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The Rights of the Accused

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In determining what protections to accord those accused of criminal activity, the Supreme Court has tried to balance the Constitution's protection of individual liberties and the state's need to ensure public safety. Ideally, criminal justice procedures would protect citizens from excessive intrusions by government and protect the falsely accused, while enabling the state to prosecute criminals and punish those who undermine the social order. In practice, we have seen a debate between proponents of a due process model, which emphasizes the protection of individual liberties against the abuse of government power, and proponents of a crime-control model, which gives priority to maintaining safety and security through the detention and prosecution of accused criminals (Packer 1964; Roach 1989).

This chapter examines changing public attitudes toward these competing priorities over the last half century in light of three major Supreme Court decisions (*Gideon v. Wainwright*, *Miranda v. Arizona*, and *Mapp v. Ohio*). Through these decisions, the Supreme Court bolstered the due process rights of the accused, even as the public by and large preferred to strengthen prosecutorial power. In the 1970s, for example, almost half of the public expressed a willingness to forgo certain constitutional rights in order to control crime.

Since then, polls indicate greater public acceptance of the Court's decisions in these landmark cases. However, the public continues to perceive a trade-off between protecting individual rights and aggressively fighting crime. When forced to choose, the majority continues to value public safety over the rights of the accused.

The analyses presented in this chapter suggest some important points about the power of the Court and its role in shaping the attitudes of the mass

public. First, the relationship between Court decisions and public opinion must be understood in a broader political context that includes the interplay among political institutions with different incentives and constituencies. In the case of rights for criminal defendants, the ideological push of the Court was countered with a steady and strong push back from the executive, the legislature, law enforcement agencies, and the media. On this issue, it appears these competing forces may have ultimately held more sway over public opinion.

Second, trends in public opinion regarding the rights of the accused suggest that although the Court may have significant power to legitimize procedural rules, public support for specific limits on law enforcement and prosecutors does not always extend to the ideological justification for these limits. Although over time much of the public has come to support the rules of criminal procedure that were outlined by the Court in the 1960s, public opinion is still skeptical of the philosophical underpinnings of those rules.

The "Rights Revolution"

In the 1960s, in a trio of cases concerning the constitutionality of criminal procedures in state courts, the Supreme Court expanded legal protections granted to the accused. In *Mapp v. Ohio* (1961), the Court revisited an issue it had addressed in 1949 in *Wolf v. Colorado*: in a state criminal proceeding, did the due process clause of the Fourteenth Amendment disallow the admission of evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable search and seizure? In *Wolf*, the Court found such evidence admissible; in *Mapp*, it concluded that such evidence was inadmissible—a principle that has come to be known as the exclusionary rule.

Two years later, in *Gideon v. Wainwright*, the Court revisited *Betts v. Brady* (1942), in which the Court held that the right to a lawyer was guaranteed in state criminal cases only when special circumstances would otherwise make a fair trial impossible, such as particularly complicated or capital cases. Justice Black delivered the majority opinion in *Gideon*, asserting that, contrary to *Betts*, the guarantee of counsel was a right deemed by the Court to be "fundamental and essential to a fair trial."

And in 1966, in *Miranda v. Arizona*, the Court addressed the question of whether constitutional rights could be assured in practice if the police were not required to inform the accused of those rights. The Court ruled that a confession would be admissible in court only if, prior to custodial interrogation, the police had made the detainee aware that he had a right to remain silent, that anything he said could be used against him at trial, that he had a right to speak with an attorney and to have an attorney present during questioning, and that if he could not afford to hire an attorney, the state was obligated to appoint one for him.

In these and several other cases, the Warren Court established precedents to protect the rights of those accused of crimes. In many ways, however, the

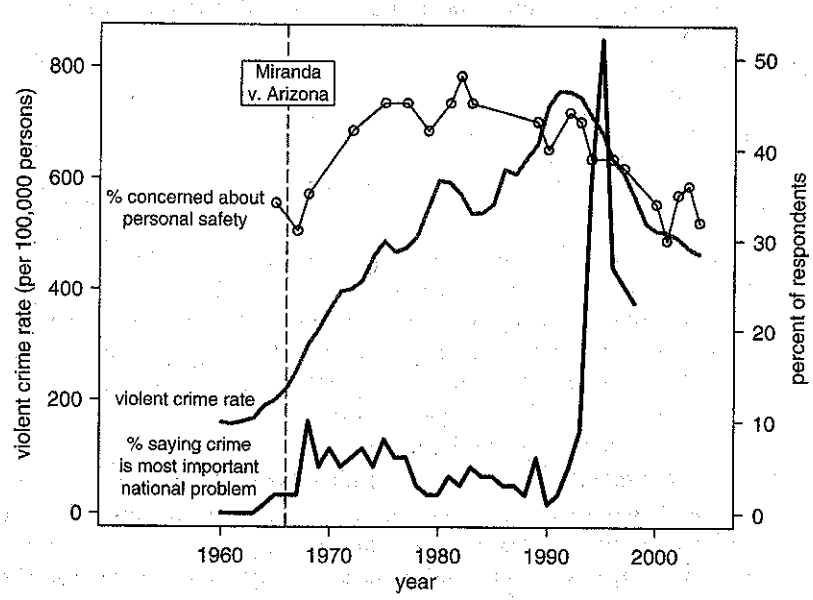

Figure 2.1. Crime rates and public concern about crime, 1960–2004.
concern about personal safety: the percentage of respondents answering yes to the question: Is there any area near where you live—that is, within a mile—where you would be afraid to walk alone at night? (Source: Bureau of Justice Statistics).
violent crime rate: violent crimes per 100,000 persons (Bureau of Justice Statistics).
crime as most important problem: the percentage of respondents mentioning crime in response to the question: What do you think is the most important problem facing this country today? Source: Gallup.

