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Introduction

The post-Warren Court's routine findings of constitutional compliance by law enforcement, the courtroom apparatus, and correctional agencies are of no surprise to anyone studying the American criminal process. Legal realists have long come to regard doctrinal niceties as tools that render legitimacy to intrusive, abusive, and punitive state practices.[2]

But upon closer examination, the Supreme Court's usage of constitutional standards as a way to "kosherize" inferior defense quality,[3] prosecutorial misconduct,[4] and correctional abuses,[5] as well as policing practices,[6] prosecutorial discretion,[7] and plea-bargain abuses,[8] merits deeper attention. When the Supreme Court expresses deference to authority, relying on a particular standard of review and making that standard the issue rather than the rights violation in the particular case,[9] does it "believe" in what it says, or is it cynically exploiting constitutional doctrine to garner legitimacy? And if the Constitution is more than mere window dressing to advance the interests of the powerful, in what ways is it "real"?

To answer these questions, I juxtapose two common approaches to criminal-courtroom policy: the legal-model approach and the sociological-empirical approach. Each approach offers a valuable

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1. Lightly edited and adapted from Hadar Aviram, *Taking the Constitution Seriously? Three Approaches to Law's Competence in Addressing Authority and Professionalism*, *in* THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff eds. 2017).

2. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

3. Strickland v. Washington, 466 U.S. 668 (1984).

4. Batson v. Kentucky, 476 U.S. 79 (1986).

5. Ruffin v. Commonwealth, 62 Va. 790, 796 (1872).

6. Terry v. Ohio, 392 U.S. 1 (1968).

7. United States v. Armstrong, 517 U.S. 456 (1996).

8. McMann v. Richardson, 397 U.S. 759 (1970).

9. *See* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 111 (Sharon Dolovich & Alexandra Natapoff eds. 2017).

interpretation of legal policies and goals, emphasizing certain factors that account for legal practices in the field; however, each of them fails to account for other factors, thus incompletely explicating the criminal process. I then use Niklas Luhmann's Systems Theory as a third approach that takes both the Constitution and its limitations seriously. As I argue, systems theory complements doctrinal analysis and sociolegal critique by showing how the very nature of constitutional communications limits their usefulness for criminal-justice reform.

The Legal-Model Approach: The Constitution as a Value Choice

One perspective on the post-Warren Court's forgiving approach toward the criminal-justice apparatus views the Constitution as a vehicle for advancing one set of legal values over another. A convenient starting point is Herbert Packer's "Two Models of the Criminal Process."[10] Analyzing the Warren Court revolution as it was occurring, Packer transcended the government/defendant dichotomy that dominated contemporary discourse, arguing that the due process revolution consisted of a shift along a continuum between two "ideal types." On one end lay the Crime Control Model, which prioritized efficiency, advocating for reliance on police and prosecution powers under the assumption that any defendant that made it past these checks into the trial system was "presumptively guilty." This model relied on bargaining and finality and shied away from trials and appeals. On the other end lay the Due Process Model, which prioritized avoidance of wrongful convictions, treating the criminal justice apparatus with suspicion and allowing for constitutional challenges and ample post-conviction review.[11] Charles Whitebread and Christopher Slobogin argue for a subsequent pendulum swing back toward Crime Control in the post-Warren-Court era, identifying four themes: a focus on factual guilt/innocence, echoing Packer's "presumption of guilt," a shift from bright-line constitutional rules to flexible, "totality of the circumstances" tests, greater belief in the integrity of the police and prosecution, and greater deference to state courts.[12] Packer himself, a due-process

10. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

11. Elsewhere, I have argued that due process has two aspects, formalism and fairness. *See* Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 L. & SOC. INQUIRY 237 (2011).

12. CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 4-5 (5th ed. 2008).

enthusiast, expressed on his deathbed in the early 1970s disillusionment with the Warren Court's project.

Many have used Packer's models as a springboard for suggesting their own models, which were regarded as preferable or more realistic representations of the criminal process. But even Packer's analysis, which imbues the Court's constitutional stance with a more nuanced worldview than mere partisanship, is fraught with the naïveté of what Hunt and Wickham call the "intellectual insularity" of legal scholarship.[13] For Packer, whether the justices subscribe to crime control or due process, they are still, in good faith, applying universal principles to specific cases by classifying real-life situations into preexisting legal "ideal types," which they apply universally and objectively.[14] This approach does not see the Court as a political institution embedded in the broader socioeconomic, racial and political context.

