

Faith, Justice, and the Teaching of Criminal Procedure

Marquette Law School Professor Michael M. O'Hear delivered the following remarks at last year's sixth annual Conference of Religiously Affiliated Law Schools, held at Baylor Law School. The Marquette Law Review printed the remarks as an essay, which we reproduce here because we believe that it will be of interest to a number of members of the legal profession.

Essay by Professor Michael M. O'Hear

Many of us who teach at religiously affiliated law schools find ourselves pondering from time to time the significance of the religious affiliation. Legal education, after all, is a form of professional training, and the legal profession is a decidedly secular one. Our students, by and large, come to us seeking the knowledge and skills they will need to be successful in this secular undertaking. Most, I suspect, would regard proselytizing in the classroom, or any extended, overt treatment of matters of faith, as, at best, a distraction from the true mission of the law school.¹ Indeed, many religiously affiliated law schools boast such religious diversity among students and faculty that it is hard to imagine any teacher promoting an aggressively sectarian agenda in the classroom without causing a bitter and divisive backlash from students and colleagues.

One can, of course, debate whether religiously affiliated law schools ought to strive for greater homogeneity of religious belief. Should, for instance, Catholic law schools hire only Catholic teachers and admit only Catholic students? My own instincts are that a school that purports to prepare students for professional careers in an increasingly diverse American society ought to deliver its education in an institutional environment that promotes comfort with, and appreciation of, important forms of social diversity, including religious. But this difficult question is not really my subject in this essay. Instead, for present purposes, I will simply assume that it would be unwelcome and inappropriate for me, in my law school classroom, either to seek converts to my religious faith or to persuade my students, on strictly religious premises, to adopt particular positions on controversial social issues that are closely associated with one church or another (e.g., the anti-abortion or anti-death-penalty positions of the Catholic Church).²

Does this mean that I must check my faith at the classroom door? My answer is a qualified *no*: faith values need not be wholly suppressed. Even with a due regard for the diversity of religious beliefs within the classroom and the predominantly secular expectations that most students have of their professional education, I do think that I can appropriately introduce into the classroom normative perspectives on the law that are informed by my faith values. I



should hasten to underscore what, for me, is an important distinction, that is, between perspectives *informed by*, as opposed to *derived from*, faith values. I have in mind principles of human dignity and the value of life that, for me and many others, resonate profoundly with our religious traditions, but that do not necessarily depend, in an intellectual sense, on any particular theological framework.

Is this approach really any different from what I might employ in the classroom at a nonreligiously affiliated law school? I have never taught at such a law school, so I cannot say with certainty whether I would feel equally comfortable with this approach in other contexts. I can say that, despite the essentially secular nature of our undertakings, I do perceive a real openness at *my* religiously affiliated law school to normative perspectives that are morally richer than formalism, law and economics, or legal process. And it is not entirely implausible that this openness is enhanced, at least on the margins, by our religious affiliation, by our chaplain, and by the small acknowledgments of a higher being we routinely make as an institution, such as the saying of invocations and benedictions at formal law school events.

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In the remainder of this essay, I will move from the general to the specific, providing an illustration of

how my teaching of one course, Criminal Procedure, is informed by my faith values. In particular, I will focus on one important challenge with which I wrestle when teaching Criminal Procedure: how to encourage students to think about procedural justice in ways that go beyond the conventional reliability paradigm, that is, the view that procedural safeguards exist solely in order to minimize the risk of wrongful convictions.

By way of background, I will begin with a critique of the American criminal justice system that is grounded, at least in my mind, on some core elements of my Christian faith. I do not mean to suggest that this critique is Christian or Catholic *per se*, but rather that, to my way of thinking at least, the critique gains particular force from its connection to certain values espoused by the Christian Gospels. These values may be summed up as follows. All human beings are children of God and members of the Body of Christ. As such, each person possesses an essential and irreducible dignity that must be respected by all other people. Jesus provides our great model here. Time and again, in the Gospels, He reaches out to, and shows compassion for, the socially marginalized: the poor,³ lepers,⁴ the disabled,⁵ tax collectors,⁶ the woman caught in adultery,⁷ members of disfavored ethnic groups,⁸ and even one of the criminals crucified next to Him.⁹ Jesus teaches that all of us—including, perhaps most notably for my purposes, those who violate our criminal laws—have intrinsic value in the eyes of God, regardless of social prejudices to the contrary.