Court's decisions were out of step with public opinion and may even have shifted public opinion against the Court's pro-rights position.

In part, this was because the Court's decisions were handed down at a time when the public was becoming increasingly concerned about rising rates of crime (see Figure 2.1). According to the Bureau of Justice Statistics, the rate of violent crime doubled during the 1960s, from 161 crimes per 100,000 persons in 1960 to 329 per 100,000 in 1969. The rate of property crime also doubled, from 1,726 per 100,000 persons in 1960 to 3,351 per 100,000 in 1969. In Gallup surveys, the percentage of respondents who identified crime as the most important problem facing the country rose from 1–2% in the mid-1960s to 5–10% in the late 1960s and early 1970s, and concerns about personal safety also increased.

Vocal critics held the Supreme Court accountable for these rising rates of crime: "the rate of crime did skyrocket in the midst of the Warren Court's heyday, a time when the accused and convicted seemed to win a victory every week, and so it is not surprising that some should conclude that the Supreme Court was at fault" (Caldeira 1986, 1216). As the Court continued to dramatically

alter the balance between protections for the accused and the state's prosecutorial powers, elected officials in both parties seized on the burgeoning dismay over the rising crime rate. "The political tide began to build against the due process revolution two years before *Miranda* when Barry Goldwater seized upon law and order as a campaign issue. Richard Nixon exploited fear of crime to win the presidency in 1968. He blamed crime on decisions like *Miranda*, which allegedly forced prosecutors to free guilty criminals" (Baker 1983). Nixon promised to appoint more conservative justices to the bench, judges who would end the coddling of criminals and return authority to police officers (Smith et al. 2003, 130), and some conservative legislators went so far as to call for Warren's impeachment (Friedman 1993, 302).

The U.S. Congress was likewise unwilling to endorse the Court's pro-rights mandates. Only two years after *Miranda*, Congress passed a law that substantially decreased the role of *Miranda* warnings in determining the admissibility of confessions.[1] The Supreme Court did not conclusively address this law until 2000, when in *Dickerson v. United States* it asserted that "*Miranda* [had] announced a constitutional rule that Congress may not supersede legislatively."[2]

The Supreme Court was also chastised by various state courts for overreaching and for trampling on state sovereignty through decisions that sought a "federalization of the criminal law" (Specter 1962; Canon 1973). In an article presenting the "Prosecutor's Stand," Fred Inbau concurred, arguing that "the Court has taken it upon itself, without constitutional authorization, to police the police... [going] beyond all reasonable bounds in imposing its own divided concepts of due process upon the states" (1962, 1414).

Many law enforcement officials also spoke out against the Court, criticizing its decisions for tying their hands (Canon 1973); as a veteran law enforcement official wrote, "We believe that court decisions have gone too far, that the courts are, in many cases, ignoring the public right to protection" (Leonard 1965). Other police officials found more to support in the Supreme Court's rulings, but even they warned that "law enforcement [must] not be deterred from its task of maintaining law and social order, by restrictions which may render it substantially less effective" (Broderick 1966).[3]

The general public may not have understood the finer points of constitutional law, but they heard and responded to media reports that were critical of the Court's decisions (MacKenzie 1968; Leo 1996; Leo & Thomas 1998, xvi) and to elite consternation over rates of rising crime and an increasingly activist Court (Baker 1983): "These dramatic decisions of the Warren Court proved to be quite controversial.... The Court was criticized, sometimes hysterically, on the grounds that it was perverting the meaning of the Constitution, tilting the scales too far in the criminal's direction" (Friedman 1993, 302).

Over the course of the 1970s, a liberal activist Court committed to the protection of individual rights became increasingly at odds with a public

concerned about rising crime rates and social upheaval. Noting that public confidence in the Court dropped precipitously from 1966 to 1984 and "hit rock bottom in 1971," Gregory Caldeira presents some evidence to suggest that as the Court handed down more rulings in support of the rights of the accused, the public's confidence in the Court decreased (1986). Although admitting that the public may not have "sharply defined conceptions of the Court or its policies," Caldeira concludes that "the mass public as a whole responds in a systematic fashion to shifts in the public policies the judges enunciate. Clearly, the public has little sympathy for either the esoterica of criminal procedure or the people who most often utilize these safeguards and apparently translates these attitudes into lack of confidence in the Court" (1986, 1223).

The story that emerges, then, is more a tale of a public at odds with the Supreme Court than a public led by it. It is difficult to delineate the precise role the Court's decisions played in sparking the backlash of the late 1960s and early 1970s, and it is likely that public opinion was more directly shaped by the fear that social forces were moving the country toward greater unrest. However, the Court served as an attractive antagonist against which politicians, eager to exploit public concerns about crime, could define their own agendas.

Public Opinion on Due Process and Crime, 1964–1978

The first year in which surveys began to tap public sentiments related to the Court and the rights of the accused was 1964, and it was not until the 1970s that pollsters asked specific and repeated questions about this topic. In the absence of long-term, time-series data on public opinion toward Court cases affirming the rights of the accused, we must piece together data from a variety of different sources. That said, the available data tell a compelling story.

The 1960s witnessed a significant rise in public awareness of rights for the accused, and evidence suggests that ordinary citizens, to the extent that they are ever attentive to the activities of the Supreme Court, became increasingly aware that this issue was repeatedly before the Court. In 1964 (the year after *Gideon* and two years after *Mapp*) and again in 1966 (the year of *Miranda*), the American National Election Study (ANES) at the University of Michigan asked respondents whether they could name actions taken by the Supreme Court that they either liked or disliked.[4] In 1964, 83% of respondents named no positive action taken by the Court, and 91% named no negative action—results that doubtless reflected respondents' low levels of political information and awareness (Converse 1964; Zaller 1992). After all, the open-ended question required respondents to come up with a topic, not merely to respond to a question about a given issue. To answer, a respondent would have had to be aware of what the Supreme Court was doing, interested enough to have formed an opinion about it, and confident enough of that opinion to express it. Of those who did make a positive comment about the Court, the vast majority

(71%) cited civil rights as the area in which they viewed the Supreme Court most positively. Of those who responded with a negative comment, civil rights and school prayer were the two dominant concerns; protection of the rights of the accused came in third.