Packer would perceive the examples from the Court listed above as a manifestation of the crime-control model. Creating and reinforcing low expectations from defense attorneys is a vote of confidence not only in public defense but also in the initial screening process by the police and the prosecution; if a case has made it to trial, the defendant is likely guilty anyway, and guaranteeing the quality of his defense is less crucial. This approach explains not only the performance prong of *Strickland* but also its prejudice prong: the defendant was probably rightfully convicted, and, therefore, any post-conviction debate about defense flaws is moot. Similarly, *Batson* and *McClesky* can be explained as a crime-control expression of faith in the system's fairness; the defendant's probable guilt makes the possibility of racial bias less worrisome. Both of these scenarios, as well as the third—the case of correctional practices—also strongly indicate the Courts' crime-control commitment to finality and impatience for postconviction inquiries.

But these three cases also expose the weaknesses of a Packerian approach as the ultimate path to understanding the post-Warren Court. Why does the Court place such trust in public defense? Does the Court's faith in the system's ability to overcome errors override what the justices surely know about racial discrimination and minority overrepresentation? And how does the Court benefit from its wholesale support of correctional practices?

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13. ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARD A SOCIOLOGY OF LAW AS GOVERNANCE 40 (1994).

14. David Trubek, *Back to the Future: The Short and Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1 (1990).

Finally, the Packerian approach lacks historical sensitivity. It tells us little about why the Warren Court shifted from crime control to due process and why the pendulum has swung back. These questions are better addressed by the second approach.

Sociolegal Approaches: The Constitution in Service of Institutional Legitimacy and Political Entrenchment

The second approach is more frequently espoused by social scientists examining the criminal process, often using empirical tools. For simplification purposes, this approach encompasses various perspectives that see the Court as one of many sociopolitical institutions, with pragmatic concerns, interests, and obligations beyond adherence to a set of values promoted by constitutional provisions.

I identify two strains within the sociolegal approach. The first focuses on factors endogenous to the criminal process and on the Court's role as an institution within the system. Such works advocate rejecting the notion of the system as a rational apparatus with a single goal in mind, opting instead to see it as constructed of many individuals with different and often conflicting roles, and handling a variety of professional, administrative and personal constraints.[15] While this literature emerges mostly from lower-court ethnographies, it is nonetheless relevant to the conversation about the Supreme Court in that it draws attention to the "real" reasons why the Court accommodates incompetent lawyers and thinly veiled, racially motivated jury selection tactics. The Supreme Court affirms the experiences of state judges who routinely encounter the "repeat players" in the system: defense attorneys and prosecutors.[16] Since the continued collaboration of these participants is essential to keep the wheels of the criminal justice machine turning, their interests are accommodated at the expense of those of the defendants, who are "one-shotters." This principle holds for federal litigation of state correctional practices: The court is well aware of the need to procure the state's collaboration, and therefore gears itself more toward conciliatory compromises and consent decrees.[17]

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15. MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); Malcolm Feeley, *Two Models of the Criminal Justice System: An Organizational Approach*, 7 L. & SOC'Y REV. 407 (1972).

16. *See* JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE (1977); PETER NARDULLI ET AL., TENOR OF JUSTICE (1988).

17. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE (1991).

This literature is particularly useful regarding ineffective assistance of counsel claims because in that situation, the defense attorneys' interests line up with those of the court and against their clients. Described in early examples of this literature as "con men" who trick their clients into pleading guilty to save everyone's time,[18] the lawyers quickly develop proficiency in identifying prototypes of cases—"normal crimes"—and perfect ways of negotiating for pleas based on these generalizations.[19]

The second strain examines the creation and administration of the criminal project as a product of the larger social structure, focusing on its reinforcement of patterns of power and inequality. Works by Marxist social historians and conflict criminologists address the emergence of laws aimed mainly at controlling and oppressing disenfranchised populations, mostly by criminalizing their behavior, such as vagrancy and poaching—crimes created and enforced to protect the property interests of powerful social groups. Similarly, such accounts highlight the stratifying effect of drug policy, death penalty enforcement, and the deliberate choices involved in the criminal prosecution of slaves in the American South. The emergence of penal practices, often shrouded in therapeutic, ostensibly benevolent reforms, is also interpreted as systemic support for oppression.[20]

Scholars disagree on the level of autonomy they ascribe to law within the power structure. Instrumental Marxists go as far as to claim that law is entirely subservient to the mode of production.[21] Structural Marxists espouse a more nuanced approach, acknowledging that law retains a certain level of autonomy; rather than automatically supporting the interests of power groups, the law sometimes offers hope to weaker groups, thus maintaining its appearance of universal and equal

18. Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15 (1967).

