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This paper uses the dichotomy between Herbert Packer's (1968) two models of criminal justice advocacy—"crime control" and "due process"—as a rhetorical paradigm for understanding policy debate about the exclusion of relevant evidence at trial. Understanding the opposition between crime control and due process advocates as a rhetorical controversy, in which commonly-used ideographs camouflage dramatically different constructions of the concepts at stake, helps to illuminate the way each side mobilizes public support for their narrative of doing. While both the exclusionary rule (which prohibits the use of illegally-obtained evidence in criminal cases) and the "fruit of the poisonous tree" doctrine (which expands this rule) have been partially dismantled, they have not been abolished, and each remains a significant and productive locus of the debate over what values should inform the criminal justice process.

Introduction

In a nation where political rhetoric resounds with promises to "get tough on crime," those calling for tougher measures often find themselves pitted against civil liberties advocates in policy debates. This division is best understood through the application of a model of criminal justice advocacy developed by Herbert Packer (1968). Packer distinguishes between advocates of a "crime control" model for justice and those advocating a model which calls instead for "due process." Curiously, though Packer's dichotomy functions as a rhetorical paradigm for understanding the kinds of arguments found in criminal justice debates, and though this paradigm is frequently discussed in the criminal justice field, it has not been widely applied in communication analysis of criminal justice issues. This paper attempts to show its utility as a vehicle for assessing arguments about the exclusionary rule, which prohibits the use of illegally-obtained evidence in criminal cases, and the "fruit of the poisonous tree" doctrine, which expands this rule.

The crime control and due process models represent two competing value systems which may be encoded in the criminal process to varying degrees (Packer, 1968). They also characterize two distinct worldviews which shape competing arguments in the criminal justice realm. In this way, crime control and due process are ideological filters for constructing narratives about the best way to do justice in this country. The debate between advocates of crime control and advocates of due process can be understood through an analysis of rhetorical controversy. The position of each faction rests on an understanding of justice that is wholly inconsistent with the interests and definitions of the opposing side. In policy debates, both groups rely on the use of ideographs in order to justify their recommendations (McGee, 1980a). The ideal types embodied by the two models serve as guideposts to compare perspectives on real-life issues, such as the exclusionary rule and the "fruit of the poisonous tree" doctrine. Developed in a climate of

civil liberties concerns, these principles have been partially dismantled through a series of crime-control-oriented rulings. Yet they have not been abolished, and in fact remain a significant and productive locus of debate over the values that should inform the criminal process.

The Doctrines

Packer (1968)'s influential dichotomy between crime control and due process values can be applied to a vast array of criminal justice policy debates, from the necessity of mandatory minimum sentencing laws to the appropriateness of educational programming in prisons and jails. However, tension surfaces between these differing perspectives as early as the evidence collection phase of a criminal investigation, which inevitably becomes a central concern during the adversarial courtroom process. The United States Constitution works in tandem with a precedent-based body of collected jurisprudence to provide a blueprint for what evidence is acceptable for the prosecution to present at trial. Two crucial judicial doctrines underpin all legal decisions regarding the inclusion and exclusion of evidence in criminal cases: the exclusionary rule, and an extension of this rule known as the "fruit of the poisonous tree" doctrine.

The exclusionary rule and the "fruit of the poisonous tree" doctrine are judicial principles that stem from the Fourth Amendment, which guarantees "[t]he right of the people…against unreasonable searches and seizures," and the due process clause of the Fifth Amendment, which holds that "no person…[may] be deprived of life, liberty, or property, without due process of law" (U.S. Constitution). The exclusionary rule was designed to prevent the prosecution from introducing evidence obtained in violation of a defendant's Constitutional rights (Teague, 1982). *Boyd v. U.S.* (1886) was the first American judicial case to exclude evidence on grounds implicating the Fourth Amendment (Schroeder, 1981). According to the Court, asking Boyd to produce personal invoices as evidence violated his Fifth Amendment rights by compelling him to be a witness against himself (*Boyd v. U.S.,* 1886). The Court also held that the search and seizure of private papers was unreasonable under the Fourth Amendment (*Boyd v. U.S.,* 1886).

Twenty-eight years later came *Weeks v. U.S.* (1914)*,* wherein the defendant's private correspondence was seized by police without a warrant. The Court stated that the protection of the Fourth Amendment must be respected by those enforcing federal laws (*Weeks v. U.S.*, 1914). The *Weeks* decision was important because the Court relied exclusively on the Fourth Amendment for its judgment, and emphasized not only the nature of the evidence but the manner in which it was seized (Schroeder, 1981). In *Amos v. U.S.* (1921), the Court extended the exclusionary rule beyond private papers. Thereafter, the Court focused on the manner in which evidence was obtained rather than the nature of the evidence (Schroeder, 1981).

