about bail is casual, impulsive, largely idiosyncratic, totally arbitrary, wildly variable, and without any possibility of objective verification" (p. 166). Uviller believes there are two reasons why most defendants are detained before trial, unable to participate fully in preparing their own defense. "Either the judge has intentionally set terms for their preconviction release that are beyond [the defendant's] reach, or they are simply unable to come up with the monetary security that others ordinarily manage" (p. 169).

Uviller's solution would be to have judges first make a decision — irrespective of wealth, considering only other, nonfiscal factors affecting the likelihood of flight — as to whether the defendant should remain incarcerated while awaiting trial. If the answer is yes, bail is denied outright, rather than set prohibitively high, and subject to expedited appellate review. If the answer is no, conditional release is granted, and monetary bail (if necessary) is set at a level the defendant can realistically manage. Uviller sees the benefit of "radical" reform to be that "[f]ocusing on the question 'Is there any good reason why this person should await judgment on the inside?' turns judges from their traditional concern: just how much money is likely to deter disappearance" (p. 183). And liberty determinations based on factors such as preventing flight or preserving public safety, rather than based on wealth, are more consonant with the inherent purposes of pretrial detention.

Uviller is quick to recognize the weaknesses of his proposal. First, his approach does not entirely remove judges from the "tea leaf-reading game," it merely redirects their predictive focus. And second, similar reform at the federal level has resulted in even more prisoners being detained by cursory and routine procedures (pp. 184-86). Most significantly, Uviller acknowledges that "tough on crime" politicians

43. Uviller writes that economic disparities between rich and poor accused involve questions of equal protection only between defendants themselves, and these issues are therefore beyond the scope of a book that addresses the imbalance between prosecution and defense. P. 162. That said, however, he also declares to be unpersuaded by claims that "only the financially fortunate have the resources to match and meet the legions of the government. And thus, in this scheme, while the playing field may be more or less level between the prosecutor and some few rich defendants, for the many poor it is woefully out of kilter, forcing them to play against the government at an irreparable disadvantage." Pp. 162-63.

Even assuming a financial disparity between government and accused does exist (Uviller is unconvinced), it is not unfair. Rather, the real imbalance comes in the form of lawyering skills, and this cuts both ways. Uviller's theory, in a nutshell, is that many prosecutors are young and inexperienced, and many defenders (themselves former prosecutors) are seasoned veterans. Pp. 163-64. Furthermore, on the basis of evidence both empirical and anecdotal Uviller is "not even so sure that, as between defendants, the one who can afford to retain private counsel will come out better than the one who, by reason of indigence, must accept assigned counsel." P. 165.

would likely circumscribe the increased judicial discretion required by his plan once the media inevitably sensationalized the release of defendants on bail (p. 187).

Ever the pragmatist, Uviller "harbor[s] some hope that function will follow form, that with a superior design in place, the operation of the system may come in time, and to some extent, conform" (p. 188). Still, this provides little solace to Uviller the idealist, who "know[s] that, especially in the explosive capsule of the process we call bail, the struggle persists between good intentions and enlightened prescriptions on one side and, on the other, the practical realities of courtrooms and legislative chambers. And as we watch that familiar spectacle, optimism does not flourish" (p. 188). In other words, when it comes to bail, Uviller cannot defend the status quo, but he is resigned to the reality that reform is not likely to be forthcoming.

II. REFORMER: REVISING THE EXCLUSIONARY RULES

Although Uviller's book is largely a defense of the status quo, the major reforms that he does advocate would require reconceptualizing a considerable amount of constitutional criminal procedure. Most significantly, he is not, to say the least, a proponent of the exclusionary rules. "In the empirical wilderness, not knowing what effect judicial response to police illegality has on other cops in other, different, and future situations, I am dubious about the underlying premises of the exclusionary rules" (p. 195). Uviller's skepticism, however, does not prevent him from concluding that "[t]he program of automatic exclusion, it seems to me, has largely done its job" (p. 197). Today, "[t]he marginal deterrence we can expect from excluding evidence is now, I believe, greatly exceeded by the social cost of depriving fact finders of relevant and probative data on which to make the difficult determination of guilt" (p. 197).