When the NES asked the same question just two years later, a similar percentage (17%) named something they liked about the Supreme Court. However, a full 38% expressed a specific dislike. This suggests both that the public had become more aware of the actions of the Court and that their increasing awareness was predominantly of actions the public disliked. Almost 20% of respondents who mentioned a specific dislike (or about 8% of the total respondents) cited protection of the rights of the accused as their complaint, noting their aversion to the Court's support for the right to counsel, a fair trial, and protection from forced confessions.

By 1970, the NES was directly registering the public's growing interest in the rights of the accused. When asked "How important would you say this issue of protecting the rights of the accused is to you: very important, somewhat important, not very important, not important," 67% of respondents replied "very important," and another 28% said "somewhat important." Black respondents evinced a more intense level of interest than whites: 75% of blacks, compared with 66% of whites, answered "very important."[5] However, the data show no significant relationship between party affiliation and interest in the issue, with 69% of Democrats, 68% of independents, and 64% of Republicans replying that the issue was very important to them.[6]

Over the course of the 1970s, the NES also recorded a shift in aggregate public opinion, as a larger proportion of respondents asserted the belief that "stop[ping] criminal activity" was more important than "protect[ing] the legal rights of the accused." In 1970, 37% of the public placed themselves at the due process end of the scale. By 1978, only 28% did so (see Figure 2.2).[7] Concurrently, respondents at the crime-control end of the scale rose from 47% in 1970 to 54% in 1978.

Like most national survey samples, the longitudinal NES study interviewed relatively few African Americans—roughly 200 each time the survey was administered—and inferences about differences between racial groups are therefore tentative. That said, the statistics suggest a somewhat surprising picture: in 1970, black and white Americans had significantly different responses to the NES question about the rights of the accused, but by 1978 the opinions of blacks had almost converged with those of whites (see Figure 2.3). In 1970, 30% of white respondents and 68% of black respondents expressed a due process position; by 1978, these percentages had fallen to 27% of whites and 32% of blacks—a difference that is statistically insignificant.

The NES also collected data on party affiliation, with respondents identifying themselves on a 7-point scale: strong Democrat, weak Democrat, independent who leans Democrat, "true" independent, independent who leans Republican, weak Republican, or strong Republican. In the data reported here,

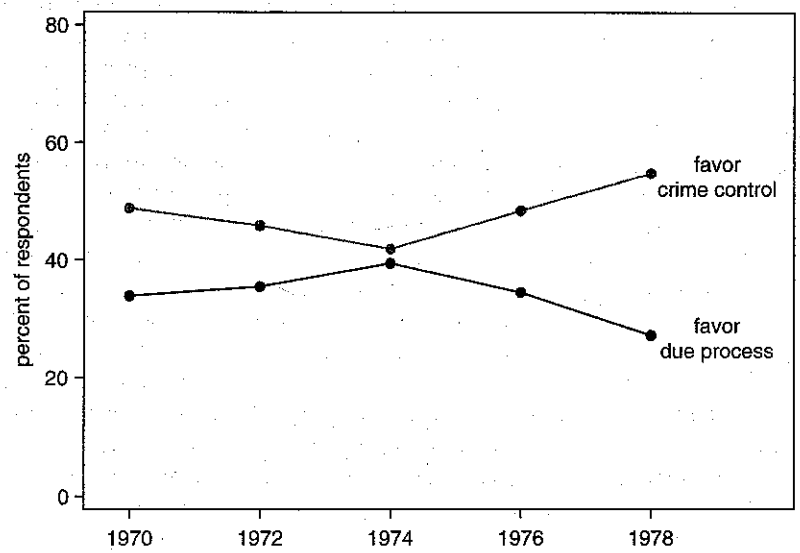

Figure 2.2. Public Attitudes toward Due Process and Crime Control, 1970–1978. Percentages indicate support for positions on a 7-point scale in response to the question, Some people are primarily concerned with doing everything possible to protect the legal rights of those accused of committing crimes. Others feel that it is more important to stop criminal activity even at the risk of reducing the rights of the accused. Where would you place yourself on this scale, or haven't you thought much about this? (7-point scale shown to respondent, with 1 = "protect rights of the accused" and 7 = "stop crime regardless of rights of the accused"). Source: American National Election Studies.

this scale is collapsed into three categories to compare the mean scores of "true" independents to the mean scores of those with Republican or Democratic leanings and identifications. Democratic respondents are subdivided into Northerners and Southerners. With black respondents excluded, the data show some partisan differences, but these are rather small. Moreover, all three partisan groups shifted their opinions uniformly over the decade. The difference-in-difference between Democrats and Republicans at the end of the decade, 0.4 (or 6% of the scale), is almost identical to that at the beginning.

The significant variation appears within the Democratic Party itself, between white Northern Democrats and white Southern Democrats. In 1970, the average self-rating for Northern Democrats was 4, slightly above the mean of the index, compared with 4.9 for Southern Democrats, a difference of about 13% of the total scale.[8] By the end of the decade, however, the difference between Northern and Southern white Democrats was no longer statistically significant.

