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REMARKS AT THE INVESTITURE OF ERIC M. FREEDMAN AS THE MAURICE A. DEANE DISTINGUISHED PROFESSOR OF CONSTITUTIONAL LAW, NOVEMBER 22, 2004

Anthony G. Amsterdam*

A convocation to inaugurate a new distinguished professorship of constitutional law naturally invites reflections on the question whether the current state of United States constitutional law makes it worth professing. Of course, such an occasion also stacks the deck against a negative answer. It would be ingratitude of the worst sort for me to accept the law school's hospitality, eat the cheese and drink the wine promised at the end of our speech-making, and devote my speech to declaring that the distinction conferred upon my esteemed colleague and good friend, Eric Freedman, is a wrongheaded venture from the get-go.

So I will not take it that far. But I will assert that a significant part of constitutional law as it is doctrinally understood and taught in law schools today is as dead as Davie Crockett's beaver hat and that it is amazing that we go on understanding it and teaching it and writing about it in the way we do. I refer to the Bill of Rights and the guarantees of due process and equal protection that are supposed to safeguard the rights of criminal defendants and of persons suspected of doing or plotting violent criminal misdeeds.

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My point is not simply that the constitutional rights of criminal defendants and suspects are being widely disregarded, violated without redress as a matter of routine practice, and amputated even at the level of rights-definition by invasive judicial interpretations and hostile legislative incursions. Those criticisms are trite.

My point is far more basic. It is that in criminal cases generally we have seen an end of the rights-based concept of justice that is supposed to be the genius of Anglo-American law. That concept says that individuals enjoy a body of legal rights protected by fundamental law. The rights are prescribed and defined by legal rules. The rules are elaborated and applied by courts, are collected and analyzed and explained in lawbooks (including codes and digests and treatises and law reviews) and are taught in law school courses. When the rights are found to have been violated or disregarded, a remedy prescribed by law is forthcoming. As the ancient maxim has it, "ubi jus, ubi remedium," where there's a right there's a remedy. As the old, characteristically sexist slogan expresses it, we have a government of laws, not men. The laws prescribe our entitlements and our liberties and our immunities, including the ways in which government is supposed to treat each of us. And if we are treated in a way that violates these laws, there is a secondary body of laws that prescribes the appropriate redress.

Isn't that the way you learned constitutional law? I learned it that way. In the United States, courts interpret and enforce the Constitution. When a party presents a claim of constitutional right to a court, the basic mode of constitutional analysis to be conducted is familiar. One asks, first, does the constitutional claimant indeed have the constitutional right that s/he claims? If so, one asks, second, has that right been violated by the conduct s/he complains of; or would it be violated if the entitlement s/he asserts is not recognized? If so, one asks, finally, what remedy the law provides to redress or avert that violation?

This is still the way courts write opinions. It is still the way digests collect the law and the way treatises and learned legal publications explicate and analyze the law. It is still the way law school casebooks are organized and, for the most part, it is the way law school courses are taught. If you don't dig it and do it this way, you will not pass your law school exams and you will continue to retake the bar exam repeatedly until you learn to do it this way.

But anyone who practices real constitutional law in real courts in real criminal cases knows that this entire model of law is an antiquated brain-wrap, mustier than Davie Crockett's coonskin. Harbor no illusions on that score. The central historical fact of contemporary American
constitutional jurisprudence is that, at least in criminal cases, the right-based conception of law is defunct. Obsolete. Otiose. No matter how much legal rules and legal rights are still talked about by courts, arrayed in digests, and studied in law schools, nowadays (with very rare exceptions) judges simply do not give a damn about what the constitutional rights of criminal defendants are or whether they have been violated. Judges parse the rules defining a defendant's constitutional rights more or less closely, more or less strictly, and more or less honestly, in order to grant or deny relief, depending upon whether they do or do not believe that the defendant suffered some outrageous injustice that is way out of proportion to the probability that he or she deserves to be punished either for committing some ugly crime or for being a vicious, worthless slimebag, or both.

