



THE SUPREME COURT, CRIME, & THE IDEAL OF EQUAL JUSTICE

Christopher E. Smith, Christina DeJong,
& John D. Burrow

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ADVANCE PRAISE FOR

*The Supreme Court, Crime,
& the Ideal of Equal Justice*

Smith, DeJong, and Burrow convincingly describe the American criminal justice system as fraught with discriminatory practices and procedures which have not been satisfactorily resolved by the judicial system. This engaging book is a worthy read for anyone interested in criminal justice or judicial politics."

—*Madhavi McCall, San Diego State University*

"The authors analyze the Rehnquist Court's failure to use its authority in interpreting the Equal Protection Clause and other constitutional provisions to advance the American ideal of 'equal justice under law.' This provocative book is a must-read for public officials and informed citizens who are serious about addressing the reality of unequal treatment in the criminal law process."

—*Joyce A. Baugh, Central Michigan University*

The Supreme Court, Crime,
& the Ideal of Equal Justice

8



David A. Schultz and Christina DeJong
General Editors

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PETER LANG

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Preface

HUMAN INSTITUTIONS ARE inherently imperfect. When human beings are responsible for making decisions within organizations and processes, it is relatively easy to raise questions about biases and errors in their decisions. If an analysis of those decisions is intended merely to find fault, then such an analysis may be regarded as unremarkable and, indeed, merely an exercise in stating the obvious. The analysis in this book, we hope, will not be perceived as merely an exercise in finding fault with the justice system. By choosing to analyze aspects of inequality in criminal law and process, this book seeks to fulfill more important purposes. First, an underlying premise of this book is that governmental institutions, more so than other human institutions, should be evaluated and held accountable for falling short of their intended purposes and principles. In a democratic governing system, it is no mere exercise in criticism to examine whether the institutions of government are serving the people's interests in accordance with the principles of the Constitution. Second, unlike some other human decision-making processes, the criminal justice system has a profound impact on the lives of human beings. Decisions that define the law as well as discretionary decisions within the system determine people's fates, including decisions about which offenders will be selected to die. Thus, flaws and biases in criminal justice decision making have the potential for special impact and importance. Finally, the identification of flaws and biases is the essential prerequisite to considering how human organizations and processes can be improved. If we are reluctant to evaluate critically the institutions and decision makers of the criminal justice system, then we have no realistic hope of suggesting ways to improve the system. Much of the discussion in the book focuses on the ways in which the U.S. Supreme Court has or has not advanced the ideal of equal justice. Although the tone of this discussion

is often critical, its underlying intentions flow from the optimistic hope that greater recognition of the facets of persistent inequality will provide a basis for future remedial actions.

Some of the material in Chapter 3 was previously published as Christopher E. Smith and John D. Burrow, "Race-ing Into the Twenty-First Century: The Supreme Court and the (E)Quality of Justice," *University of Toledo Law Review* 28 (1997): 279–300. Similarly, Chapter 4 draws from material that was previously published as Christina DeJong and Christopher E. Smith, "Equal Protection, Gender, and Justice at the Dawn of a New Century," *Wisconsin Women's Law Journal* 14 (1999): 123–154. We are grateful to the *University of Toledo Law Review* and the *Wisconsin Women's Law Journal* for granting permission to incorporate this material.

We would like to express our gratitude to the faculty and doctoral students in the School of Criminal Justice at Michigan State University. Our interactions with these colleagues have significantly enhanced both our curiosity and knowledge about criminal justice. We would also like to thank David A. Schultz for his editorial suggestions and encouragement.

