GOVERNMENT INTERESTS IN CRIMINAL LAW†

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Some commentators seem to believe that criminal law and criminal procedure cases should be easy to decide. On the one side are “constitutional” interests; on the other side are a set of amorphous and arguably “nonconstitutional” interests. The individual interests of a defendant or suspect are said to be of “constitutional” stature, recognized and protected primarily in the Bill of Rights, whereas the government’s interests are “nonconstitutional” or “subconstitutional” because they are not explicitly guaranteed by the Constitution.

Scholarly commentary has offered three major criticisms of Supreme Court jurisprudence that permits the individual’s criminal procedural rights to be limited on account of a countervailing government interest. First, especially in the past several years, there have been sustained attacks on the very concept of “balancing” in constitutional jurisprudence. A second set of criticisms applies more generally to all constitutional jurisprudence that takes account of government interests to weaken or reduce the scope of individual constitutional rights, whether or not “balancing” is explicitly invoked. For Ronald Dworkin, among others, even considering countervailing majoritarian interests is an illegitimate process because it dilutes and fails to “take seriously” the individual’s constitutional rights.¹ Finally, I sense in much popular and academic liberal commentary the assumption that government interest analysis is especially inappropriate in criminal cases because the overwhelming purpose of constitutional protections relating to criminal processes is to prohibit the government from pursuing its interests at the expense of the individual’s autonomy and privacy. The suggestion is that in all cases where the government is a party, but especially in criminal prosecutions, we encounter a conflict between a massive and powerful

† © 1992 by Kate Stith. These remarks were based on a paper prepared for the Conference on Compelling Government Interests at Albany Law School, September 26-28, 1991. The full paper, on which these remarks were based, is scheduled to appear in a volume tentatively entitled Compelling Government Interests: The Mystery of Constitutional Analysis (Stephen E. Gottlieb ed.) to be published by the University of Michigan Press.

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government and a vulnerable, helpless individual; constitutional law becomes brute power politics if the former is allowed to prevail over the latter.

A unifying theme of the criticisms of government interest analysis is that it is illegitimate to weigh values explicitly enunciated in the Constitution against values that are extrinsic to the written instrument. In his important and pathbreaking article in the *Boston University Law Review* two years ago, Professor Stephen Gottlieb takes a different tack, arguing that the concept of "government interests" in constitutional adjudication is neither more nor less legitimate than the concept of fundamental individual rights.\(^2\) In parts of his analysis, Professor Gottlieb may be understood to hoist conservatives on their own petard by arguing that conservative and neutralist critiques of substantive due process and fundamental rights are equally applicable to so-called government interests.\(^3\) Government interests, Professor Gottlieb argues, are no more textually based than nontextual fundamental rights; thus, if one is to proclaim the illegitimacy of nontextual individual rights, so also one must conceive the illegitimacy of nontextual governmental interests.\(^4\)

In the end, however, Professor Gottlieb decides that neither the conservative attack on nontextual rights nor the analogous critique of compelling government interests is persuasive.\(^5\) Professor Gottlieb concludes by proposing that it is appropriate for courts to recognize both new constitutional rights and compelling government interests that sometimes trump constitutional rights.\(^6\) As Professor Gottlieb remarked at this conference, "[T]he same principles of textual interpretation [that turn express government powers into compelling public purposes] support an equally expansive reading of the various clauses of the Bill of Rights, including the Ninth Amendment."\(^7\)

I respectfully disagree with both the traditional liberal critiques of government interests analysis and with the alternative approach offered by Professor Gottlieb. In response to the traditional critiques, I would argue that "government interests" properly understood, are very much constitutional interests. The Constitution itself assumes

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\(^3\) *Id.* at 965.

\(^4\) *Id.*

\(^5\) *Id.* at 969-72.