I am not talking about lawless, maverick judges. I am talking about something more systemic and far more radical. We are seeing a degeneration of the very idea of constitutional rights. The blindfold that Justice is supposed to wear as she weighs competing rights and obligations with indifference to the outcome has been shredded. Now, as a matter of judicial methodology, judges are supposed to peep through the blindfold, survey the outcomes which their rulings would produce, and tip the scales in such a way as to avoid unwelcome outcomes.

What evidence can I offer to support this assertion? It is all around us, but I will limit my case to three illustrative bodies of rules that control decision-making in a wide array of criminal cases.

1. The first body of rules goes under the general name of harmless error. Assume that you are convicted of a crime after a trial at which your coerced confession was admitted into evidence against you or the prosecutor insinuated to your jury that your failure to take the witness stand and testify on your own behalf means you're guilty. In either of these cases, your constitutional privilege against self-incrimination has plainly and indisputably been violated. Do you get a new trial? Not necessarily, or even ordinarily. Doctrines of "harmless error" originally created by courts to avoid appellate reversals of convictions for truly trivial and technical failures to observe arcane procedural formalities have now evolved into a broad blanket rule upholding convictions whenever appellate judges conclude that even the most obvious and indefensible violations of basic constitutional guarantees didn't make a difference in the outcome of the trial.\(^1\) In theory, the standard by which

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appellate courts are supposed to test the harmlessness of most constitutional errors in the pretrial process and at trial is whether the judges are convinced beyond a reasonable doubt that the error did not contribute to the guilty verdict or the sentence. But in practice, it much more often boils down to whether the appellate judges think that the prosecution’s evidence of guilt was potent and the sentence well deserved.

One reason why the standard gets watered down in practice is that harmless-error analysis is seldom written up in appellate opinions in a way that forces the authoring judge, or his or her concurring colleagues, or any higher appellate court, or any concerned constituency—even the law reviews or the scholarly community—to examine it critically. When appellate judges decide to reject a claim of error on harmless-error grounds, they very often do not say anything at all about the claim in their opinion. When they do say that the claim has been considered and rejected on harmless-error grounds, their explanation for why they regard any possible error as harmless is ordinarily brief and unrevealing, often conclusionary, almost always immune to criticism or review because it is case-specific and therefore opaque to anyone not thoroughly familiar with the record of the particular case.

These kinds of opaque rulings represent the fate of most claims of constitutional right made to appellate courts in criminal cases. Judges deciding criminal appeals reject five or six claims of constitutional error on harmless-error grounds for every one that they adjudicate on the merits.

2. But harmless-error analysis is only one aspect and symptom of a more pervasive trend toward result-oriented jurisprudence in constitutional criminal law. Increasingly, courts are developing the very


3. See, e.g., Gutierrez v. McGinnis, 389 F.3d 300 (2d Cir. 2004) (state appellate court rejects federal Confrontation Clause claim on grounds of harmless error where the prosecution’s case was “overwhelming”; federal court of appeals in habeas corpus proceedings holds that this state-court ruling is not unreasonable under 28 U.S.C. § 2254(d)(1) [see note 27 infra and accompanying text]); United States v. Bowens, 108 Fed. Appx. 945 (5th Cir. 2004) (violation of the Sixth Amendment right to present defensive evidence was harmless because of the prosecution’s “overwhelming evidence of guilt”); United States v. Moiseev, 108 Fed. Appx. 500 (9th Cir. 2004) (assuming that Confrontation Clause and Brady violations cumulatively impaired the defendant’s ability to impeach a prosecution witness, the errors were harmless because “any reasonable jury could still have concluded that the weight of evidence was sufficient to find Moiseev guilty beyond a reasonable doubt . . . [and the] harmless error doctrine ‘requires us to affirm a conviction if there is overwhelming evidence of guilt.’”).
substantive rules that define constitutional rights in such a way as to
make some requirement of harmful effect a precondition to finding a
constitutional violation.

