Parallel Play: The Disconnect Between Criminal Procedure and Criminology Revisited

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Eric J. Miller, Putting the Practice into Theory, 7 **Ohio St. J. Crim. L.** 31 (2009).

Criminal procedure and criminology have developed along oddly parallel tracks. Criminal procedure is rights-based and court-centric. It cares about policing and crime control not as subjects in their own right, but as objects of constitutional limitation. The field implicates the regulation of police behavior, but has traditionally paid little attention to police attitudes or police organizational culture. It implicates crime control, but has paid little attention to the social, political and cultural context in which the criminal process unfolds. This focus seems increasingly myopic. Most of the promising innovations in police reform and crime control have little to do with judicial enforcement of constitutional rights.

It's been almost two decades since Robert Weisberg's memorable skewering of criminal procedure scholars for failing to engage social science in general and criminology in particular. Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 **U. Colo. L. Rev.** 521 (1992). More recently, David Sklansky, in his important article on democracy and policing, made a similar charge. David Sklansky, Police and Democracy, 103 **Mich. L. Rev.** 1699 (2005). The situation has been improving. An increasing number of criminal procedure scholars are investigating crime's social context (for example Jonathan Simon and Bernard Harcourt), conducting their own empirical work (for example Dan Kahan, Tracey Meares and Jeffrey Fagan), or paying close attention to empirical evidence on issues like false confessions or suggestive lineups.

Eric Miller's terrific article *Putting the Practice into Theory* agrees with both Weisberg and Sklansky that criminal procedure needs to engage more seriously with criminology. His unique contribution is his argument that criminology is not merely ignored or misconstrued. The problem he identifies is that criminal procedure doctrines are often premised on unstated criminological assumptions about policing and crime. These assumptions tend to be sheer speculation, and yet they are often outcome-determinative.

Take the exclusionary rule, which is by any account a core concern (Weisberg called it a fetish) of criminal procedure. The discussion about the rule and its exceptions is rife with unsupported assumptions about what deters cops and whether magistrates are deterrable. This omission is problematic in its own right. But the greater omission is the failure to investigate the impact of the exclusionary rule at the organizational level. When the Court finally turns to this question, in *Hudson v. Michigan*, 547 U. S. 586 (2006), it is to declare that the exclusionary rule's work is now done. The Court assumes that the rule is rapidly outliving its usefulness, given the increased professionalism of modern police forces, the improvement in internal police discipline, and the increased availability of alternative remedies, including citizen review.

The Court, in Miller's words, "thus stakes its regulatory regime upon a criminological claim about the institutional structure of the police, and police training." Miller, *supra*, at 64. It refers to criminological literature, but in a "slapdash" manner. Miller, *supra*, at 65. It provides no evidence for its empirical assertion that citizen review enhances police accountability. And in a notorious misstep, the Court relies on the work of criminologist Samuel Walker to support its argument that increased police

professionalism renders the rule obsolete, though Walker himself credits the rule itself for increasing police professionalism.

Criminal procedure is built around certain well-trod tensions: bright lines rules versus particularized decision-making; the primacy of the warrant versus the primacy of reasonableness; judicially-created remedies like the exclusionary rule and *Miranda* warnings versus various alternatives. Miller demonstrates that regulatory questions lurk behind these debates. Should regulatory standards be uniform or discretionary? What types of screening or monitoring work best? At what stage(s) should screening or monitoring for compliance with standards take place? What actors or institutions are best suited to monitor compliance? Miller, *supra*, at 38. He argues that rather than confront these regulatory questions head-on, standard criminal procedure discourse simply assumes that police institutional structure takes a certain form. Miller, *supra*, at 50.

For example, Miller argues that the familiar debate between bright line rules and particularized decision-making ought to be part of (or at least informed by) a broader regulatory debate. Is a top-down, managerial model of police regulation preferable to a model that encourages street-level cops to develop policy based on their experience and pragmatic good sense? For Miller, the problem with a bright line rule case like *New York v. Belton*, 453 U.S. 454 (1981), is that it assumes the existence of a managerial model in which top brass generate clear rules that effectively guide street-level cops. It never actually investigates whether the model is in place, and if so, how well it works. The problem arises when the discourse—judicial or scholarly—simply shifts between models without acknowledging or evaluating their underlying criminological assumptions.

Miller's article is part of a stellar new symposium issue on the question "What Criminal Law and Procedure Can Learn from Criminology," edited by David Harris and Joshua Dressler, and with articles by Harris, Eric Luna, Richard Leo and Jon Gould. The whole symposium is a must-read. Miller's article adds a critical dimension. It's a reminder that criminological assumptions will permeate criminal procedure whether or not criminology is taken seriously. The choice is whether to speculate and assume, or to bridge the disciplinary divide.

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