19. David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965).

20. *E.g.*, TONY PLATT, THE TRIUMPH OF BENEVOLENCE: THE ORIGINS OF THE JUVENILE JUSTICE SYSTEM IN THE UNITED STATES (1972); DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 (1993).

21. GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939).

application and guaranteeing that, in the long run, the power structure will prevail.[22]

These approaches clearly support the observation that the Court obtains legitimacy by supporting the interests of power groups. For example, by supporting the fiction of adequate criminal representation via the "effective assistance of counsel" test, the Court justifies abusive and punitive practices. The defense attorney's presence becomes a fig leaf behind which injustices can hide. Similarly, the façade of racial blindness diverts attention from the myriad racialized practices in the criminal process. And finally, the assertion that inmates are being punished for their crimes—with all practices associated with their incarceration conveniently labeled as "punishment" and "not punishment"—masks the severe deprivation of fellow humans' basic material, social, and medical needs. Even the sporadic exceptions to this pattern of finding counsel's assistance to be adequate[23] nevertheless conform to this overall paradigm. This handful of exceptions creates an illusionary impression of equality and justice, numbing us to the robust body of opposite decisions.

The problem with this approach is its non-falsifiability. When the Court rules for the state, we ascribe that to its support of the existing power structure. When it rules in favor of the defendants or inmates, we ascribe that to the need to maintain false consciousness and legitimacy. Only when the abuse of power is so blatant that a pro-government decision would cause outrage does the Court shy away from it and give a handout to the disenfranchised. The extent to which the Court succeeds in predicting the reaction to its rulings is an index of its political astuteness.

But even if it is profitable for the Supreme Court to support the system at the expense of the disenfranchised and downtrodden, why is the Constitution such a convenient vehicle? If the Constitution is such a powerful legitimizing tool, why is its ability to provide satisfying solutions to real problems so limited?

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22. Alan Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 L. & SOC'Y REV. 39 (1985).

23. *E.g.*, Missouri v. Frye, 132 S. Ct. 1399 (2012); Lafler v. Cooper, 132 S. Ct. 1376 (2012); Brown v. Plata, 131 S. Ct. 1910 (2011).

A Third Approach: The Constitution and Its Interpretation as an Index of How Law Treats Authority and Professionalism

The third approach transcends the doctrinal insularity of the Packerian perspective, as well as the dismissiveness toward law, and the Constitution, of the sociolegal perspective. While the legal or political consequences of the Court's approach matter, of course, this approach examines the issue through a discursive lens: How does law, in itself, think? This "discursive perspective"[24] focuses not on the ontological nature of reality, but on the role of the Constitution in propagating a given view of reality. It helpfully illuminates law as a system without cynically sacrificing the importance of law itself to the result.

For our purposes, the relevant aspect of systems theory, as espoused by Niklas Luhmann, is its concern with law's boundaries, self-production, and relationship with external structures.[25] The unit of analysis for the theory is a "communication." Luhmann defines "law" as a set of legal communications, which converse with each other and refer to each other. It is through these communications that law attains a "mind" and a perspective independent from, and unrelated to, that of human legal actors. What distinguishes legal and non-legal communications is their function: the maintenance (stabilization) of expectations (e.g., that actors in the criminal justice system will adequately represent defendants, guarantee racial neutrality, and treat inmates decently) in the face of disappointments (e.g., an unprofessional lawyer, a racially-biased jury, or an abusive prison warden). The main distinction made by legal communications in respect to these behaviors is the legal/illegal dichotomy.[26] The communications which determine which behaviors will be deemed "legal" and which will be regarded as "illegal" are contingent upon the concept of justice, which often manifests itself through equality (the equal/unequal distinction).