By 1928, the Court held that it was constitutionally required to exclude most evidence seized in violation of the Fourth Amendment; however, this applied only to individuals acting under federal authority (Schroeder, 1981). It was not until *Mapp v. Ohio* (1961) that the Supreme Court explicitly ruled that the exclusionary rule also applied to the states' prosecution of state crimes. When obscene literature was seized during an illegal search of the defendant's residence, the Ohio Supreme Court affirmed her conviction for

possessing lewd material on the basis that the Fourth Amendment did not forbid the admission of evidence obtained by unreasonable search and seizure in state prosecutions of state crimes (*Mapp v. Ohio,* 1961). The U.S. Supreme Court reversed the state court's decision, closing "the only courtroom door remaining open to evidence secured by official lawlessness" (*Mapp v. Ohio,* 1961).

Left open, however, was the question of whether or not evidence obtained indirectly from a rights violation should also be excluded. The "fruit of the poisonous tree" doctrine, declaring evidence inadmissible when the defendant can demonstrate a causal connection between the evidence and a prior rights violation (Maguire, 1964), was first espoused in 1920 in *Silverthorne Lumber Co. v. U.S.* The government admitted that it had erred in illegally seizing company papers, but desired to use knowledge gained from those papers to frame and evidence a new indictment against the company (*Silverthorne Lumber Co. v. U.S.,* 1920). However, the Court held that the Constitution prohibits not only the illegal seizure of evidence, but also all evidence resulting from it (Bain & Kelly, 1977). The "fruit of the poisonous tree" doctrine extended the exclusionary rule to all evidence discovered because of a rights violation (Maguire, 1964). The exclusionary rule thus expanded over time to include "virtually any kind of evidence" unlawfully obtained by government agents (Teague, 1982, p. 635).

Due Process Support

The exclusionary rule and the "poisonous tree" doctrine are supported by advocates of the due process model, which espouses high evidentiary standards and the primacy of individual rights (Packer, 1966). By 1965, the Court had articulated a number of reasons for evidentiary exclusion (Schroeder, 1981). These had two primary foci—the rights of the individual against whom the illegally seized evidence would be admitted and the societal interests promoted by evidentiary exclusion, specifically, the importance of securing judicial integrity and deterring illegal police actions (Schroeder, 1981). These concerns are representative of the liberal position of the 1953–1969 Supreme Court under Chief Justice Warren, which exemplified due process values (Ball, 1978; Kamisar, 2003; Thaman, 2010).

The justifications for a robust exclusionary rule emphasize the rights of the accused. For due process advocates, the interests of society are served not by an efficient criminal process, as with the crime control model, but by ensuring that the process does not impinge upon the "dignity and autonomy of the individual" (Packer, 1966, p. 239). Because the combination of stigma and loss of liberty that may result from the criminal process is considered the ultimate deprivation that the government can impose, the criminal process must be judicial and adversarial, forcing the prosecution to fight at every stage to prove the legal guilt of the defendant (Packer, 1966). Due process values therefore demand the creation and enforcement of laws which protect citizens from improper searches and seizures, and from any advantages gained over them as a result (Kaplan, 1974).

The due process world view is compelling in its evocation of values of freedom and autonomy, values which are enshrined in the American imagination. In due process rhetoric, *freedom* and *autonomy* are ideographs, or virtue words, defined by McGee

(1980a) as "ordinary language term[s]…[which] represent…commitment to a particular but equivocal and ill-defined normative goal" (p. 15). Ideographs commonly appear in political discourse as explanations or justifications intended to strengthen public support for a particular political position or action (McGee, 1980a; Sandmann, 1996). Although ideographs provide the illusion of specificity, their mutability between contexts furnishes them with an essential ambiguity that is the root of their rhetorical power (McGee, 1980a). Crime control supporters do not claim to devalue *freedom* or *autonomy*; rather, due to the abstract and individualized nature of these concepts, they are able use the same ideographs to appeal to a different subset of the community while implying normative consensus.

Crime Control Criticism

The crime control position on the exclusionary rule was summarized in *People v. DeFore* (1926), where Judge Cardozo famously asked "[s]hould the criminal go free because the constable has blundered?" This same sentiment was articulated by Chief Justice Burger in his dissenting opinion in *Bivens v. Six Unknown Federal Narcotics Agents* (1971). Justice Burger argued that any potential benefits of the exclusionary rule did not outweigh "the high price it exacts from society—the release of countless guilty criminals." Burger's statement embodies the central concern of crime control advocates with regards to evidentiary exclusion. This is a compelling argument, drawing upon fear and a sense of injustice to provoke a strong emotional response.