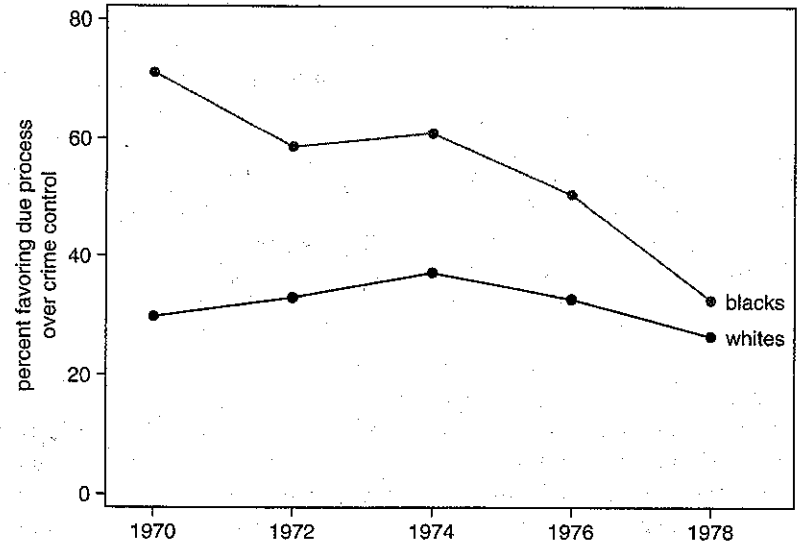

Figure 2.3. The Racial Gap Diminishes in Support for Due Process, 1970–1978. Percentages indicate proportion indicating support for "due process" position (5, 6, or 7) on a 7-point scale. See Figure 2.2 for question wording. Source: American National Election Studies.

Multivariate regression analyses confirm and extend our understanding of these NES data. In the multistage models shown in Table 2.1, support for crime control (as opposed to due process) in 1970 is regressed on four sets of variables. Model I uses only age, race, and sex as attitude predictors; model II adds social characteristics to these; model III adds several measures of political ideology (party identification, attitudes toward the war in Vietnam, attitude toward racial desegregation, support for small government); and model IV adds concerns about social unrest, measures of the perceived importance of the rights of the accused, whether crime is viewed as a major issue, and the degree to which a respondent has positive feelings toward marijuana users.

These regression analyses indicate that both race and age are significant predictors of attitudes on this issue. African Americans were significantly more likely to support the rights of the accused in 1970, and older respondents were somewhat less likely to take a pro-rights stance. However, the age effect disappears once one controls for the effects of political variables.

Somewhat surprisingly, neither gender nor most of the social characteristics included in model II appear significantly correlated with attitudes toward the rights of the accused. Exceptions to this are that people with more education were likely to be somewhat more supportive of due process, as were those residing outside the South. When education and Southern residence are accounted for, racial differences appear slightly larger.

Table 2.1
Predicting Support for Crime Control over Due Process

Variables	I	II	III	IV
Immutable demographic characteristics				
Age	.02***	.02***	.01	.00
	(.00)	(.00)	(.01)	(.01)
Black	−1.54***	−1.81***	−.98***	−.65*
	(.15)	(.19)	(.28)	(.28)
Female	.11	.15	−.08	−.02
	(.11)	(.12)	(.18)	(.18)
Social characteristics				
Education		−.01***	−.02***	−.01*
		(.00)	(.01)	(.01)
Income		.05*	.04	.03
		(.03)	(.05)	(.05)
South		.26*	−.08	−.16
		(.13)	(.20)	(.19
Nonurban		−.03	−.03	−.01
		(.04)	(.06)	(.06)
Children		−.12	−.30	−.33
		(.17)	(.23)	(.23)
Unemployment		−.20	.02	−.03
		(.35)	(.47)	(.45)
Political Orientation				
Democrat			−.48*	−.31
			(.21)	(.21)
Independent			.02	.22
			(.31)	(.30)
Support for Vietnam			.04	−.02
			(.04)	(.04)
Support for racial desegregation			.06	.00
			(.07)	(.07)
Support for small government			.43***	.35***
			(.08)	(.08)
Rights of the Accused				
Support using force to quell unrest				.32***
				(.06)
Rights of accused important issue				.46**
				(.15)
Crime major issue				.05
				(.19)
FT of marijuana users				−.01#
				(.00)

(continued)

Table 2.1
(continued)

Variables	I	II	III	IV
Constant	3.36***	4.04***	3.70***	.95
	(.17)	(.43)	(.76)	(.93)
N	1,424	1,208	556	532
Adj. R^2	.10	.11	.18	.25
S.E.E.	2.089	2.061	2.001	1.90

Table entries are unstandardized regression coefficients with estimated standard errors in parentheses. ***$p<.001$; **$p<.01$; *$p<.05$; #$p<.10$.
Dependent variable measures proportion indicating support for "due process" position (5, 6, or 7) on a 7-point scale. See notes to Figure 2.2 for question wording.
Source: American National Election Studies.

Model III generally confirms the partisan trends already discussed, showing that Democrats were somewhat more rights-supportive than Republicans. These partisan differences were quite small, though, and they disappear altogether in model IV, when opinions on crime and social unrest are accounted for.

As model IV indicates, respondents who viewed the rights of the accused as an important issue were more inclined to favor crime prevention at the expense of individual rights. The NES survey also included several questions tapping respondents' relative social conservatism, including attitudes toward the war in Vietnam and toward racial integration, but there was no significant relation between respondents' attitudes on those issues and their position on crime control. In contrast, attitudes toward the rights of the accused were significantly related to feelings about urban and campus unrest: respondents who supported the use of force to quell these disturbances were more likely to support the crime-control model of criminal justice. Not surprisingly, respondents who felt more positively toward marijuana users were also slightly more inclined toward protecting the rights of the accused.