These distinctions made by the system's communications and operations are exclusive to the system. Law, like other systems, is an autopoietic system, in which "everything that is used as a unit by the system is produced by the system itself."[27] Since the system consists of

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24. NIELS ÅKERSTRØM ANDERSEN, DISCURSIVE ANALYTICAL STRATEGIES: UNDERSTANDING FOUCAULT, KOSELLECK, LACLAU, LUHMANN (2003).

25. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 47 (2004).

26. Jean Clam, *The Specific Autopoiesis of Law: Between Derivative Autonomy and Generalised Paradox*, *in* LAW'S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS (Jiri Priban & David Nelken eds. 2001).

27. ANDERSEN, *supra* note 24.

communications, and the communications use distinctions unique to law, it can only converse with itself, using its own terms and distinctions.[28] Importantly, as a self-sufficient, self-perpetuating system, law supplies its own legitimacy using internal tools and referring back to them for validity.[29]

Law, argues Luhmann, operates in a universe of systems, and addresses questions that come up in other systems. These questions, however, do not translate well across systems, because systems are cognitively open but operationally closed to each other; they can communicate *about* each other but not directly *to* each other. Whenever a system is irritated by an external event, or an external perspective from a different discipline, a structural coupling between the two systems may occur: the first system may choose, through its own operations and distinctions, to select the second system; the first system then communicates about the second system using the first system's own distinctions, vocabulary and inner logic.

Law's form of operative closure is normative closure; while maintaining cognitive openness, and being exposed to other systems through the cases presented to the system or the operation of political institutions that surround it, law chooses to assimilate issues and events based on its fundamental legal/illegal distinction.

When the Constitution is irritated by evidence of unprofessional defense attorneys, racial biases, or cruel and indifferent jailers, it has to translate this evidence to a question it can comprehend and answer. These big problems have to be reduced to binary questions—namely, whether a given practice with which the system is confronted falls above or below a certain threshold—before they can be addressed by legal communications.

Note the systemic poverty of the Court's approach in the criminal-justice examples and its inadequacy in capturing and addressing them properly. Effective assistance of counsel—or, more clearly put, whether counsel performance is legal/illegal in the sense that it falls beneath some minimum threshold—is a very limited way to address quality, professionalism, agency, budget constraints, and any other issue stemming from the dark side of *Gideon*. Similarly, a deep conversation about the ways in which racism affects the criminal process is translated to the impoverished, limited binary question whether the outcome was

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28. Michael King, *You Have to Start Somewhere*, in CHILDREN'S RIGHTS AND TRADITIONAL VALUES 3 (G. Douglas & L. Sebba eds. 1998).

29. Stanley Fish, *The Law Wishes to Have a Formal Existence*, *in* THE FATE OF LAW (A. Sarat & T. R. Kearns. eds. 1991).

legal/illegal, decided based on whether it was unequal enough to fall beneath the legality threshold. And broad questions about our trust in the humanity and professionalism of correctional staff, which could raise issues of causality and situational dynamics,[30] are translated to the impoverished, limited binary question whether the treatment of the inmates was legal/illegal in the sense that it fell beneath a minimum threshold of conditions.

In these three situations, and many more, the Constitution has to consider (or confront) questions to which it is cognitively open: What professionalism means, how professionalism affects justice, and how professionalism may be promoted. But its limitations and internal rules mean that it can only converse *about* these issues (and not *with* other systems that might tackle these questions differently) in a normatively closed way, that is, through its binary threshold framework.

This also explains another discontent with the Court's approach: setting constitutional standards not only "kosherizes" current practices, but also acts as a barrier to future litigation. Law's self-referential qualities ensure that the next time an irritant invades the legal conversation, it will refer back to itself, its usual modes of understanding and decision, and its operative rules, in providing an answer. This limitation is built into the world of constitutional communications.

Conclusion

One possible way to analyze the three approaches is to regard the legal approach as what judges say they do, the sociolegal approach as what judges do, and the systems-theory approach as what the interaction between the constitution and the outside world does. Systems theory cannot provide a prescriptive mandate to judges, nor can it blur, in itself, the line between the constitution and the realities of the criminal process.

What systems theory offers us is a modicum of modesty when expecting great things from the courts. If what we need are better defense attorneys, juries, and correctional officers, hanging our hopes on the flawed instrument of constitutional communication will prove hollow indeed.

30. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

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