\(^6\) *Id.*

that individual liberties will often be limited by the public interests expressed or pursued by government. It is simply wrong, I submit, to conceive of every criminal litigation as a conflict between interests of "constitutional" stature (the interests of the individual) and interests of "extraconstitutional" or "subconstitutional" stature (the interests of the public or the government). Both sets of interests are of constitutional stature. Professor Gottlieb agrees with me, as I read him, that it is entirely legitimate to take into account public purposes or government interests in constitutional adjudication.

I disagree, however, with Professor Gottlieb's major conclusions—that government interests are merely the counterpart of non-contextual constitutional rights, and that government interests and nontextual individual rights are derived from the Constitution in the same way. I assert that the Constitution's recognition of government interests is more fundamental than any implicit constitutional recognition of unlisted individual rights, through the Ninth Amendment or otherwise.

In my remarks, I will briefly sketch how the Constitution recognizes various government interests in law enforcement and I will register my concerns with the manner in which various wings of the Supreme Court, as well as academic commentators, have considered these law enforcement interests.

First, let us look at the Constitution. If, as the Declaration of Independence supposed, governments are instituted to pursue common interests of "Life, Liberty, and the pursuit of Happiness," a fundamental presupposition of the Constitution of 1789 was that state governments would be the primary guarantors of citizen liberties. Yet, we do not find in the Constitution a list of interests—exhaustive or suggestive—that our state governments may legitimately pursue. This should not surprise us. State power preceded the Constitution. The function of the Constitution was to confine this state power by explicitly delegating some powers to the federal government and by declaring other powers off-limits to both the national and state governments. Within the specific limitations stated in the Constitution, the power of the states to pursue collected interests remain plenary.

Hence, for most of our constitutional history, no one even dreamt of questioning that the Constitution recognizes the legitimacy of "government interests"; it was understood that the Constitution itself presupposes the legitimacy of public purposes pursued by government through constitutional means. It is, after all, a structural

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* The Declaration of Independence para. 2 (U.S. 1776).
premise of the Constitution that government (especially state government) will create, define and pursue an almost limitless variety of public purposes. Thus, the Preamble to the Constitution describes the need to “insure domestic Tranquility” and to “establish Justice” (as well as, among other things, the need to “secure the Blessings of Liberty to ourselves and our Posterity”) as among the fundamental purposes of the governmental structure about to be created.9 The power of the federal government to define crime—that is to declare certain behavior outside of the protection of the law and to subject violators to the coercive power of the state—is explicitly granted in provisions of Article I, Section 8 relating to “Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,”10 the exercise of “exclusive Legislation in all Cases whatsoever”11 over the seat of the national government, and, of course, the delegation of legislative power as “necessary and proper” to effectuate the federal government’s various constitutional powers.12 In the Habeas Corpus, Bill of Attainder, and Ex Post Facto Clauses of Article I, Section 9,13 in the presidential pardon power of Article II,14 and in the jury trial right granted in Article III,15 the pursuit of federal law enforcement interest is effectively legitimated by the existence of constraints on the manner in which those interests are pursued. Similarly, the Bill of Attainder and Ex Post Facto Clauses of Article I, Section 1016 and the Extradition Clause of Article IV17 assume (and in the latter case, further) state law enforcement interests.

In my view, the Bill of Rights affirms the legitimacy of governmental pursuit of law enforcement interests, even as it restricts government action.18 In particular, the Bill of Rights recognizes that the rights of individuals must often be protected through collective action—that is, through and by government. The Bill of Rights prescribes important individual protections against government abuses, but it affirms and preserves the role of government in protecting individuals against private abuses.

9 U.S. Const. pmbl.
10 Id. art. I, § 8, cl. 10.
11 Id. cl. 17.
12 See id. cl. 18.
13 See id. § 9, cl. 2-3.
14 See id. art. II, § 2, cl. 1.
15 See id. art. III, § 2, cl. 3.
16 See id. art. I, § 10, cl. 1.
17 See id. art. IV, § 2, cl. 2.
This is especially evident in the Bill of Rights reliance on "law"—in the sense defined in Article I, the legislative output of a collective government process—as a means for screening which deprivations of property and liberty shall be permitted and which shall be prohibited. For the most part, the individual liberties protected by the Bill of Rights and elsewhere in the Constitution are not absolute and they are not defined in a vacuum. For instance, a law (that is, a statute) may deprive a person of life, liberty, or property, but only a law—not government officials acting without a law or outside of the law.