The 1978 NES did not ask all the same questions as the 1970 survey, but it did include enough of the same variables to allow us to run models I through III and compare the regressions. These regression analyses corroborate the trend noted earlier: that by 1978 there was no longer a significant difference between black and white respondents on the issue of the rights of the accused.

Public Opinion in the Rehnquist Era

Over the years, the public has continued to remain interested in issues surrounding the rights of the accused. As Julian Roberts points out, "Stories relating to criminal justice are never far from the front pages and from the collective consciousness" (1992). When asked to name any of the constitutional rights accorded to people accused of serious crimes, 78% of the public can name at least one (Center for Survey Research & Analysis 2000)—an impressively high percentage for a mostly uninformed public. Likewise, public interest in the rights of the accused has by no means waned. In 1996, 68% of the public felt that protecting the rights of the accused was very important to them, and another 20% said it was somewhat important to them (Texas A & M University, Sam Houston State University, and Public Policy Research Institute 1996).

As discussed in detail below, surveys also suggest that the public has gradually come to accept the once-controversial rulings of the Warren Court and that far fewer people now believe that the Court's decisions in cases like *Mapp*, *Gideon*, and *Miranda* were seriously flawed. Yet although the public may have become more comfortable with due process rules and procedures laid out by the Court in these cases, they remain as skeptical as ever of the underlying ideology. In general, the public remains apprehensive of expanding the rights of the accused and unwilling to support individual rights at the expense of fighting crime. When forced to choose, a large majority of the public continues to believe that being tough on criminals is more important than protecting individual rights.

Changing Attitudes toward Miranda

Leo and Thomas (1998) go so far as to call *Miranda* "the most controversial criminal procedure case that the Court had ever decided" and discuss its onerous struggle to acquire legitimacy, given that it was "truly without precedent in the United States." At the time of the 1966 decision, only 32% of the public believed that the restrictions on police power laid out by the Court were correct and fair. A majority, 56%, believed instead that the police should be allowed to be tougher with suspects (Opinion Research Corporation 1966).

Yet a great deal has changed since then, as the *Miranda* warning has become an integral, and even mundane, part of police work. "[T]he same law enforcement community that once regarded the 1966 *Miranda* decision as a death blow to criminal investigation has now come to see the explanation of rights as a routine part of the process—simply a piece of station house furniture, if not a civilizing influence on police work itself" (Simon 1991). As the Court noted in its opinion on *Dickerson v. United States*, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture" (2000).

Thus in 2000, when the Court reaffirmed *Miranda* in *Dickerson*, 86% of the public agreed with the decision to require "police to inform arrested suspects of their rights to remain silent and to have a lawyer present during any questioning" (Newsweek and Princeton Survey Research Associates). The data show no sizable differences in support for upholding *Miranda* by either race or partisan identification: a large majority of both blacks (89%) and whites

(86%) agreed with the Court's decision, as did a large majority of Democrats (90%), independents (86%), and Republicans (82%). There were likewise no significant differences between Southerners and those from other regions of the country.

Nor did perceptions of the Supreme Court itself appear to significantly influence agreement with the *Dickerson* ruling. When asked about the ideological leaning of the Supreme Court, about 17% of the public felt that the Court is generally liberal, 14% that the Court is generally conservative, and 62% that the Court makes decisions "more on a case-by-case basis" (Newsweek and Princeton Survey Research Associates 2000). Not surprisingly, this perception is affected by party identification, with more Republicans (30%) than Democrats (9%) holding the Court to be generally liberal in its decision making, and more Democrats (20%) than Republicans (10%) perceiving a conservative Court.

Yet these perceptions do not appear to influence support for the Court's decision in *Dickerson*. Republicans who thought that the Court was generally liberal were no less likely to support the *Dickerson* ruling than Republicans who thought the Court tends toward conservatism. Democrats who thought the Court was conservative supported the *Dickerson* ruling at roughly similar rates as those who perceived the Court to be generally liberal. The same holds for measures of general confidence in the Court. Those who purported to have a great deal of confidence in the Court were no more likely to support the decision to uphold *Miranda* rights than those who stated some or very little confidence in the Supreme Court as an institution (Newsweek and Princeton Survey Research Associates 2000).

Public Opinion and the Right to Counsel

The public remains well aware of a criminal defendant's right to a lawyer. In three surveys—a 1977 survey by the National Center for State Courts, a 1983 study by the Hearst Corporation, and a 2001 survey by Belden, Russonello, and Stewart for the National Legal Aid and Defender Association—between 93% and 97% of respondents identified the right to a lawyer as a constitutional guarantee, and 88% identified the right to a court-appointed lawyer if a defender could not afford one. Moreover, the vast majority of Americans (91%) consider the provision of legal assistance for indigent defendants to be an important component of the criminal justice system (Texas A&M University 1996); a full 96% deem the provision of a defense lawyer for those who cannot afford one to be a right that is either "essential" or "important but not essential" (Center for Survey Research and Analysis 2000). The right to counsel is also a right that few people would willingly give up: a 1994 Gallup/America's Talking poll on patriotism found that only 14% of people would willingly give up the right to have a lawyer if they were arrested, even in an effort to reduce overall levels of crime.

Of the major Court decisions on the rights of the accused, *Gideon* was arguably received as the least controversial. Most states recognized the need for counsel in order to assure a fair trial (Beaney 1963, 1156), and as Anthony Lewis writes in *Gideon's Trumpet*, "To even the best-informed person unfamiliar with the law it seemed inconceivable, in the year 1962, that the Constitution would allow a man to be tried without a lawyer because he could not afford one" (1989). Although Lewis perhaps overstates the case when it comes to the general public, "for the most part, media and the legal community praised Gideon" (Rosen 1986).