The crime control model emphasizes truth-seeking and administrative efficiency and prioritizes factual guilt over legal guilt (Packer, 1968). From a crime control viewpoint, allowing guilty persons to go free is the ultimate failing of the criminal process (Packer, 1968). The crime control model accepts errors as a consequence of efficiency insofar as they do not interfere with the goal of repressing crime by allowing guilty persons to go free or damaging the reputation of the justice system to the degree that the deterrent effects of the law are diminished (Packer, 1968). Markman (1997) argues that the exclusionary rule is responsible for "releasing the obviously guilty…permitting juries to be misled…and…[the] tolerance of false testimony" (p. 431). These so-called "crummy technicalities" have undermined the integrity of the criminal process such that the government cannot preserve the people's right to freedom from predators (Markman, 1997, p. 431). Crime control advocates believe that when criminals go unpunished, social disorganization and loss of social freedom inevitably follow (Packer, 1968). From a crime control perspective, the implied meaning of *autonomy* has nothing to do with protecting individuals against the tyranny of the state; rather, *freedom* is equated with undiminished safety for the law-abiding citizens of the community.

This directly opposes the view articulated in *Mapp v. Ohio* (1961) that "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws." These opposing conceptions of *freedom* bear a striking resemblance to the alternative meanings of *liberty* identified by McGee (1980b). To illustrate the multiplicity of meanings in an ideograph, McGee (1980b) retells the anecdote of Antun Robecick, a Gary, Indiana steelworker who emigrated to his native Yugoslavia after retiring. Perhaps unexpectedly, Robecick is unable to judge which country has more freedom: Yugoslavia is a totalitarian regime

controlled by a sole man, yet he felt safe to walk its streets alone at night (McGee, 1980b; Sandmann, 1996). In contrast, Robecick had freedom of thought and speech in the United States, but feared for his safety and felt like a prisoner in his own house (McGee, 1980b; Sandmann, 1996). Having experienced firsthand both conditions, and understood both as manifestations of his relative freedom, Robecick was the unique position of seeing the true ambiguity of an ideograph. To those entrenched in a crime control or due process worldview, however, only one meaning is visible.

Here, the rhetorical controversy over the meaning of justice—another ideograph central to the debate between crime control and due process proponents—becomes especially clear. McGee (1980a) emphasizes that, at any specific moment in history, all ideographs are synchronically connected to each other like brain cells linked by synapses. *Justice* therefore is informed by understandings of *freedom* and *autonomy* and vice versa. From a due process standpoint, violations of the procedural integrity of the criminal process inflict greater harm on society than "lost" convictions (Packer, 1968). This is evident in the privileging of legal, procedurally-determined guilt over factual guilt (Packer, 1968). Opposing Markman (1997), Thaman (2010) argues that the security of the populace is most threatened when law enforcement agents are able to achieve convictions even when they violate citizens' rights in the process. It is not the criminal going free that threatens social disorder and injustice, but the government overstepping its bounds (Packer, 1968). Thus, it is not a "terrible cost" when criminal convictions are forfeited due to constitutional violations (Thaman, 2010, p. 384). Due process advocates emphasize the victimless nature of many of the crimes in cases where convictions are "lost" due to evidentiary exclusion, usually involving the suppression of drugs or other "harmless" evidence (e.g. Kamisar, 2003; Kaplan, 1974; Schroeder, 1981; Thaman, 2010). Conversely, crime control advocates condemn evidentiary exclusion for allowing killers, rapists, and other violent criminals to unjustly go free (e.g. Brown, 1982; Markman, 1997; Kaplan, 1974; Wilkey, 1979).

From a crime control perspective, the criminal process should be principally concerned with factual guilt (Packer, 1968). Supporters of a crime control model see the exclusionary rule as a distortion of the truth insofar as it suppresses "undeniable facts" by excluding material evidence that indicates factual guilt on the part of the defendant (Markman, 1977; Schroeder, 1981; Wilkey, 1979, p. 222). Crime control advocates may support the exclusion of evidence of questionable reliability, such as coerced confessions (Wilkey, 1979), because these errors jeopardize the reputation of the criminal process and damage its deterrent effects (Packer, 1968). However, they are resolutely opposed to most cases of evidentiary exclusion, arguing that the rules are unnecessary for the truly innocent and only protect guilty persons (Markman, 1997; Wilkey, 1979).