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The Ideal of Equal Justice

THE STRUCTURES AND processes of government institutions are designed to fulfill specific goals. They do not necessarily succeed in fulfilling these goals, but presumably the people who work within these institutions, if committed to a government's values, will strive to improve their institutions' effectiveness in advancing underlying goals. Among the institutions of government, courts are particularly important. A country's courts enforce its laws and thereby help to ensure that disputes between citizens are resolved peacefully and that individuals who commit crimes are identified and punished appropriately. In criminal cases, courts apply the rules and procedures that determine which individuals will lose their property, liberty, and lives as punishments for violating society's rules. These important, fate-determining decisions made during court proceedings should presumably be reached in accordance with a governing system's goals and values. According to the U.S. Constitution and U.S. Supreme Court decisions defining constitutional law, the fair and equal treatment of people in the criminal law process is a paramount objective of the American legal system. The chapters of this book will examine whether American law and judicial processes actually achieve this goal and, more importantly, whether the justices of the U.S. Supreme Court, who are key decision makers in the system, strive to improve the legal system's effectiveness in advancing the underlying goal of equal justice.

The Goals of Legal Systems

How does one identify the goals of a legal system and evaluate whether those goals are attained in the processing of criminal cases? In essence, any

analysis of system goals must begin with an examination of a system's rules and processes. Each country's legal system has its own structures, rules, and procedures for processing criminal cases. Each system also has specific officials empowered to make decisions that help to determine the fates of people drawn into the criminal law process. When comparing legal systems and how they operate, evident differences between systems reflect divergent traditions, values, and objectives. For example, many European countries use an "inquisitorial" process in which judges actively participate in the investigation and processing of cases, especially by asking questions of witnesses during court proceedings (Provine 1996). By contrast, trials in the United States are based on an "adversarial" process in which the judge is relatively passive, the truth is presumed to emerge from the clash between the opposing lawyers who advocate vigorously on behalf of each side, and a jury of citizens makes determinations of guilt or innocence (Abraham 1993). The inquisitorial system seeks to discover the truth about legal cases by utilizing a truth-seeking process that places great reliance on thorough investigations and considered judgments by law-trained professionals employed by the government. Obviously, the American system's goal of discovering the truth is pursued through an alternative process. The American system evolved from English roots and reflects the Anglo-American tradition of involving lay citizens as decision makers in trials. In its use of citizen-jurors, the American system differs from inquisitorial processes by incorporating skepticism about the risks of excessive prosecutorial and judicial power. Moreover, in its use of zealous defense attorneys and an adversarial process, the American system emphasizes the additional goal of protecting the interests of defendants from any abusive exercise of governmental authority. Truth-seeking, citizen decision making, and protection of defendants' rights are not the only goals advanced by the American legal system. These specific goals are highlighted in the use of an adversary system in American courts, but additional goals are reflected in other aspects of the laws and legal procedures employed in the United States.

Legal systems do not develop entirely by accident. As indicated by the foregoing examples, a close examination of rules and procedures can

illuminate underlying traditions and values. Systemic goals may be easy to identify and evaluate in a country with a criminal law process that has only a few specific objectives. If, for example, the sole or primary purpose of a legal process is to preserve and maintain the power of a specific leader or regime, then one would expect to see this limited objective reflected in broad law enforcement powers, summary proceedings, draconian punishments, and few legal protections, if any, for individuals. Critics of the government would be arrested upon mere suspicion and then summarily punished in severe ways. If the regime maintained its power and opponents of the regime were either eliminated or terrorized into silent submission, then the legal process could be judged effective in fulfilling its intended function of regime maintenance.

By contrast, it is more difficult to evaluate the criminal law process of the United States because there is a broader array of values and objectives, not all of which can be pursued simultaneously in a harmonious fashion. The American legal process seeks to repress crime and punish criminal offenders, but it also seeks to pursue these objectives while protecting the rights of individuals and limiting the power of government (Cole & Smith 2001). One measure of the success of the criminal law process would be the extent to which criminal offenders are apprehended and punished. However, other measures must necessarily focus on the extent to which law fulfills the expectations of citizens in a constitutional democracy by adhering to espoused principles. For Americans, the suppression of crime is one important objective, but the success of the criminal law process must also be evaluated according to the provision of fair processes and the fulfillment of the rights promised in the U.S. Constitution and state constitutions. In addition, there are other objectives whose attainment is necessary to fulfill Americans' conceptions of justice. These additional objectives include accurate decisions about which defendants are guilty and appropriate, proportional punishments for convicted criminal offenders. The news media, commentators, and the public devote significant attention to instances when a prisoner is released, sometimes after sitting in prison for decades, because new evidence demonstrates his or her innocence (Finucane 2001). Similarly, public debates about the attainment of justice