In sum, the Bill of Rights was not designed to disable Congress and the President from enacting laws to protect a regime of liberty against private abuse. Rather, it was designed to protect all citizens from the arbitrary actions of bureaucrats, tax agents, and other autocratic administrators of federal law. The overriding message of the Bill of Rights is not "the less government power the better," but rather, that the rights of individuals and the powers of government must be held in balance.

In my paper prepared for this conference I also sketch why the transformative Fourteenth Amendment is generally consistent with the original understanding that protection against private violence of liberty and property is a fundamental interest (and may be, as some recent commentators assert, an affirmative obligation) of government. At the time the Fourteenth Amendment was ratified, as at the founding of the Republic, it was understood that state governments had a foremost political obligation to protect their residents from violence and unlawful takings. The argument may be made that the Privileges and Immunities Clause of the Fourteenth Amendment embedded this obligation in the text of the Constitution and extended its benefits to all citizens.

It is therefore especially interesting, even ironic, that many scholars who argue for the existence of affirmative government obligations embedded in the Constitution nonetheless object to the Court's readiness to engage in government interest analysis to delimit the scope of individual constitutional rights. The irony is perhaps most noticeable with respect to the government's law enforcement interests and responsibilities. In one breath, it is argued that the government may be held liable for its failure to meet asserted constitutional obligations to protect citizens from private wrongs such as theft and violence. In the next breath, it is argued that the Supreme Court illegiti-

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19 U.S. Const. amend. XIV, § 1.
mately invokes law enforcement interests to dilute or qualify constitutional guarantees.

To illustrate why these two arguments are difficult to reconcile, compare the opinions in *DeShaney v. Winnebago County Department of Social Services*, and *United States v. Salerno*, which is a 1987 case that upheld the constitutionality of the preventive detention provision of the 1984 Bail Reform Act. Stated briefly, in *DeShaney* it is Chief Justice Rehnquist and the conservatives who refused to recognize an obligation on the part of the government to provide "minimal levels of safety and security." Yet, in the *Salerno* case, which upheld preventive detention, these same Justices stressed the fundamental character of "the Government's regulatory interest in community safety." Justices Marshall and Brennan provided a symmetrical study in apparent perspective-shifting. In *Salerno*, they barely concede that "[p]reventing danger to the community through the enactment and enforcement of the criminal laws is indeed a legitimate goal" of government, while in *DeShaney* they argue that government has a vital duty to provide protection against violence.

It seems to me that those who would read into the Constitution an affirmative government obligation to protect against private violence are implicitly, if not explicitly, recognizing that the government often has a compelling interest in law enforcement. Furthermore, unless we pretend we are living in a make believe world of infinite government resources, we are required to address the conflict between the liberty interest of individual criminal suspects or defendants on the one hand, and the liberty interests of other individuals in the community on the other hand.

Resolving this conflict is largely what the constitutional law of criminal procedure is about. That this is so may be obscured by the procedural posture of a criminal prosecution, where an individual is formally arrayed against the presumptively powerful "government" or "state" or "people." As a result, those who would minimize or temper the law enforcement interests of government see themselves as protecting the interests of the individual, whereas those who regard

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82 *Id.* at 741.
83 *DeShaney*, 489 U.S. at 195.
84 *Salerno*, 481 U.S. at 748.
85 *Id.* at 759 n.4 (Marshall & Brennan, JJ., dissenting) (emphasis added).
86 *See DeShaney*, 489 U.S. at 203-12 (Brennan, Marshall & Blackmun, JJ., dissenting).
the government's law enforcement interests as fundamental seem disposed to provide less protection to the individual.