Although Uviller's focus on the deterrence rationale mirrors the recent approach of the Court,[44] many would argue that justifying the exclusionary rules in cost-benefit terms inappropriately requires defending the doctrine's efficacy, not whether it is constitutionally compelled.[45] This does not mean Uviller is unwilling to concede that values other than deterrence of police misconduct are served by the exclusionary rules; protecting the "dignitary interest" of the judiciary commands that "courts must remain alert to and fundamentally intolerant

44. *See, e.g.*, United States v. Leon, 468 U.S. 897, 918 (1984) ("No empirical researcher, proponent, or opponent of the [exclusionary] rule has yet been able to establish with any assurance that the rule has a deterrent effect.") (quoting United States v. Janis, 428 U.S. 433, 452 n.22 (1976)).

45. *See generally* Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

of any incursion on the precious — and precarious — liberties of the citizens" (p. 197).

But, that said, Uviller is eager to "start from scratch and construct a fair system that most closely serv[es] the best of the competing values now crudely approximated by the jerry-built catacomb we call the exclusionary rules" (p. 198). Uviller conceives of his project as a thought experiment. He sets out to write a "shiny new code," reserving the right to take "some license with decided cases" (p. 199). "In my dreamworld, I would write on a clean slate, faithful only to a reasonable reading of basic constitutional tenets and to some personal notions of efficiency and fairness" (p. 199). The result is a proposed overhaul of the law of confessions and search and seizure. This Part will focus on Uviller's most ambitious suggestions to drastically revise the Fourth, Fifth, and Sixth Amendment exclusionary rules, and explain how it is unclear that either prosecution or defense would benefit from his proffered alternatives.

A. *Confessions*

When it comes to rewriting the policies governing police interrogation, Uviller is anything but timid. The *Miranda*[46] rules warning a suspect of his right to remain silent may have been effective initially (a point which Uviller does not concede[47]), "[b]ut today, the *Miranda* ritual is a meaningless little joke having virtually no curative or prophylactic effect on the initial condition that prompted it, oppressive and coercive inquisition."[48] Accordingly, Uviller would:

> throw out the *Miranda* rules requiring an incantation of "rights" to exorcise the coercive atmosphere of "custodial interrogation," and along with it the affiliated doctrine based on the Sixth Amendment that a suspect is entitled to the "assistance" of counsel at lineups and interrogation after some mystical point in the process known as "formal accusation" has passed. [p. 200]

Instead, Uviller would construct the following rules. Immediately upon capture, but prior to arrest, uncounseled "conversations" — "uninhibited by any artificial advice concerning the 'right to silence,'

46. Miranda v. Arizona, 384 U.S. 436 (1966).

47. P. 200. "The effect of the famous advisory will always be unknowable (despite the serious efforts of several scholars to figure out whether the litany actually deters confessions, and if so with what effect on convictions)." *Miranda* "probably had a good effect indirectly on interrogation procedure, keeping the cops mindful of the fact that a court was looking over their shoulders." *Id.* But, "[i]t also probably had a bad effect insofar as it taught cops that a little white lie in the right place could save the case, otherwise doomed by a tardy or incomplete warning." Pp. 200-01.

48. P. 201. There is no shortage of commentators who would disagree with Uviller on this point. *See generally* Symposium, Miranda *After* Dickerson: *The Future of Confession Law*, 99 MICH. L. REV. 879 (2001).

'right to counsel,' and all that" — would be permitted, but only during the "natural exchange attendant on the initial encounter or the unprovoked initiative of the defendant himself" (p. 201). Limited only by the requirement that these conversations be conducted free of "true coercion," (defined as "physical force or the threat of it"), the police may freely question the suspect (p. 201).