Questions about the modern public's enthusiasm for *Gideon* arise when one reviews the states' unwillingness or inability to assure *effective* counsel for the indigent. In particular, many state legislatures have declined to adopt stringent oversight of state-provided counsel and have failed to provide the resources to public defenders that are available to privately hired counsel (Levine 1975; Lewis 2003). The public has not been aggressive in calling for greater support for state-appointed counsel. Indeed, despite almost unanimous support for the right to a lawyer, only 57% of respondents support guaranteeing indigent defendants a lawyer with a small caseload, and only 48% support guaranteeing indigent defendants a lawyer with equivalent experience to that of a private lawyer (Belden et al. 2001).

The public is equally divided over who should pay for court-appointed lawyers and how much money should be spent. When asked whether they favored or opposed using taxpayer funds to provide court-appointed lawyers to people accused of crimes, only 64% were in favor (Belden et al. 2001)—far below the 91% and 96% who voiced support for the right to a lawyer. When further asked whether in their state the government "should be spending more or spending less on legal defense for people who cannot afford a lawyer," 57% supported keeping spending at its current level, 14% supported a reduction, and 17% supported an increase (Belden et al. 2001).

Public Opinion and Police Tactics

In *Mapp*, the Supreme Court formally expanded the scope of the exclusionary rule by ruling that evidence obtained illegally is inadmissible in state courts. We have little survey data about public attitudes toward exclusionary standards in the years immediately following *Mapp*. More recently, the public has been divided over whether evidence obtained illegally should be admissible in a court of law, with a significant proportion opposed to exclusion of relevant evidence. In 1981, 56% of people supported the admissibility at trial of evidence that was obtained illegally "if police thought they were complying with the law when they seized the evidence." Only 30% of people favored excluding such evidence (Roper Organization). In 1989, 41% agreed with the statement "Prosecutors should have the right to use any evidence of wrongdoing they have against a person accused of a crime, even if it was obtained illegally"

(American Civil Liberties Union and Peter D. Hart Research Associates 1989). In 2000, 64% either strongly or somewhat agreed that "even if evidence is illegally obtained it should be allowed in court if it helps to prove that someone is guilty" (Center for Survey Research & Analysis).

Contemporary Attitudes toward the Ideology of Due Process

As the preceding discussion has suggested, the public has in many ways become more comfortable with the Supreme Court's rulings on criminal procedure. In 1970, 77% felt that the decisions of the Court had made it too easy for criminals to escape punishment (Time Magazine), but by 1991, 63% felt that the Supreme Court was doing too much to protect the rights of the accused (ABC News/Washington Post). While the phrasing is somewhat different between these two questions, the 14-point decrease suggests a change in public opinion in the direction of support for due process. However, it may also reflect a significant change in the character of the Court. In the post-Warren era, the Court has been less overtly supportive of the rights of the accused and has handed down a number of decisions on the side of crime control (Smith et al. 2003, 125–37).

Yet despite increasing support for the Court's decisions around criminal procedure and for many of the legal protocols these decisions enshrined, a sizable majority of the public continues to embrace an ideological position most closely aligned with a crime-control model. When we track public attitudes from 1970 through 2002, we find a decreasing percentage of the public supporting a due process position. In 1989, only 16% of the public were concerned that "the constitutional rights of some people accused of committing crimes [were] not being upheld," compared with 79% who were more worried that criminals were being "let off too easily" (Gallup Organization). Notably, by 2002 only 18% felt that "even if this means some guilty people are let go, it's important to protect the rights of the accused" (Farkas et al. 2002)—one measure of the considerable disconnect between the Warren Court's criminal justice philosophy and the ideological position of contemporary Americans.[9]

The data from 2002 show no significant difference between blacks' and whites' attitudes on this question. Apparently, high incarceration rates among African American men have not caused the racial gap in attitudes seen in the early 1970s to reemerge.[10] The data also show no significant partisan differences in expressions of support for due process, with Republicans, independents, and Democrats expressing support at aggregate levels of 17%, 20%, and 18%, respectively. Partisan differences appear only in support for crime control relative to the other options, and even here the gap is not particularly large. Republicans (34%) are slightly more likely to express support for crime control relative to due process or both than either independents (28%) or Democrats (27%).

An even clearer indication of the continuing ideological divide between the Warren Court and the modern public is that, when forced to make a choice, the public at large remains unwilling to support rights protections at the expense of public safety. In a 1998 survey, a national sample of adults was asked, if they "absolutely had to choose between each of the following values, which is more important to you, personally? Being tough on criminals, or protecting the rights of those accused of crime?" Here, a large majority (76%) felt that it was more important to be tough on criminals (Washington Post/Kaiser Family Foundation/Harvard Americans on Values Follow-up Survey).

Moreover, respondents who chose being tough on crime felt more strongly about their position than respondents who chose protecting rights. Of those who said that protecting the rights of the accused was more important to them, 40% said that it was much more important, and 37% that it was somewhat more important. By comparison, 66% of respondents who chose being tough on criminals said that this was much more important to them than protecting the rights of those accused of crimes, with an additional 25% calling it somewhat more important (Washington Post, Henry J. Kaiser Family Foundation, and Harvard University 1998).

The continuing hesitation of the public to afford the accused more rights may be due in part to a strong sense that those who are accused of crimes are usually guilty. Although the law assumes that anyone who has been accused of a crime is innocent until proven guilty (Goldstein 1971; Fleming 1974), only a minority of Americans believe that the system should be predicated on the assumption of innocence, and most believe that those who are accused of committing crimes are usually guilty. A majority of Americans (64% in 1993 and 57% in 1995) believe that "regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence" (Cable News Network, USA Today, and Gallup Organization). Similarly, 54% of Americans believe those who are accused of crimes are either always or frequently guilty (National Legal Aid and Defender Association), and 63% believe that those who are arrested for crimes are always or frequently guilty (Belden et al. 2001). The belief that those who have been arrested are generally guilty appears significantly related to attitudes about what services the accused should be afforded. Those who agree that "most people who are arrested and charged with crimes are guilty" are also significantly more likely to voice opposition to increased government funding for court-appointed lawyers (Belden et al. 2001).