We may all become too complacent—altogether too predictable—if we look at criminal law and procedure only in the context of particular criminal prosecutions. We may tend to overlook the fact that the cause of individual liberty is often pursued by both sides in a criminal trial. For too many commentators, the conventional statement of the conflict in criminal cases—as "the government" versus "the individual"—"John Doe"—seems to resolve the question presented. For libertarians and others wary of government power, this manner of stating the conflict requires that we place a thumb on the scales of justice in favor of the individual. Conversely, for statists of all stripes, the interests of mere individuals often pale in significance to those of the community. As Roscoe Pound has warned, "If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it." 27

Perhaps the greatest danger of our usual phrasing of the conflict in criminal law and procedure cases ("the state" or "the government" against "the individual") is that this formulation glosses over whose interests are pursued by the government. While much academic criticism of the Court's criminal jurisprudence is exaggerated or unjustified, it is fair to say that the Court has often failed to explain the exact nature or the constitutional origins of the government interests at stake in particular cases. Too readily the court has simply adopted the term "law enforcement interest" to cover situations that may have substantially different constitutional significance. The generally murky articulation of governmental interests at stake in criminal law cases obscures the fact that there are several different species of interests and that these different species have different constitutional stature.

There are, it seems to me, at least three types of interests that have been subsumed under the rubric "government interests." Although the lines of demarcation may not always be sharp and clear, I submit that it would usually be possible, and helpful, to determine which species of government interest predominates in a given case.

First, there are the interests of the public—interests of members of the public, held individually or collectively. Most importantly in the area of criminal law, the interests of the public include the prosecution of those guilty of crime and the abolution of those not guilty of

crime. Public interests also may include purposes at war with one another—for instance, safer roadways and faster roadways.

Second, there are the administrative interests of the government as a functioning entity. These interests range from the mundane (such as avoidance of administrative inconvenience, or reducing administrative costs, or, for that matter, increasing administrative budgets) to the critical (such as assuring the collection of taxes due).

Third, there are personal interests of government employees and government officials. These may range from achieving personal fame or advancement, to ensuring a safe and comfortable workplace, to graft or corruption.

I tentatively propose that a law or government policy that serves predominantly the interests of elected or appointed government employees (as opposed to the interests of those served by government) has the least constitutional value. A government interest has greater constitutional significance when it represents the administrative state’s interest in functioning efficiently. Finally, a government interest is most compelling when the government is pursuing the interests of the general public or of a defined segment of the public, irrespective of the government’s own interest as a bureaucratic entity or the interest of particular government officials.

Some appreciation of a hierarchy of this kind can inform the judgment of a court, by obliging it to characterize forthrightly the nature of the government interest at stake. Of course, mere characterization or categorization of government interests should not decide a case. A court must in any event consider the constitutional significance of the competing individual interest, and, importantly, the extent to which each of these interests are truly at stake. Where a challenged practice or law only minimally furthers a “public interest” or where there are less restrictive alternatives for furthering that interest, the government may not prevail even though the interest marginally furthered is constitutionally compelling. Similarly, although administrative convenience and the personal convenience of officials are less significant than “public interests,” it may be that in a particular case, these lesser interests are so significantly furthered at such de minimis infringement of competing individual interests that the government interest would prevail.

In conclusion, let me express my hope that by distinguishing between the interests of government officials, the interests of government qua government, and the interests of government as an agent for members of the public, we may better appreciate the constitutional conflict presented in criminal law and criminal procedure
cases. The overriding issue presented in these fields of law is how government should allocate scarce resources among competing liberty interests—the liberty interests of the individual defendant and the liberty interests of other members of the community. As the recent DeShaney and Salerno cases demonstrate, private abuse may threaten individual freedom and happiness just as surely as government abuse. The Constitution clearly recognizes this dual threat to individual liberty. Once we recognize that the term "government interest" (or "state interest") is sometimes but a placeholder for the interests of members of the public, it is clear that personal liberties and other individual interests are often represented on both sides of criminal law and criminal litigation.