The Exceptions to the Rule(s)

Following the Warren Court's establishment of a robust exclusionary rule, the Supreme Court has limited its use via an increasing number of exceptions (Kamisar, 2003; Mertens & Wasserstrom, 1981). This erosion reflects the adoption of crime control values by the Court. The due process counterargument is illustrated by Justice Brennan's dissent in *U.S. v. Havens* (1980), where the Court ruled that the impeachment of the defendant using illegally-seized evidence did not violate the defendant's Fourth Amendment rights

(Teague, 1982). Decrying this new exception to the exclusionary rule, Brennan asserted that "what is important is that the Constitution does not countenance police misbehavior, even in the pursuit of truth" (*U.S. v. Havens*, 1980). However, in keeping with calls for convictions based on truth, or factual guilt (e.g. Markman, 1997; Wiley 1979), the Court began prioritizing the efficient functioning of the criminal process above civil liberties concerns.

The Supreme Court's adoption of a "good faith" exception to the exclusionary rule stands as one of the most significant retreats from the exclusionary rule as originally established. Since 1974, members of the Court advocated the adoption of an exception mandating that evidence would not be excluded on the basis of rights violations in cases where law enforcement agents acted under a reasonable, good-faith belief that their actions were constitutional (Ball, 1978). In Fourth Amendment cases, most good faith violations involve failure to meet probable cause requirements (Ball, 1978). An officer may make a "good faith mistake," believing that the facts constitute probable cause, or commit a "technical violation" by relying upon a statute, warrant, or precedent which is later invalidated (Ball, 1978, p. 635).

U.S. v. Williams (1980), wherein the United States Court of Appeals adopted a good faith exception to the exclusionary rule, represents what Justice Brennan termed its "slow strangulation" (Brown, 1982, p. 660). The court ruled that when the exclusion of evidence is sought because police misconduct led to its discovery, the evidence should still be admitted when the conduct, even "if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper" (*U.S. v. Williams,* 1980). The court justified this exception on the basis that the purpose of the exclusionary rule is to deter police misconduct; thus, excluding evidence when the police acted rightly is unnecessary (Brown, 1982; Mertens & Wasserstrom, 1981).

The Supreme Court applied the good faith exception four years later in *U.S. v. Leon et al.* (1984), where it held that evidence seized in reasonable, good-faith reliance on a search warrant which was subsequently invalidated should not be barred from admission. Subsequent decisions were premised on the understanding that *Leon* supported a categorical exception to the exclusionary rule for police misconduct contingent on clerical errors (e.g. *Arizona v. Isaacs*, 1995).

Herring v. U.S. (2009) may be said to represent a "sea change" in exclusionary rule jurisprudence, as it was the first case to take the mental state of the police into account (Posner, 2009). By holding that an officer's actions must exceed mere negligence, *Herring* paved the way for further expansion of the good faith exception (*Herring v. U.S.,* 2009). In *Davis v. U.S.* (2011), the Court again ruled that the reasonable, good-faith actions of law enforcement precluded the exclusion of evidence. The Court further stated that the exclusionary rule applies only when "police exhibit deliberate, reckless, or grossly negligent" disregard for the Fourth Amendment (*Davis v. U.S.,* 2011). Justices Breyer and Ginsburg dissented, arguing that the good faith exception would soon swallow the exclusionary rule entirely (*Davis v. U.S.,* 2011). This may not be an unwelcome development for the Court, however, which has long exercised its discretion in serious

cases to stretch legal doctrine and hold dubious searches and seizures legal (Kaplan, 1974).

The Court carved out a number of similar exceptions for the "fruit of the poisonous tree" doctrine. In *Silverthorne Lumber Co. v. United States* (1920), the Court stated that illegally-obtained facts could still be admitted if knowledge of them was garnered from an independent source. The burden of proof lies with the prosecution, who must convince the court that the evidence is independent of the unlawful act (Maguire, 1964). In *Nardone v. U.S.* (1939), the Court established a second exception, that of attenuation (Bain & Kelly, 1977). According to the majority, the prosecution may argue that the connection between the initial violation and the derived evidence has become "so attenuated as to dissipate the taint" of illegality (*Nardone v. U.S.*, 1939). In *Wong Sun v. U.S.* (1961), the Court restated the attenuation exception, but their language has been used to support another exception, which applies where the government "undoubtedly would have (probably would have) (could have) (might have) lawfully discovered the 'tainted' evidence" through legal means (Kamisar, LaFave, & Israe, 1974, qtd. in Bain & Kelly, 1977, p. 625). This "independent discovery" exception is the most nebulous and controversial of the "poisonous tree" exceptions (Bain & Kelly, 1977).