Already Uviller's plan begs an obvious question: What constitutes a "natural exchange" between police and suspect? Uviller recognizes the potential difficulty of answering this question in light of the multiple factual scenarios in which police apprehend suspects, but he is unfazed. "Hard as they may be for thee and me, these are just the sort of questions trial judges are accustomed to answering" (p. 201). Granted, one of the principal objections to *Miranda* is that it fails to address the problem of the "swearing contest" between police and defendant in court.[49] But Uviller's scheme, thus far conceived, would seem to only substitute a "swearing contest" about one set of events (whether *Miranda* rights were properly administered) for another (whether the questioning occurred during the initial "natural exchange"). At least in this respect, Uviller's inquiry offers less protection against police deception than other reform proposals, such as calls to videotape police interrogation.[50]

In exchange for disallowing any police questioning after the initial "natural exchange," Uviller would substitute "intensive interrogation by the examining magistrate at arraignment when the case first gets to court" (p. 201). The accused would be represented by counsel at this inquiry, and would be free to decline to answer any questions from the bench. Should he choose to do so, however, "the judge may draw — and allow the jury who eventually hears the case to draw — the appropriate inference from the choice of silence under the circumstances" (pp. 201-02). Such a scheme "goes considerably further than the foolish *Miranda* charade to protect against hidden, subtly coercive probes of the isolated suspect's mind. At the same time, it allows fair access to the mind of the person who is most likely to know something

49. *See Miranda*, 384 U.S. at 516 (1966) (Harlan, J., dissenting) ("The [*Miranda*] rules do not serve due process interests in preventing blatant coercion since . . . they do nothing to contain the policeman who is prepared to lie from the start."); *see also* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681 (1996) ("*Miranda* has altogether failed to resolve a number of problems that continue to bedevil the constitutional law of criminal procedure," including "the problem of adjudicating the 'swearing contest' between officer and suspect in court.").

50. *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1130 (1998) ("Videotaping would better protect against police brutality, end the 'swearing contest' about what happened in secret custodial interrogation, and allow suspects who are manipulated into falsely confessing to prove their innocence.").

about the events at issue — or at least about his own removal from them."[51]

At first glance, it may appear that Uviller's proposals would be a boon to law enforcement. Such an inference is not completely unwarranted, as *Miranda's* detractors typically oppose the rules on the ground that they impair police efforts to solve crime.[52] But initial appearances may be deceiving. Uviller quite reasonably anticipates that law enforcement would oppose his scheme, as proscribing all police questioning beyond their initial encounter with the suspect would inevitably result in the loss of confessions. Uviller does not doubt that skilled police interrogators, alone with a suspect, "can convert a confident denial into a detailed confession in a matter of hours" (p. 206). The problem, as Uviller sees it, is that too many confessions are obtained via questionable methods. "In the lengthy, unsupervised, unrecorded interaction of cops and suspects confined on police turf, free choice becomes a murky element" (p. 206). In the end, "though valid confessions would surely be lost, a dark corner of sequestered police practice would be closed. And that is good for public faith, I think" (p. 206).

Uviller's plan is arguably more favorable to criminal defendants than *Miranda* in another significant respect as well. Under *Harris v. New York*,[53] the "fruits" of *Miranda* violations may be used for impeachment purposes, a decision that has drawn harsh criticism.[54] Uviller, on the other hand, would disallow such practices: "Nor should confessions that were obtained in delayed or protracted police interrogation be introduced in evidence or their indirect leads used" (pp. 210-11). Again, Uviller does not deny that his scheme, certain to "produce a sizable increase in excluded evidence of autoinculpation," would make it more difficult to convict criminals (p. 211).

Uviller sees his model as a compromise, a more equitable balance between competing interests. Defendants will no longer receive *Miranda* warnings, but nor will they be subject to extended police questioning, as all interrogation will be conducted by a magistrate in

51. Pp. 202-03. Uviller, recognizing the obvious counterarguments to his proposal, notes that allowing a judge and jury to draw adverse inferences from a defendant's guilt would require: first, overruling Griffin v. California, 380 U.S. 609, 615 (1965) (holding that the Fifth and Fourteenth Amendments forbid "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"); and second, returning to an original understanding of the Fifth Amendment's right to silence as guaranteeing freedom from torture, but not immunity from inquiry (at pp. 203-05, Uviller cites as support for this proposition Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996)).