A classic example of this is the Brady doctrine\(^4\) defining a
prosecutor’s constitutional obligation to disclose exculpatory or
impeaching information to the defense. To make out a Brady violation,
the defense must show that the undisclosed information was “material,”
and the test of materiality is whether there is a reasonable probability
that disclosure of the information would have made a difference in the
outcome of the trial.\(^5\)

A similar rule is increasingly being used to define the defendant’s
rights of access to defense evidence or witnesses when such access is
impeded by various forms of governmental action, ranging from the
deporation of potential witnesses to the denial of continuances
necessary to enable the defense to secure a witness’s attendance at trial.
In all of these situations, courts are incorporating a “prejudice”
dimension into the rules that define a defendant’s rights.\(^6\) Prejudice in
the sense of a demonstrable effect on the outcome of the trial is being
made a necessary ingredient of any judicial finding that a defendant has
the constitutional right s/he claims.

Lately, courts have begun to develop similar rules with regard to an
indigent defendant’s entitlement to state funds for expert witnesses,
investigative services, and other defense resources under Ake v.
Oklahoma.\(^7\) I had a conference recently with a judge who plainly
thought that Ake was spelled “ache.” Constitutional law is becoming so
result-oriented, so concerned with guesswork about outcomes that it is
devolving into one big “Ouch” test. No showing of “Ouch,” no finding
of constitutional violation.

Another cardinal example of this development is the federal Sixth
Amendment law of ineffective assistance of counsel. That law is
currently dominated by the so-called “two-pronged” rule of Strickland v.
Washington.\(^8\) In order to make out ineffective assistance of defense
counsel at trial or on appeal, a criminal defendant must show both that
counsel’s performance was below minimum standards of competency

\(^5\) E.g., Strickler v. Greene, 527 U.S. 263, 289-96 (1999); Kyles v. Whitley, 514 U.S. 419,
and that this substandard performance prejudiced the defendant.\textsuperscript{9} The test of prejudice under \textit{Strickland}, as under \textit{Brady}, is whether there is a reasonable probability that the outcome of the trial or sentencing proceeding would have been different but for counsel's substandard performance.\textsuperscript{10}

This was bad enough to start with. I remember reading the \textit{Strickland} opinion the day it came down and saying to myself that it upended all the constitutional law I had ever learned. The \textit{Strickland} Court's explicit reasoning was that the purpose of the right to counsel was to assure criminal defendants a fair trial. Therefore, unless court-appointed counsel's performance is so bad that the whole trial is rendered unfair, there can be no violation of the right to counsel.\textsuperscript{11} I had always thought that \textit{Gideon v. Wainwright}\textsuperscript{12} incorporated the Sixth Amendment into the Fourteenth, but apparently I had that backward. According to \textit{Strickland} it is the Fourteenth Amendment's right to a fair trial that gets incorporated into the Sixth Amendment right to counsel. And the test of fairness is judicial satisfaction with the outcome. So if reviewing judges are comfortable that a defendant is guilty and deserved the sentence he got, his lawyer's failure to come near meeting the minimum standards of professional performance doesn't violate the Sixth Amendment guarantee of the right to the assistance of counsel for one's defense. Again, no "Ouch," no constitutional rights violation.

There used to be other tests for ineffective assistance than \textit{Strickland}. One was the so-called \textit{Cronic} test\textsuperscript{13} under which a violation of the Sixth Amendment right to counsel could be found in some circumstances without a showing of prejudice. Another was a specialized rule relaxing the showing of prejudice in cases where counsel had a conflict of interest.\textsuperscript{14} I will spare you the details, which are fast becoming of merely antiquarian interest. Because in a series of cases over the past four years, the Supreme Court has made clear its intent to retract the sphere of each of these rules, expand the sphere of \textit{Strickland} proportionately, and demand some sort of showing of prejudice as a

\textsuperscript{9} See id. at 687-700.
\textsuperscript{10} See id. at 694-95.
\textsuperscript{11} See id. at 687, 691-92, 696.
\textsuperscript{12} 372 U.S. 335 (1963).
precondition of finding ineffective assistance of counsel in virtually every imaginable situation.\textsuperscript{15}