emerge when there are concerns about disproportionate or otherwise inappropriate punishments being imposed on a particular offender (Clary 2001).

Equal Justice in the American System

One especially important objective underlying American legal processes is equal treatment of similarly situated criminal suspects, defendants, and offenders. Equal justice is a central component of the conception of law in the United States. According to Professor Ronald Allen (2000, xviii), “[T]he notion of equality, of treating like cases alike, is both integral to the nature of law and uncontainable once identified.” Egalitarianism is a core element of the “American ideology” that shaped the governing institutions and laws of the United States (Ladd 1987). At the founding of the nation, this idea is most famously embodied in Jefferson’s statement that “all men are created in equal” in the Declaration of Independence. Obviously, American history’s legacy of inequality predicated on race, gender, immigrant status, and other demographic factors indicates that the nation has fallen short of achieving an idealistic conception of egalitarianism. Indeed, some commentators argue that inequality is an established, accepted element of American political culture (R. Smith 1997). Despite the gap between the espoused ideal and reality throughout American history, most of the formal mechanisms for legal discrimination, such as racial exclusion from voting and gender exclusion from jury service, were eliminated by the late twentieth century. In *Taylor v. Louisiana* (1975), for example, the U.S. Supreme Court invalidated a state statute that excluded women from jury service unless they made a special request to be considered for participation. The Supreme Court’s decisions in *Taylor* and other cases serve as important statements about the high priority that the American governing system places on treating people equally in their contacts with government institutions and processes. In light of these judicial decisions that purport to advance equal treatment, it is appropriate to evaluate the extent to which the legal system actually achieves the ideal of equal justice, especially because judicial institutions and processes are key purveyors of this ideal through the words of publicly announced decisions.

The justices of the United States Supreme Court work within a building which itself proclaims the message of the judicial system's aspirational goal. Prominently displayed above the Court's high columns and massive bronze door are the words, "Equal Justice Under Law." These words are literally etched in stone. While the Court's interpretation of the U.S. Constitution's provisions inevitably change as justices come and go and as society's values change, "Equal Justice Under Law" will remain as an enduring and unalterable proclamation, visible to all who pass by or enter the nation's highest court. In addition, the Supreme Court and other courts bear responsibility for interpreting, applying, and defending the Constitution's explicit command, contained in the words of the Fourteenth Amendment, to provide "equal protection of the laws" for all people. The courts also interpret and enforce other constitutional provisions designed to achieve "equal justice under law," such as the appointment of defense attorneys for indigent defendants under the Sixth Amendment's guarantee of a "right to counsel."

Evaluating Equal Justice

In light of the courts' central role in the advancement of the ideal of equal justice, how should these institutions be evaluated to assess their commitment to and success in attaining equal treatment for all people? Sometimes authors use "straw man" arguments and analyses to make their points by presenting a hollow or superficial representation of an opposing viewpoint that can be easily demolished by their own preferred arguments. Their own conclusions and analyses appear to be deceptively persuasive or strong when contrasted only with a weak or unrealistic alternative. In evaluating the achievement (or lack thereof) of equal justice, it would be possible to set the judicial system up as a "straw man" by treating it as if it could be a flawless embodiment of a "textbook" system that fulfills idealistic notions of what a "perfect" criminal law process should be. Then one could criticize existing institutions, rules, and procedures for failing to accomplish an idealized vision of absolutely equal treatment for all people who come into contact with criminal justice officials. In reality, however, the governing system of the United States is specifically designed to ensure