52. *See, e.g.*, Cassell & Fowles, *supra* note 50.

53. 401 U.S. 222 (1971).

54. The Court's decision in *Harris* has been described as "the first blow the Burger Court struck *Miranda*." Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883, 951 n.373 (2000).

the open environs of a courtroom, with the assistance of counsel. On the other hand, defendants lose their right to remain silent without consequence, as both judge and jury would be allowed to infer guilt from the suspect's refusal to answer a magistrate's questions. In sum, with something to offer both sides, as well as something taken away, Uviller's plan is unlikely to be warmly received by either civil libertarians or law enforcement.

B. *Search & Seizure*

Above all, Uviller wants to read the warrant requirement back into the Fourth Amendment: "I would retain all instruction to the ground troops on the simplest, core essence of the provision: make your intrusions only by warrant bearing the sanction of the court" (p. 207). That said, to ensure that warrants become "normal, ordinary protocol of search," Uviller would employ technology to aid the process by which they are obtained (p. 207). For instance, "[e]lectronics today accord the means by which warrants can be instantly issued on the radio-transmitted, sworn allegations of the field officer" (p. 208). Uviller emphasizes, however, that simplifying the process does not mean that evidence seized pursuant to a warrant would be exempt from challenge (as is largely the case at present), nor weaken the protection afforded by the warrant requirement. Warrants could be challenged if "issued on false allegations or inadequate grounds, or if they contained vague specifications of the place to be searched and the things to be seized," and evidence would be excluded if "gained in the course of abusive or needlessly destructive execution" (p. 208).

Evidence seized in the absence of a warrant, however, would be subject to discretionary exclusion, rather than the current standard of automatic exclusion. In each case, the judge would ask: "in all the particular circumstances of this acquisition, are the interests of justice advanced more by admission or exclusion?" (p. 209). In answering this question, judges would be guided by five considerations "central to the idea of a 'reasonable' search."[55] Such a system, by implementing an ad hoc process, admittedly would "weaken the prescriptive virtues of the exclusionary rule" (p. 209). Uviller's response is to point out the weaknesses of the current standard, a warrant requirement with so many exceptions that it is practically toothless.

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55. P. 209. These five factors are:

(1) the gravity of the matter under investigation;

(2) the depth or destructiveness of the search;

(3) the importance of the evidence sought in light of other evidence available;

(4) the availability of less intrusive means to acquire it;

(5) the degree of privacy that should be accorded the person, place, or container searched or the property interests infringed by its seizure.

As with his plan to rewrite confession law, the key feature of Uviller's model is increased judicial discretion. He is "basically inclined to celebrate discretion as the mark of a mature and responsible system" (p. 214). As a general matter, "[s]ince faith must be lodged somewhere in an open system of justice, I choose (with appropriate misgivings) to trust judges" (p. 214). On an individual level, "[m]ost of the judges I have met consider it important, terribly important, to be cautious, conscientious, and objective" (p. 214). Be that as it may, Uviller does not address the fact that the vast majority of judges in this country are popularly elected, and thus particularly sensitive to political pressure.[56] Accordingly, as Professor Welsh White argues:

> If the exclusionary rule is mandatory, the conscientious judge will be able to say he had no choice: the law required him to exclude the evidence. If the exclusionary rule is discretionary, however, the judge cannot make this statement. . . . From the public's point of view, the judge who exercises his discretion to exclude evidence is choosing to make it more difficult to convict an accused criminal. Because a judge will not want to be perceived as impeding effective law enforcement, he will generally exercise his discretion to admit the evidence.[57]

Under Uviller's standard, this concern seems particularly relevant. If, in each case, the judge must ask herself, "Are the interests of justice advanced more by admission or exclusion?", one may posit that even the most honorable jurist would be strongly tempted toward admission, especially if the crime is brutal, the victim is young, or public sentiment is otherwise particularly aroused. To be sure, a principled argument may be made in favor of alternatives to the current mandatory fourth amendment exclusionary rule,[58] but Uviller largely declines to make it. Instead, he simply deposits his confidence in judges and optimistically leaves them free to do the right thing.