The public's hesitancy to support the rights of the accused may also be linked to a pervasive feeling that the criminal justice system is broken. Most Americans are reasonably confident that the criminal justice system "generally makes the right decision" about guilt and innocence; in 2001, 80% of Americans expressed either a great deal or some confidence in the system's ability to come to the right conclusion (CBS News). Yet only 23% of whites and 25% of blacks express confidence in the criminal justice system as a whole, and a significant proportion of the public doubts the ability of the criminal justice system to carry out its most fundamental responsibility: combating crime (Gallup

Organization 2000). When asked how often they think "people who commit crimes get away without being punished," 94% of the public responded that this occurs either often or sometimes (Center for Survey Research & Analysis 2000). Indeed, in a 1979 poll, more people named the excessive leniency of the judicial system as responsible for the increasing national crime rate (25%) than named unemployment (20%), lack of parental guidance or discipline (18%), the economic situation and inflation (13%), or drugs and alcohol (12%) (Gallup Organization). In a 1994 poll, 33% of people felt that the courts and the prison system were the institutions most culpable for increases in crime, more than home and schools (27%), pop culture and the media (14%), the government (12%), or the law enforcement system (8%) (Wirthlin Group).

The public clearly perceives a tension between the protection of individual rights and the ability of police and courts to effectively fight crime, and these concerns have serious implications for public attitudes toward the rights of the accused. In a 1989 poll, 78% of the public agreed that "protecting the constitutional rights of accused criminals makes law enforcement very difficult" (American Civil Liberties Union and Peter D. Hart Research Associates), and in a 1993 poll, 70% indicated their belief that "the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes" (Cable News Network, USA Today, and Gallup Organization). As long as the public perceives a trade-off between individual rights and the maintenance of safety and security, the majority are likely to continue supporting crime control over a due process model of criminal justice.

Conclusion

In a recent debate over the addition of a crime victim's amendment to the Constitution, Senator Patrick Leahy (D-Vermont) wrote: "The few and limited rights of the accused in the Constitution are there precisely because it will often be unpopular to enforce them—so that even when we are afraid of a rising tide of crime, we will be protected against our own impulses to take shortcuts that could sacrifice a fair trial of the accused and increase the risk of wrongful conviction" (2003).

To illustrate the historical disparity between the decisions of the Supreme Court and public attitudes toward the rights of the accused, this chapter has addressed changes in aggregate public opinion, as well as its composition, following the years in which the Court handed down a series of significant rulings (*Gideon v. Wainwright*; *Miranda v. Arizona*; and *Mapp v. Ohio*). The scarcity of polling data prior to these major Supreme Court decisions makes it difficult to establish whether the Court's decision directly affected the attitudes of the public toward the rights of the accused. What empirical evidence we have, however, suggests that the attitudes of the general public were out of sync with the Court in the years following its decisions and that the public in the aggregate became even less rights-oriented over the following decade.

The 1970s public does not appear to have divided along party lines in its support of crime control. Although there is evidence of a slight difference between Republican and Democratic evaluations of the importance of crime control relative to the protection of individual rights, this difference is substantively small. There is also evidence of decreasing divisions between the attitudes of black and white Americans. Whereas in 1970 African Americans were somewhat more likely to support a due process vision over one guided by crime control, this gap almost completely disappeared by 1978. Over the course of the decade, African American attitudes appear to have moved steadily toward that of whites and away from the position of the Court.

In the decades since, the public appears to have become more comfortable with the procedures and protocols established by the Supreme Court's due process decisions. In particular, the public has come to view the outcomes of *Gideon* and *Miranda* as broadly legitimate. Yet this by no means suggests that the public has come to embrace the philosophical position of the Court on constitutional protections for the accused. When the rights of those accused of crimes are considered in light of competing concerns, such as the desire to prosecute crime and to ensure that those who are guilty are found guilty, the modern public appears still more closely aligned with an ideological position emphasizing crime control.

Appendix: Data and Methods

The following surveys are analyzed and presented in the text:

Surveys by the American National Election Studies. Multiple years. Conducted through face-to-face interviews with a nationally representative sample of adults.

Surveys by the Gallup Organization. Multiple years. Conducted through telephone interviews with a nationally representative samples of adults.

Surveys by the General Social Survey. Conducted by the National Opinion Research Center (NORC) at the University of Chicago, multiple years. Conducted through national area probability sample of about 1,500 adults prior to 1994 and 3,000 adults thereafter. Data include black oversamples.

Survey by National Constitution Center. Conducted by Public Agenda Foundation, July 10–July 24, 2002. Based on telephone interviews with a national adult sample of 1,520. Fieldwork by Robinson and Muenster Associates, Inc.

Survey by Newsweek and Princeton Survey Research Associates, June 29–June 30, 2000. Based on telephone interviews with a national adult sample of 752.

The following survey results are reported in the text and were obtained from searches of the Gallup Brain online database provided by the Gallup Organization, Princeton, N.J.:

Survey by Gallup Organization, June 8–June 11, 1989. Based on telephone interviews with a national adult sample of 1,235.

Survey by Gallup Organization, October 1979. Based on telephone interviews with a national adult sample of 1,541.

The following survey results are reported in the text and were obtained from searches of the iPOLL Databank and other resources provided by the Roper Center for Public Opinion Research, University of Connecticut:

Survey by ABC News/Washington Post, July 1, 1991. Based on telephone interviews with a national adult sample of 553. Interviewing was conducted by ICR Survey Research Group.