that individuals are treated differently in different jurisdictions. The U. S. Constitution is based on a system of federalism in which individual states possess the authority to enact their own laws and to develop their own institutions and procedures. Thus, acts that are legal in some states may bring prosecution and imprisonment in others. For example, prostitution is a legal, regulated business in Nevada but is a crime elsewhere in the country. In addition, states provide different punishments for identical acts. Some people convicted of murder in Texas and other states may be sentenced to death, whereas Michigan, Wisconsin, Minnesota, and a few other states have no death penalty. Because of the federalist model, it may be most appropriate to evaluate the attainment of equal justice within the limited confines of a single jurisdiction governed by a single, common set of laws. Thus, one might argue that equal justice should only be evaluated by examining whether everyone within a specific state is treated the same as everyone else within that specific state. For example, an analyst might ask whether all burglars in Delaware with similar criminal records receive the same punishments as comparable burglars in that state or whether prosecutors in Wyoming pursue the same criminal charges against suspected thieves who commit similar acts of larceny.

Alternatively, one can evaluate equal justice by examining the specific laws that govern the entire country. Federal criminal statutes apply throughout the United States, although they cover only a limited number of offenses, such as drug trafficking, counterfeiting, and fraud, that can be prosecuted and punished through the federal courts. More importantly, most of the constitutional rights contained in the Constitution's first ten amendments, known as the "Bill of Rights" as well as all of the rights in the Fourteenth Amendment are applicable throughout the entire country. The Bill of Rights, including First Amendment rights to freedom of speech and religion, Fourth Amendment rights against unreasonable search and seizure, and Sixth Amendment trial rights, originally provided people only with protections against actions by *federal* law enforcement officials and ensured specific processes in *federal* courts (*Barron v. Baltimore* 1833). Using an interpretive approach known as "incorporation," the U.S. Supreme Court applied most of the rights in the Bill of Rights to state officials and state

court proceedings (Hensley, Smith, & Baugh 1997). The Fourteenth Amendment, which was added to the Constitution in 1868 after the conclusion of the Civil War, explicitly gives people legal protections against actions by the states. These protections include the right to “due process of law,” the “privileges and immunities of citizenship,” and the “equal protection of the laws.” In a case-by-case process from 1925 through the end of the 1960s, the Supreme Court interpreted individual provisions of the Bill of Rights as being embodied within or “incorporated into” the Fourteenth Amendment’s right to due process and therefore applicable to protect individuals against actions by state officials to the same extent that they provided protections in federal court proceedings (e.g., *Duncan v. Louisiana* 1968). By the end of the 1960s, very few rights in the Bill of Rights had not been incorporated into the Fourteenth Amendment and applied to the states. The handful of unincorporated rights include the Second Amendment’s provision on well-regulated militia and the right to bear arms, the Fifth Amendment right to a grand jury, and the Seventh Amendment right to a jury trial in civil cases (e.g., *Hurtado v. California* 1884). Thus, with the exception of the right to a grand jury, all of the important constitutional rights affecting criminal law processes were incorporated and applied against the states. All court proceedings in the country, state and federal, are governed by the Supreme Court’s interpretations of rights concerning searches, self-incrimination, double jeopardy, defense counsel, cruel and unusual punishments, and other elements of the Bill of Rights. As a result, one fair means of evaluating the legal system’s fulfillment of the ideal of equal justice is to examine the extent to which courts apply the common, universal rights contained in the Bill of Rights for people throughout the country.

Another form of problematic “straw man” arguments about equal justice would be to select a few anecdotes about individuals who received different outcomes in the criminal justice system as the basis for condemning the entire system’s failures. Any unequal treatment can provide the basis for examination and criticism, but in a large country with a population in excess of 250 million people, it would be virtually impossible to ensure identical treatment for every individual. Moreover, it can be