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56. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725 (1995) (noting that in only twelve states are judges not electorally accountable). Uviller only briefly addresses how American judges are selected, and then to make a separate point:

> Lest I be called naive, I would add that my inclination toward discretion spurs urgent attention to the processes of appointment and removal of those empowered. Improvement in the woeful American political appointment process, however, will not come from reducing the scope of judicial license but, paradoxically, from increasing it. As we recognize the scope of discretion with which we empower our judges, perhaps we will strive more earnestly to select the best qualified for the role. We will eventually come to realize (as the British have) that people should not be thus empowered by virtue of party service, or racial, sexual, or ethnic fit.

P. 214.

57. Welsh S. White, *Improving Constitutional Criminal Procedure*, 93 MICH. L. REV. 1645, 1677 (1995) (reviewing CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993)).

58. *See* LAFAVE, *supra* note 2, § 1.2(c), at 35 n.53 (providing an overview of scholarship offering alternatives to the exclusionary rule).

Again, as with Uviller's confession model, an initial assessment may indicate that these reform efforts would have a disproportionately adverse effect on defendants. But first appearances may likewise be deceiving in this context, as Uviller persuasively demonstrates the benefits to the accused under his plan. Evidence obtained from searches conducted pursuant to a warrant would not be presumptively admissible, as is the case presently. First, Uviller "would bar the harvest of a search by warrant unsupported by probable cause or lacking a particular description of the mission" (p. 211). Second, Uviller would abolish the so-called "good faith exception" recognized in *United States v. Leon*,[59] where the Court held that "the Fourth Amendment exclusionary rule should be modified so as to not bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[60] Jettisoning the good faith exception, a move supported by multiple commentators,[61] would unquestionably aid defendants more than prosecutors.

As for warrantless searches, Uviller hopes they will become a rarity, "exceptions rather than the common practice" (p. 211). Should they occur, however, automatic exclusion is replaced by discretionary exclusion, a substitution which Uviller admits will mean that "illegally seized evidence would be admitted in some cases where, today, it would be excluded" (p. 211). Is this unfair? Uviller thinks not. The interests of fairness would be served in many ways; juries would receive more complete factual information, which would promote truth in verdicts, which would increase the public's respect for the law. Finally, ad hoc judicial discretion "is fair because it cuts through what appears (not without reason) to be a senseless morass of 'technicalities' in the law of search and seizure" (p. 211).

* * * * *

Uviller's revision of the Fourth, Fifth, and Sixth Amendment exclusionary rules is a serious departure from his defense of the status quo in so many other areas of criminal procedure. He acknowledges his "radical redesign" of these major tenets, but believes the changes are necessary. "I conclude that when it comes to full and vigorous prosecutorial pursuit at trial, our system is not performing as it should" (p. 290). More importantly, he believes that his reforms are fair. "I do not think I cut back on any vital values when I argue that

59. 468 U.S. 897 (1984).

60. *Id.* at 900.

61. *See* LAFAVE, *supra* note 2, § 1.3(a), at 52 n.5 (compiling examples).

fairness demands greater access to probative evidence and a better chance that all verdicts will be based on a more complete picture" (p. 290).

Ultimately, however, it would appear that Uviller's prescriptions would be inadequate to cure the ills he identifies with the current exclusionary rules. "Cops are always in need of instruction, granted. They need to know, if nothing else, that someone is watching. But just how much instruction they actually receive from the courts today is questionable. Too many courts, too many finely wrought opinions, too many thinly sliced situations, major transmission problems" (p. 290). Uviller's code is therefore ostensibly founded on the need to provide better guidance to law enforcement, to produce a "document where any fool could go and look up what is legal and what is not" (p. 198).