Crime Control Support

Crime control proponents support these exceptions; even those who argue for the complete abolition of the exclusionary rule believe that caveats, particularly the good faith exception, mitigate its worst qualities (Markman, 1997). One criticism of the exclusionary rule prior to *U.S. v. Williams* (1980) was that it failed to discriminate between "grossly willful" police misconduct and errors made under the best possible judgment (Wilkey, 1979, p. 226). The good faith exception prevents the most egregious cases of criminals going free due to minor violations (Brown, 1982) and increases the efficiency of the criminal process in a manner consistent with crime control goals by protecting the use of probative evidence in judicial fact-finding (Ball, 1978). The exceptions of independence, attenuation, and inevitability that mitigate the fruit of the poisonous tree doctrine similarly boost judicial discretion and make it less likely that evidence will be excluded.

Nonetheless, many crime control advocates view the exclusionary rule and "poisonous tree" doctrine as fundamentally detrimental to the criminal process. Like other procedural requirements associated with due process, the mandatory exclusion of evidence "fosters perjury, consumes valuable judicial resources, and contributes to court delays" (Schroeder, 1981, p. 1383), hampering crime control premiums on speed and finality (Packer, 1968). These hurdles allow innocent defendants to languish in jail and dangerous individuals pending trial to remain free (Schroeder, 1981). This contravenes the crime control objective of quickly screening out the innocent and rapidly securing the convictions of the guilty, which ultimately contravenes the primary goal of *justice* as conceptualized by crime control supporters (Packer, 1968). The exclusionary rule distracts from the crucial question of guilt versus innocence (Schroeder, 1981), generating political hostility by flaunting the costs of Fourth Amendment rights in terms of crime control (Kaplan, 1974).

Due Process Concerns

From a due process perspective, however, the diminishing strength of the exclusionary rule and its "poisonous tree" extension is a cause for concern. Kamisar (2003) suggests that "nowadays the criminal only 'goes free' if…the constable has blundered *badly*" (p. 133). Indeed, the blunder must now demonstrate "deliberate, reckless, or grossly negligent" disregard for the Fourth Amendment (*Davis v. U.S.,* 2011). Limiting the exclusionary rule to bad faith violations might encourage police to engage in unlawful conduct with the belief that the courts will forgive all but the most egregious behavior (Kaplan, 1974; Schroeder, 1981). Likewise, the gradual undermining of the "poisonous tree" doctrine, achieved by balancing the seriousness of the unlawful act with the connection between the act and the derivative evidence (Thaman, 2010), has increased opportunities for the prosecution to convict based on rights-violating evidence. Because the stigma and deprivation of liberty that result from criminal convictions are so severe, due process advocates argue that this represents a greater risk to public security, or *autonomy*, than "lost" convictions (Packer, 1968; Thaman, 2010). Thaman (2010) asserts that each time a (non-violent) defendant escapes the "Draconian punishment" of the U.S. through a successful suppression motion, it is "a plus for humanity and human rights" (p. 384). Like the crime control argument that evidentiary exclusion will improperly excuse guilty persons, this rhetoric draws upon Americans' desire for *justice* in criminal procedure, positing instead that U.S. criminal sanctions are so unduly harsh as to make "failure" preferable to conviction in cases of unconstitutional prosecution.

Conclusion

Ultimately, the exclusionary rule and the fruit of the poisonous tree doctrine are hallmarks of the due-process-oriented Warren Court. Subsequent Supreme Court decisions have focused more on expeditious crime control, dismantling these exclusionary rules through proliferating exceptions. However, despite calls for their abolition, the principles have not been weakened to the point of disintegration. In fact, evidentiary exclusion remains a fruitful catalyst for important debates over what values should inform criminal justice policy. As Packer (1968) emphasized, crime control and civil liberties protection are not mutually exclusive; both goals coexist in the contemporary criminal process as they did in the heyday of the Warren Court. Examining old tensions and exploring new areas of dispute are crucial for understanding and improving the criminal process and ensuring the security of society at large. Packer's two models provide the foundation for the arguments presented in debates between advocates for broader law enforcement powers and those demanding greater protection of human rights against state encroachment. Understanding the opposition between crime control and due process advocates as a rhetorical controversy, in which commonly-used ideographs camouflage dramatically different constructions of the concepts at stake, helps to illuminate the way each side mobilizes public support for their narrative of doing *justice*.

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