3. As a third and last example of the trend in constitutional law to replace a rights-based jurisprudence with one that is result-oriented, consider the array of rules dealing with post-appeal remedies—or what are more commonly called postconviction remedies—in criminal cases. After a forty-year period of expansion that was contemporaneous with the growth of modern-day constitutional criminal procedure rights, the Supreme Court in the late 1970s began to cut back sharply on the availability of federal habeas corpus remedies for persons convicted at state trials in which their federal constitutional rights had been violated.\textsuperscript{16} In 1996, swept by a wave of fury in the wake of the Oklahoma City bombing, Congress enacted the so-called Antiterrorism and Effective Death Penalty Act,\textsuperscript{17} building on issue preclusion and review-curbing ideas that the Court had initiated and ratcheting them up so as to make federal habeas relief for constitutional violations still more difficult to obtain. State courts and state legislatures commonly flocked to follow the U.S. Supreme Court’s and Congress’s lead, restricting state court postconviction remedies for constitutional violations in a similar manner.

I won’t try to summarize the new body of rules governing postconviction procedure for you. They are intricately labyrinthine, and so confusing that courts today devote ten times as much labor, intelligence, and prose to deciding whether they can hear a convicted person’s constitutional claims at all as they devote to considering the merits of such claims.\textsuperscript{18} I will focus on several key features of the rules.

First, postconviction remedies are restricted by standards of harmless error that allow even more violations of constitutional rights to go unredressed than the harmless error rules applied on appeal. In postconviction proceedings, constitutional violations are deemed harmless and disregarded unless they are found to have “had a


“substantial and injurious effect or influence” in bringing about the conviction or sentence.\textsuperscript{19} This is a standard which, in practical effect, leads postconviction judges to dismiss almost all claims of constitutional error in trial and sentencing proceedings by saying that the prosecution had a powerful case and therefore nothing else that happened at trial or on appeal matters.\textsuperscript{20}

Second, the rules of postconviction procedure operate in such a way as to magnify the significance of the \textit{Strickland} standard for ineffective assistance of counsel that I mentioned earlier. This is so because postconviction remedies are necessary primarily in cases where a criminal defendant’s claims or the facts necessary to support them were not properly presented at trial or on appeal. What the postconviction rules elaborated by the U.S. Supreme Court since the 1980s—and then expanded by Congress and adopted by most state courts—have done is to say that \textit{unless} a criminal defendant’s lawyer was ineffective by \textit{Strickland} standards, any constitutional claims that the lawyer could have presented but failed to present satisfactorily at trial or on appeal cannot be entertained in postconviction proceedings, with very rare exceptions.\textsuperscript{21} This makes \textit{Strickland’s} result-oriented “prejudice”
component the key to postconviction remedies in almost all criminal cases.

Third, the rare exceptions to this rule precluding postconviction relief for constitutional violations are themselves articulated in ways that depend on result-oriented inquiries. Most of the exceptions involve doctrines that go by the shorthand name of “cause and prejudice.” The prejudice component of the doctrines is, as its name implies, still another device for telling judges to decline to entertain constitutional claims unless they are convinced that a criminal conviction was undeserved because of the defendant’s likely innocence. Subdoctrines under the cause and prejudice doctrine go by names like “miscarriage of justice” and “actual innocence.” And what the caselaw expounding these subdoctrines shows is that the courts today believe that the only miscarriage of criminal justice is the conviction of somebody who was neither involved in any way in the crime—a victim of mistaken identity—nor the least bit blameworthy for living in a life style that made him apprehendable under the suspicious circumstances giving rise to his mistaken identification. “Actual innocence,” in turn, means that to secure postconviction relief a convicted person must demonstrate to judges both that his or her constitutional rights were violated in the criminal process and that he or she is really not guilty by a standard that can only be described as the squeaky clean test.