It is not at all obvious, however, that a discretionary exclusionary rule would bring greater clarity to police officers' decisionmaking process. The Court's decision in *Miranda*, it should be remembered, was premised on similar aspirations of providing guidance.[62] But consider, for example, the incentives generated by Uviller's confession model. When police detain a suspect, aware that he may be questioned only until the moment of arrest (at which point all interrogation must cease until arraignment), their instinct will presumably be to stretch the "natural exchange attendant on the initial encounter" to its broadest limits. Courts will inevitably be forced to determine the scope of what is "natural." Only that communication which occurs within the first one minute of capturing the suspect? Five minutes? During the car ride to the stationhouse? Even conceding to Uviller the institutional competence of trial judges to make these determinations,[63] before too long the state and federal reporters will be replete with varying interpretations as to what constitutes a natural exchange, undermining the instructional value of Uviller's simple code.

Similar problems arise with Uviller's search and seizure model. He "protest[s] that today we have only the illusion of a set of rules by which future police conduct can be guided" (p. 209). "Courts divide, and every case is different. Even the illusion of settled directives is difficult to maintain. So little is lost" (p. 209). More important, however, is to ask: What is gained? According to Uviller, no longer would courts "depend for guidance on only the crudest inferences from past adjudication;" in this context, a mass of confusing and contradictory precedent (pp. 209-10). The admission of evidence obtained from warrantless searches would instead turn on the "demands of justice in

62. *See* Dickerson v. United States, U.S. Reporter (2000) (noting that "The *Miranda* opinion itself begins by stating that the Court granted certiorari . . . *'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.'* ") (quoting *Miranda*, 384 U.S. at 441-42).

63. *See* text accompanying *supra* notes 56-58.

each particular case" (p. 209). This may be an acceptable standard for *judges* to apply when deciding motions to suppress evidence, but it would seem to provide little assistance to *police* at the crucial moment when contemplating to search or seize in the absence of a magistrate's advance approval. When a case is being investigated, the "demands of justice" are far less apparent than when it is being tried. Officers who legitimately believe that evidence will be lost or destroyed in the time necessary to obtain a warrant (even an electronic one) would be forced to make decisions based on uncertain predictions about whether a judge will later deem their actions reasonable according to factors they cannot presently anticipate. (Such as, for example, "the availability of less intrusive means to acquire it" (p. 209).) As unruly as modern Fourth Amendment jurisprudence may be,[64] it would appear to be at least marginally more instructive than Uviller's multi-factored, ad hoc inquiry. In sum, Uviller's plans to rewrite the exclusionary rules, while ambitious, seem more to displace problems than to solve them.

CONCLUSION

Uviller believes the American criminal justice system, while far from perfect, is "tolerably fair." Whether readers will agree with him is likely to be dictated by the nature of their participation in the process,[65] and thus their baseline instincts about where the distribution of advantages should ultimately rest. Uviller does not deny the inherent subjectivity of this analysis, nor does he claim to have arrived at any universal definition of fairness:

> Law in both substance and process is, after all, an expression of what we think is right, a collection of aspirational conventions. It is surprisingly difficult, however, to tease them out of the tightly woven fabric of common experience and invisible assumption. And if and when any intrepid soul undertakes to expose and describe these essential strands, there is bound to be disagreement, mocking any claim to universal accord. [p. 280]

What we are left with, then, are the opinions of one (albeit influential) law professor and former prosecutor. His conclusions about fairness will undoubtedly differ from those of the parents of a murdered child, the inmate serving a life sentence for a third strike conviction of

64. P. 210. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("Even before today's decision, the [Fourth Amendment] 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable.").

65. P. 17 ("[W]hat you consider the appropriate balance of forces may depend, in large measure, on whether you view the question from the perspective of the innocent accused, the guilty accused, the persuaded prosecutor, or whether you (like me) still insist that the primary function of a criminal trial is to separate the guilty from the innocent with some few overarching public values.").

felony theft of a bicycle, the law enforcement officials who must traverse the often ambiguous line between zealously fighting crime and respecting civil liberties, or the citizens who simply want to feel safe in their neighborhoods.

This diversity of available perspectives underscores the difficulty of ascertaining any shared standard of fairness. But just because the task is difficult does not mean the effort should be avoided. For that reason, *The Tilted Playing Field* is most appropriately interpreted as a valuable statement in the ongoing dialogue about fairness and criminal justice.