Survey by American Civil Liberties Union and Peter D. Hart Research Associates, February 21–February 25, 1989. Conducted by Peter D. Hart Research Associates and based on telephone interviews with a national adult sample of 1,003.

Survey by Cable News Network, USA Today, and Gallup Organization, February 8–February 9, 1993. Based on telephone interviews with a national adult sample of 840. The sample included 503 whites and 315 blacks. The national results are weighted to the correct proportion in the population. The questions in this survey replicate the questions asked of the jurors in the jury selection for the Rodney King case in federal court.

Survey by Cable News Network, USA Today, and Gallup Organization, March 17–March 19, 1995. Conducted by Gallup Organization and based on telephone interviews with a national adult sample of 1,220. The survey included 1,000 national adults and an oversample of 220 blacks. The results reported were asked of the national adult and black oversample and are weighted to be representative of the national adult population.

Survey by CBS News, June 9, 2001. Based on telephone interviews with a national adult sample of 565. The respondents were first interviewed May 1–12, 2001, and were reinterviewed June 9, 2001.

Survey by CBS News, September 5–September 6, 1995. Based on telephone interviews with a national adult sample of 1,069. The sample included an oversample of blacks. Results were weighted to be representative of a national adult population.

Survey by CBS News, July 5, 1994. Based on telephone interviews with a national adult sample of 601.

Survey by Center for Survey Research & Analysis, University of Connecticut, February 17–March 7, 2000. Based on telephone interviews with a national adult sample of 1,011.

Survey by TIME Magazine. Conducted by Louis Harris and Associates, 1970.

Survey by Hearst Corporation and Research & Forecasts, August 20–August 25, 1983. Conducted by Research & Forecasts, August 20–August 25, 1983, and based on telephone interviews with a national adult sample of 983.

Survey by National Center for State Courts and Yankelovich Clancy Shulman, October 1–December 31, 1977. Based on personal interviews with a national adult sample of 1,931. The study also had three other samples of influentials: 317 lawyers, 194 state and local judges, and 278 community leaders.

Survey by Newsweek and Princeton Survey Research Associates, June 29–June 30, 2000. Based on telephone interviews with a national adult sample of 752.

Survey by Newsweek and Gallup Organization, November, 1970. Conducted by Gallup Organization and based on personal interviews with a national adult sample of 519.

Survey by Opinion Research Corporation, December 1966. Based on personal interviews with a national adult sample of 946.

Survey by Roper Organization, September 19–September 26, 1981. Based on personal interviews with a national adult sample of 2,000.

Survey by Texas A & M University, Sam Houston State University, and Public Policy Research Institute, Texas A&M University, May 16–June 1, 1996. Conducted by Public Policy Research Institute, Texas A&M University, and based on telephone interviews with a national adult sample of 1,085.

Survey by Washington Post, Henry J. Kaiser Family Foundation, Harvard University, August 10–August 27, 1998. Conducted by Washington Post and based on telephone interviews with a national adult sample of 1,200. Interviewing was conducted by Chilton Research.

Survey by Washington Post, January 1978. Based on telephone interviews with a national adult sample of 1,519. Interviewing was conducted by George Fine Research, Inc.

Survey by Wirthlin Group, September 6–September 9, 1994. Based on telephone interviews with a national adult sample of 1,019.

Notes

1. Under U.S. Code 3501, reading a *Miranda* warning to a suspect was treated as one of several criteria to be weighed in judging the admissibility of a confession, and a confession was admissible even if one of the factors had been overlooked. This effectively moved the admissibility standard back toward the voluntariness test, where it had been prior to the *Miranda* ruling.

2. Some argue that in deciding *Miranda* the Court invited Congress to legislate its own safeguards so long as they were as effective as *Miranda* in preventing self-incrimination; see Hendrie (1997) and Cassell (2001). It is unlikely, however, that 3501 is what the justices had in mind, to the extent that the statutory law as written undermines *Miranda*'s specific safeguards.

3. Of course, there was also dissension among elites, and many in the legal community directly challenged these criticisms of the Court; see Kamisar (1962).

4. Question: "We are all pretty busy these days and can't be expected to keep up on everything. Have you had time to pay any attention to what the Supreme Court of the United States has been doing in the past few years? Is there anything in particular that it has done that you have liked or disliked? What is that? Anything else?"

5. The chi-square for these group differences is 8.654 and is significant at the $p<.05$ level. However, as the sample size of African American respondents is small, this finding is suggestive rather than conclusive.

6. There likewise appears to be no difference relative to employment status, income, or education. All demographic variables were assessed in simple crosstabs, as well as in a logistic regression.

7. The exact question was "Some people are primarily concerned with doing everything possible to protect the legal rights of those accused of committing crimes. Others feel that it is more important to stop criminal activity even at the risk of reducing the rights of the accused" (for the response scale, see Figure 2.2). It is worth noting an asymmetry in the phrasing: expressing greater support for stopping criminal activity required a trade-off between crime control and the reduction of rights for the accused, but expressing greater support for the protection of individual rights did not require the respondent to explicitly risk an increase in criminal activity. This framing, if it had any affect, likely influenced respondents to place themselves lower on the scale, in the direction of support for rights protections.

8. This difference is significant at the $p<.001$ level, with an F statistic of 21.539.

9. There is some evidence that a larger proportion of the public has come to support *both* due process and crime control. Compared with 18% of the public in 1978 who held a position somewhere in the middle of the ideological spectrum, in 2002 50% of the public felt that "it's just as important to protect the rights of the accused as it is to put guilty people in jail" (Farkas et al. 2002).

10. The African American samples in these surveys are again too small for conclusive analyses.

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