Congress has endorsed these doctrines in the Antiterrorism and Effective Death Penalty Act, providing that, in various situations, federal habeas corpus relief is not available to persons whose constitutional rights were violated in the state criminal process unless these persons show “by clear and convincing evidence that[,] but for [the] constitutional error, no reasonable factfinder would have found... guilty of the underlying offense.” And Congress went further. It also provided that if a state court has rejected a criminal defendant’s claim of federal constitutional error on the merits, federal habeas corpus

25. See, e.g., Calderon v. Thompson, 523 U.S. 538 (1998); House v. Bell, 386 F.3d 668 (6th Cir. 2004); Sistrunk v. Armenakis, 292 F.3d 669 (9th Cir. 1992) (en banc).
relief cannot be granted to that defendant upon a finding that the state court’s decision was erroneous as a matter of federal constitutional law. Federal habeas relief can be granted only if the state court’s decision involves an “unreasonable application” of federal constitutional law—an application so strained that it cannot be regarded as within the bounds of reason. You see how far this procedure deviates from the notion that criminal defendants enjoy a body of rights guaranteed by the Constitution and that, when those rights are violated, there will be redress for the violation. Federal habeas corpus courts no longer decide cases of alleged violations of federal constitutional rights in the state criminal process by looking to the rules of constitutional law and asking whether those rules confer a constitutional right upon the defendant that was violated by the way in which he or she was treated by the state courts. Nowadays they ask only whether any errors that the state courts may have committed in rejecting a defendant’s federal constitutional claims were outside the range of honest bungling or were close enough to it for government work.

Finally, the U.S. Supreme Court invented a rule, subsequently adopted and made more strict by Congress, that has to do with a convicted defendant’s ability to claim the benefit of changes in the interpretation of constitutional rights that result from judicial decisions handed down after his or her conviction. This is the rule of Teague v. Lane, saying that new developments in constitutional doctrine which expand defendants’ rights cannot be invoked in federal habeas corpus proceedings by a defendant whose conviction became final before those developments occurred. Conversely, if constitutional developments retract defendants’ rights after a particular defendant’s conviction became final, the government can invoke those developments to defeat the defendant’s federal habeas claim that his or her rights were violated under the law of the Constitution as it existed at the time of his or her trial and appeal. To give a defendant the benefit of obsolete constitutional rights would be, the Court insists, a costly, illegitimate windfall. To deny the government the benefit of obsolete limitations upon constitutional rights would be, by contrast, a costly betrayal of

prosecutors’ and courts’ legitimate expectations of legal stability, that mainstay of the social order. If you find these propositions puzzling, even contradictory, I can only advise you to read Justice O’Connor’s Teague opinion with an eye to its unarticulated assumptions about the origins and evolution of the legal universe. According to those assumptions, prosecutor-friendly rules of criminal procedure are the products of the natural order, predating human intervention and possessing an enduring quality of rightness that survives any modification human agencies may later make in them. The Supreme Court does occasionally replace those natural rules with others that are more defendant-friendly, but these latter rules are the artificial, quirky products of unpredictable human tinkering and have no authority transcending the transitory will of their manufacturers. The two kinds of rules seem to have an ontological relationship somewhat like that of good cholesterol and bad cholesterol. Obviously, the courts can do no wrong in seeking to alleviate the untoward results of their occasional indulgences in bad cholesterol.

Okay. So what does all of this tell us about the current status of constitutional law in criminal matters? It tells us:

First, that the doctrinal rules defining the constitutional rights supposedly conferred by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and their state constitutional parallels are of very little consequence in the actual adjudication of claims of constitutional violations by reviewing courts in the criminal process. They are of somewhat more consequence in the original trial court. But, ironically, trial judges tend to be relatively uncritical believers in black-letter, hornbook law and neither know nor care much about the sophisticated analyses of constitutional rights and rules that ceaselessly preoccupy scholars and teachers of constitutional law. And, of course, many trial judges—particularly those who must run for office in contested elections—are result-oriented and legally disoriented for reasons that are blowing in political winds no academic study of constitutional law can inform or withstand.