This belief, however, is in tension with many of the basic premises of our American criminal justice system. For one thing, so much of the system is directed to stigmatizing, shaming, and degrading criminal defendants. Professor Whitman has done some particularly compelling work in identifying and critiquing these tendencies in the American system, for instance, contrasting the indignities of life in American prisons with the more self-consciously respectful treatment accorded Western European inmates.¹⁰

Perhaps even more insidious, though, than the intentional efforts to degrade is the criminal justice culture of speedy case processing.¹¹ Put yourselves in the shoes of a typical criminal defendant. Like most

criminal defendants, you cannot afford a lawyer to represent you. Fortunately, the state will provide a lawyer for you. Unfortunately, that lawyer—poorly paid and under-resourced—will be juggling your case along with dozens, perhaps hundreds, of others. Your contact with your lawyer will be sporadic and fleeting. Your case—like approximately 90 percent of American criminal cases—will almost certainly be resolved through a plea bargain. The deal will be negotiated by the prosecutor and your lawyers with little or no direct involvement by you, and probably based chiefly on a police officer's version of the events. Then your lawyer will present the deal to you on a take-it-or-leave-it basis. In order to pressure you to plead quickly, your lawyer is apt to repeat, and even amplify, the threats made by the prosecutor about the terrible price you will pay at sentencing if you exercise your constitutional right to a jury trial.

So when do you get your day in court?

Technically, you must speak at the change-of-plea hearing, but this involves little more than giving carefully scripted answers to a series of “yes-no” questions posed by the judge. At sentencing, you will have a greater opportunity to speak your mind, but your lawyer will discourage you from doing much more than offering a terse and unconditional apology for the crime. Your lawyer will likely say more on your behalf, but, remember, this is an overtaxed public defender: he probably will not go much beyond a brief recitation of a few factual circumstances that he believes are likely to evoke the judge's sympathy. In the end, the sentencing hearing is apt to be a remarkably short and casual affair, given that years of a human being's life may be at stake.

Defendants, in short, are often well justified in

feeling that no one in the system—not even their own lawyer—*really* cares about who they are, where they have come from, and what their perspective is on the crime. In my view, a system that makes profoundly important decisions about an individual's life without first giving that individual a meaningful opportunity to tell his or her side of the story is a system that treats human beings in a degrading fashion. Even assuming—for argument's sake—that the system “works” (in the sense that no innocent people are convicted, and no unjustifiably harsh sentences are imposed), I would still contend that the system is not a just one, at least as I understand the term *justice* in light of my beliefs about human dignity.

The reliability paradigm of procedure—which exalts conviction accuracy far above other values—is, I think, at least partly to blame for this culture of speedy case processing. Why? If the people in the system are thinking

about procedure solely in terms of reliability, they are not apt to have qualms about the

culture I have just described. By and large, the system does work, or at least gives the appearance of working, if working is understood in that limited sense of not punishing the innocent. Most people in the system, even defense lawyers, seem reasonably confident that most defendants really are guilty.

This is an understandable assumption.

In general, defendants become defendants because some nominally objective, professional law enforcement officials decided

there was probable cause that they committed a crime. Most defendants, moreover, come from socially disadvantaged backgrounds and have multiple characteristics (race, income, sex, ethnicity, education, age, criminal history, gang affiliation) that are associated with elevated levels of criminality.

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In the end, if guilt can plausibly be assumed from the outset in most cases, then, from a reliability standpoint, we may justifiably feel comfortable with the sort of highly expedited process that I criticized earlier.

For that reason, I think it important, when I teach Criminal Procedure, to help my students—many of whom will be practicing criminal law in the not-too-distant future—to see alternatives to the reliability paradigm, even though that paradigm does seem dominant in the relevant case law.

The constitutional right-to-counsel cases are a particularly effective vehicle. I start with *Powell v. Alabama*,¹² the famous Scottsboro case. A group of poor, black defendants faced capital rape charges in the Jim Crow-era South.¹³ A lawyer was not appointed until the eve of trial.¹⁴ He was obviously ill-prepared, and despite the flimsy nature of the state's evidence, the defendants were convicted and sentenced to death.¹⁵ Why should this be regarded as a due process violation (as the Supreme Court held)?¹⁶ The answer is reasonably clear: because there was no real adversarial testing of the evidence in the case, the verdict was unreliable—a good lawyer would have drawn out the gaps and inconsistencies in the stories of the complaining witnesses, and thereby prevented a wrongful conviction. It is no real stretch for students to see that a system with a high risk of wrongful convictions is not a just system.

With *Strickland v. Washington*,¹⁷ however, the story becomes considerably more complicated. David Washington, charged with capital murder, confessed and pleaded guilty against the advice of his lawyer.¹⁸ Feeling a sense of hopelessness about the case, the lawyer then did essentially nothing to prepare for the sentencing hearing.¹⁹ For purposes of comparison, I tell students about the hundreds of hours two other lawyers and I have spent on a pro bono capital case investigating the family background, education, work history, medical history, and mental health of our client. Although the efforts of Washington's lawyer plainly did not comport with the norms of experienced capital defense lawyers, the

Supreme Court rejected Washington's claim of ineffective assistance of counsel. The Court did so, in large part, by reference to what I term the reliability paradigm: there was absolutely no reason to doubt the accuracy of Washington's conviction, and the supposedly sympathetic information about Washington's personal background and mental state that was unearthed by post-conviction counsel was far less than compelling. The Court, using the language of the test it imposed for "ineffective assistance of counsel" claims, found no "reasonable probability" of a different outcome if Washington's first lawyer had done the sort of investigation and presentation of evidence that was performed by post-conviction counsel.²⁰

Justice Marshall's dissent, which I think is outstanding, embodies the contrasting dignity paradigm. Marshall wrote, "The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree."²¹ Even if he received no better *outcome* than he deserved, Marshall argued, David Washington was entitled to a better *process*.²² His lawyer—feeling "hopeless" by his own admission—gave up on him. Lost to David Washington was any meaningful opportunity to place his crimes in context; to present himself in the public setting of the courtroom as a real human being, rather than a sociopath; and to show that he was capable of doing good in the world, not just evil. In my view, Washington did indeed suffer real prejudice, measured by the rejection of his basic human dignity, even if his lawyer was wholly incapable of altering the judgment of death that was ultimately rendered.

