The Future of Criminal Justice
Albert W. Alschuler

Winston Churchill once observed that the quality of a nation's civilization can be largely measured by the methods that it uses in the enforcement of its criminal law. In the final decade of the twentieth century, Americans can hope that there are other yardsticks.

Recent years have marked some milestones in our nation's penal history. Over one million Americans are currently behind bars, and the United States now imprisons a substantially higher proportion of its population than any other nation whose incarceration rates we can approximate. A decade ago, South Africa and the Soviet Union imprisoned more people per capita than we did, but we have now overtaken them by a substantial margin.

As the number of Americans behind bars has burgeoned, so has the number under other forms of correctional restraint. The Bureau of Justice Statistics offered the following comparison: "At the end of 1980, approximately 1.8 million persons were under the care, custody, or control of a correctional agency or facility. At the end of 1989, total correctional populations numbered nearly 4.1 million adults." The BJS reported that at the end of 1989 "[o]ne in every 25 men and 1 in every 173 women were being supervised."

Some demographic groups are obviously more vulnerable to participation in crime and to punishment than others. Today nearly one out of four black men in their 20s is under some form of criminal restraint—prison, jail, probation, or parole.

The doubling in the rate of criminal punishment during the past decade is not attributable to any increase in the rate of crime. Indeed, crime rates are lower today than they were a decade ago in almost every offense category. Americans appear to know more about occasional upward blips in the crime rate (the city's "bloodiest weekend in a decade") than about the generally downward slope. Because crime is news, some tilt in media reporting seems inevitable. In the electoral arena, moreover, figures who appeal to and contribute to the public's fear of crime seem never to have had the field so fully to themselves.

Political scientists suggest that we live in the time of the "plebiscite Presidency." Public officials can no longer count on the backing of stable coalitions organized along party lines. Their goal is often short-term approval, and they seek issues that promise immediate payoffs and that already have strong public support. Partly for this reason, they fear endorsing any position that an opponent can characterize as "soft on crime" in a 30-second television commercial.

As America's prison population doubled and more during the 1980s, the proportion of Americans who said that criminal sentences were "not harsh enough" increased from 79 percent to 85 percent. A former Chairman of the Illinois House Judiciary Committee, John Culerton, told a conference of judges that he had struck a bargain with the other members of his committee. No one would seek to increase the sentence for a crime by more than one "level" during a single session of the legislature.

"That way," Culerton explained, "we could leave room to do it again."

The politics of resentment are more marked in America than elsewhere. Our treatment of capital punishment illustrates the contrast. Every Western democracy other than the United States has effectively abolished the death penalty, and when members of Canada's Parliament proposed reinstituting this penalty in 1987, the nation's Conservative Prime Minister led a decisive majority in opposition. America alone continues to enact new death penalty legislation and to impose capital punishment more frequently.

Similarly, America has embarked on a $10 billion-per-year war on drugs. Presidents and "czars" speak of a drug epidemic. As best anyone can judge, however, the rate of drug offenses has declined more substantially than the rate of other crimes. Only the number of drug cases in the courts has soared.

The drug war itself probably is not

As the nation's Civilian War on Drugs continues, the question remains: Where is the enemy? A historical perspective is relevant here. Before 1900, the nation's drug-related law enforcement efforts were aimed at medical and religious institutions. Dr. William J. H. Rolfe, who presided over the U.S. Drug Enforcement Administration from 1971 to 1973, is said to have beenLabeling things as drugs was often a way of criminalizing and classifying behavior. Today, many antithetic formulations are common: narcotics, hard stuff; soft drugs, those that are not

The major cause of the decline in drug use. Law enforcement efforts have focused primarily on limiting the supply of drugs, yet cocaine and heroin have been among the few commodities in America whose prices have moved in the opposite direction from inflation. The combination of declining use and declining price suggests that diminished drug use is the product of reduced demand rather than reduced supply. People "just say no," and the use of legal drugs—alcohol and tobacco—has declined along with the use of illegal substances.

American criminal procedure has become an almost schizophrenic system of feast and famine. In 1990, the longest criminal trial in American history came to an end two years and nine months after it had begun. This trial did not involve financial machinations of great complexity or an army of white collar defendants; the de-
more than 500 cases that she handled during the year. Robert followed her advice.

The authorities later realized that Robert H. was not guilty of the charge to which he pleaded guilty; through a bureaucratic error, they had confused him with someone else. Despite Robert's innocence, however, the public defender may not have given him bad advice. She told him that, if he pleaded guilty, he could go home that day; and if he wanted a trial, he could have one—after waiting in jail for perhaps another year.

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Sentencing guidelines and mandatory minimum sentences have done for sentencing what plea bargaining has done for adjudication. Judges and other officials need no longer pause to consider the facts of their cases. We allocate punishment wholesale.