Second, the doctrinal rules that do tend to be of great consequence in the actual adjudication of claims of constitutional violations by reviewing courts in the criminal process are for the most part vacuous platitudes like the rule defining “prejudice” for purposes of adjudicating ineffective assistance of counsel claims under Strickland, or the rule defining “materiality” for the purpose of adjudicating prosecutorial

nondisclosure claims under *Brady*, or the rules defining "harmless error" on appeal or "cause and prejudice" in federal habeas corpus practice. These are largely rules offering no substantive complexity that is worth studying or teaching anywhere but in a bar review cram course, and offering no more guidance to judges deciding cases than a valentine card in the traditional shape offers to surgeons performing heart transplants. Such rules do nothing more or less than direct judges to make fact-centered, case-specific judgments, usually about the strength or weakness of the prosecution's evidence of guilt or of the ugliness of the crime for purposes of sentencing enhancement.

Finally, it is these fact-centered case-specific judgments that govern the disposition of almost all constitutional issues in almost all criminal cases decided by appellate and postconviction courts. And judgments of this sort are almost wholly immune from analysis or governance in terms of the sorts of legal rules that we ordinarily think of, and write about, and teach, as comprising the substance of constitutional law.

Does this suggest that constitutional law is unworthy of study or teaching? No, although it does suggest that much of the focus of what the legal academy thinks about and writes about and teaches on the subject of constitutional law relating to the criminal process is of little practical importance, as distinguished from aesthetic interest or utility as the apparatus for mental muscle-building through intellectual gymnastics.

If constitutional scholarship and teaching are to have some greater influence on the actual administration of the criminal law, what directions might they take? That question leads me, not surprisingly, to three of the major emphases of the constitutional scholar and teacher who is being invested today as the inaugural Maurice A. Deane Distinguished Professor of Constitutional Law, Eric Freedman.

First, constitutional teaching and scholarship need to be more concerned with historical studies, particularly, detailed studies of the ways in which our legal institutions have evolved in troubled times. We are not the first generation in American history—or in English history before it—that has had its heritage of legal rights subverted by intensely felt needs to accommodate concerns about public safety and assuage fears of insecurity by suspending safeguards that—looking back and then forward in calmer times—we recognize as necessary to protect individual freedoms and restrain governmental powers in the ways envisioned by our basic ideals of constitutional democracy. Yet time and again we have rediscovered the capacity to demand that our courts and public officials respect those ideals and pay them better homage than lip
service. Meticulous historical study of our lapses and recoveries can give us the understanding that we need of why we so often lose efficient faith in fundamental freedoms and how we can recover it. This is the sort of work that Eric Freedman has done with singular distinction and that makes his investiture as the first occupant of an important constitutional chair especially appropriate.

Second, constitutional scholarship and exposition can be set to the task of public education. In an era when the media exercises enormous power to mold popular opinion and also has considerable direct influence on the weight that judges give to contending values and concerns, a vital role for constitutional scholars is to design and implement means for making our historic commitments to individual liberty and fairness and equality understandable in the forums of public discourse. Eric Freedman has been at the forefront of the growing number of serious constitutional scholars who also take this responsibility seriously. His sophisticated grasp of the way the media functions and his systematic cultivation of opportunities and methods for translating our most fundamental legal principles into popularly accepted values have made a pioneering contribution to the work that constitutional law must perform if it is to play an effective part in regulating the operations of practical government.

Third, constitutional scholars must attend to developing international perspectives on the issues with which the United States Constitution and state constitutions are concerned. Isolationist thinking bred of the comfortable, cocky myth of American exceptionalism has largely obscured for us the fact that the Framers of our Constitution meant it to enshrine the most enlightened and progressive ideals of the community of nations. If the dumb fiasco of the lawless mass detention of suspected terrorist operatives at Guantanamo Bay by the current administration has had any positive consequence at all, it is that the world-wide outcry of repugnance for this cowboy adventure into totalitarianism has reminded us that other nations around the globe have much to teach us about respect for liberty and its protection by the rule of law. In exposing the injustices and oppressions of Guantanamo to the censure of the world and in bringing the world’s censure to the attention of the United States Supreme Court in the Guantanamo litigation brought to end these injustices and oppressions, Eric Freedman has once again played a prominent and pioneering role.

For these reasons among others, I suggest that Eric’s installation as a Distinguished Professor of Constitutional Law should be for all of us
an occasion of extraordinary pride in a time when we have lamentably few other reasons to be justifiably proud of ourselves.