Strickland thus functions as a terrific vehicle for encouraging students to think about procedural justice in broader terms than reliability, as well as the special role that defense lawyers may play in helping defendants to tell their side of the story.

Matters become even more complicated with *Faretta v. California*,²³ in which the Court recognized a defendant's right of self-representation. One striking feature of the case is that both the majority and the dissent

took for granted that the pro se defendant will, in general, do a poorer job of subjecting the state's case to robust adversarial testing than will the defendant represented by counsel.²⁴ Indeed, the majority acknowledged that its decision was in tension with *Powell*.²⁵ If not reliability, then what values are advanced by *Faretta*? Our discussion of *Strickland* suggests an answer: the right to mount a pro se defense ensures that the defendant really can tell his or her side of the story without a recalcitrant or incompetent lawyer getting in the way. Indeed, *Faretta* is an unusual decision in the way that the Court self-consciously subordinated reliability values to dignitary interests.

Chief Justice Burger's dissent, which emphasizes the reliability costs of self-representation,²⁶ problematizes my view that defendants should be given a fair opportunity to tell their side of the story. A defendant's view about what is important about his or her background and conduct may undermine or distract from favorable evidence that is more directly relevant to the legal issues in a case. I tell students here about a dilemma that not infrequently confronts capital defense lawyers. The law recognizes mental illness and mental retardation

in various ways as defenses to capital punishment.²⁷ Reliability values thus indicate that the capital defense lawyer should always present evidence of mental illness and retardation. On the other hand, these are stigmatizing conditions in our society. Some capital defendants have spent years attempting to overcome or hide such conditions and may view the prospect of baring such conditions in court as profoundly degrading. What should the lawyer do when the client refuses to be presented in the most legally advantageous manner, when the defendant's chosen "story" about himself omits information that might save his life?²⁸

Throughout the discussion of *Strickland* and *Faretta*, I strive for a balanced presentation, giving reliability its due and not insisting that students agree with my alternative understanding of procedural justice. Indeed, through our discussion of the *Faretta* dissent, I self-consciously attempt to problematize my view. I do hope, however, that the discussion will cause students at least to question the reliability paradigm and perhaps contribute to a greater sensitivity to issues of basic human dignity in the criminal justice system. •

Notes

1. I would, of course, except from this generalization elective courses on law and religion, church law, and the like.

2. This is not to say that *students* should be discouraged from arguing in favor of such positions in the classroom; good teachers, I think, are capable of *welcoming* a student's religious perspectives in class discussion without *endorsing* those perspectives or leaving other students feeling unduly put-upon. One might draw an analogy to the Supreme Court's discussion of a "corridor between the Religion Clauses," that is, a "space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005).

3. *See, e.g., Mark* 10:46–52 (healing of blind beggar).

4. *See, e.g., Luke* 5:12–13 (healing of leper).

5. *See, e.g., John* 5:1–9 (healing of disabled man by the pool).

6. *See, e.g., Matthew* 9:9–13 (eating with tax collectors and sinners).

7. *John* 8:1–11.

8. *See, e.g., John* 4:7–26 (conversation with woman from Samaria).

9. *Luke* 23:39–43.

10. *See, e.g., James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003).

11. Professor Natapoff offers a similar account of this culture in Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005).

12. 287 U.S. 45 (1932).

13. *Id.* at 49.

14. *Id.* at 56.

15. The weaknesses in the state's case were exposed in a later retrial involving a better-prepared defense lawyer. *See* Stephan Landsman, *History's Stories*, 93 MICH. L. REV. 1739, 1739–41 (1995).

16. *See Powell*, 287 U.S. at 71.

17. 466 U.S. 668 (1984).

18. *Id.* at 672.

19. *Id.* at 672–73.

20. *Id.* at 699–700.

21. *Id.* at 711 (Marshall, J., dissenting).

22. *Id.*

23. 422 U.S. 806 (1975).

24. *Id.* at 832–33, 838.

25. *Id.* at 832–33.

26. *Id.* at 839–40 (Burger, C.J., dissenting).

27. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (barring execution of mentally retarded criminals).

28. For a penetrating analysis of the pressure on capital defense lawyers to fit their clients into extreme "caricatures" of mental illness, see James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J. L. & HUMAN. 417, 442–46 (1996).