One recent Federal Drug Control Act, for example, imposes a mandatory minimum sentence of five years for the possession of five grams of crack cocaine. Five grams is the weight of two pennies or five paperclips. A gram of crack contains three to five "hits," and five grams seems roughly to mark the borderline between possession for personal use and possession for small-scale dealing. During the fiscal year that ended in the summer of 1989, federal judges sentenced about 400 first offenders for the possession of five grams of crack. These judges—mostly Reagan, Carter, Ford and Nixon appointees to the bench—placed 300 of the 400 offenders on probation. Had the same 400 offend-
individual offenders and the punishments they deserve.

As to the future, I offer two predictions. First, the prophesy that Abraham Lincoln called true and appropriate in all situations: “This too shall pass away.” (Alas, I see little sign that it will happen any time soon.) And second, a still older prediction: “Whatsoever a man soweth, that shall he also reap.” As Winston Churchill recognized, we cannot diminish the least favored members of our society without at the same time diminishing ourselves.

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The Supreme Court and Our Future

Larry Lessig

If a century ago one had predicted the Supreme Court’s next hundred years, one would no doubt have gotten it wrong. Within five years of such a forecast, the Court would have held that segregation was consistent with the equal protection of the law; sixty-three years later, that it was not. Within six years, the Court would have begun the transformation of the 14th Amendment from a guarantee of equality to a guarantor of economic liberty; forty-six years later, on that front at least, it would have beaten a full retreat. Within some sixty years, it would have launched a different activist campaign, this time to protect the rights of some of the weakest in society; but as the century closes, that battle too has come to an end. At best, it was a century of cycles; at worst, it was confused.

Of a prediction of the next hundred years, there is little reason to expect anything more. At most we can speak about the very near future, a clue to which may be found in the very recent past. Consider just one case. It is the law that a criminal conviction obtained by general verdict cannot stand if one of the grounds upon which the conviction could have rested is unconstitutional or in some other way illegal. As the Supreme Court held in Yates v. United States in 1957, “a verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.”

In Griffin v. United States, decided this Term, the Court considered the types of insupportable grounds that are within the rule of Yates—specifically, whether the Yates rule covers a ground that is insupportable because the evidence it relied upon is insufficient as a matter of law. In an opinion written by Justice Scalia, the Court (without dissent) said that it did not. The Yates rule, the Court held, applied to “legal errors” only, and for these purposes, insufficiency of evidence is not “legal error.” True, the Court said, in some cases the Court has held that insufficiency of evidence is legal error; indeed, it is constitutional error. But even if sometimes insufficiency of evidence is “legal error,” sometimes it is not. In this case, not. As the Court viewed it, the difference was mere “semantics.”

For what was important was that “what the petitioner seeks is an extension of Yates’ holding . . . to a context in which we have never applied it before.” Griffin is a criminal (or at least may be); with respect to criminals, the Constitution now protects only what it now protects; its protections will not be extended to something more.

Which is not to say that they will not be contracted to something less. The recent past is littered with examples of the Court’s willingness to change constitutional law when change means less protection for the currently disfavored, and more protection for the currently favored: Less protection for criminals, for the poor; more protection for states, for racial majorities, and for the police. For this is no less an activist Court than courts before—activist both in the sense that it constructs constitutional barriers to the decisions of democratic majorities (by resisting affirmative action and creating “states’ rights”), and in the sense that it pursues its reconstructive task at an ever increasing rate.

Conservatives argue that such change is conservative because restorative, but restorative to what end? Even if the Constitution has been illicitly “amended” by past activist Courts, does anyone really believe that the public views this current restoration as a reaffirmation of original principles rather than as yet another illicit and political attempt by yet another president to “amend” the Constitution through judicial appointment? Will the result of this restoration be a public reawakened to the possibility of constitutional law, or a public increasingly cynical about constitutional politics? The Court calls itself conservative, but we have known conservatives. Justices Harlan and Frankfurter were conservatives. These justices are not. This Court, like the Court before it, like the Court before it, and like the Courts before it, has its own conception of a properly activist role, and with a certain unseemliness, is quite eagerly pursuing it.

The result will be a relatively more statist society, though statist in an oddly skewed sense. Government will have more power as individual rights are curtailed; but less power as majority rights (resisting affirmative action) and states’ rights (resisting regulation by Congress) are expanded. (The one exception may be economic and property rights. There, individual rights may increase—a gain for some of those already possessed of the most power in society.) And barring calamity, this will be the pattern for at least the next two decades, for the conservatives have succeeded in lacing the court with youth—the average age of the last five appointees is fifty-three, the average retirement age over the century is seventy-two; the most recent addition, Justice Thomas, will just speed the reform.

Beyond substance, however, there is something particularly arresting about