Criminal Rights

Courts have a special role to play in our society. Unlike the two political branches of our government—Congress and the Executive—which are most sensitive to majority public opinion, courts must protect and defend minorities. Indeed, courts most often are called upon to ensure that the government acts in a fair and reasonable manner and to make certain that individual rights are protected.

Courts have a particularly important role to play in the protection of criminal rights; they must see that no injustice is done to the person accused of a crime. In the last thirty years, the U.S. Supreme Court has taken great care in enforcing the constitutional rights of persons accused of crimes. These include such protections as the right to remain silent and the right to counsel. Some of these criminal procedural safeguards have sparked controversy among law-enforcement officials, political leaders, commentators, and the general public. Typically, critics of the criminal justice system point to its failures—failures that either put criminals back on the streets or penalize innocent and unsuspecting people.

The next two selections examine the role of the courts in the criminal justice system. In the first, journalist Bernard Gasper reports on the views of New York State judge Harold Rothwaex, an outspoken critic and the author of Guilty: The Collapse of Criminal Justice. According to Judge Rothwaex, the criminal justice system, with all its procedural guarantees, is tilted too much in favor of criminal suspects, so much so that he believes “We’re in the fight of our lives” to preserve a law-abiding society.

In the second selection, John Kilwein, professor of political science at West Virginia University, challenges Rothwaex’s views. While conceding that crime continues to be a major problem in the United States, Kilwein argues that it would be unwise to adopt Rothwaex’s “reforms” of the criminal justice system. Kilwein contends that the real issue is whether the criminal justice system fully protects all citizens from the possible abuses and excesses of law-enforcement officials. The many procedural guarantees of the Constitution and the courts, he argues, are merely the means to ensure a “fair fight” between a criminal defendant and a criminal justice system that is stacked heavily in favor of the government. Without these guarantees, Kilwein contends, there exists the very real possibility that innocent persons might be accused, tried, convicted, and punished without adequate protection of the law.
At 2 A.M. on November 20, 1990, Leonardo Turriago was pulled over for speeding by two state troopers. They asked if they could look into his van, and Turriago said they could. Inside, the troopers saw a trunk and asked Turriago about it. He sprang open its lock, then ran away. Opening the trunk, the troopers found the body of a man shot five times.

Turriago was quickly caught. In his apartment, police found 11 pounds of cocaine and guns. The suspect told them where to look for the murder weapon, and it was recovered. Turriago was convicted of second-degree murder and sentenced to 45 years to life.

The defense appealed, saying the troopers had no right to search the van. On June 6, 1996, Turriago’s conviction was overturned. A New York appellate court ruled that the police search was not justified and had been coerced.

“Criminal justice in America is in a state of collapse,” says Judge Harold J. Rothwax, who has spent 25 years presiding over criminal cases in New York City. “We have formalism and technicalities but little common sense. It’s about time America wakes up to the fact that we’re in the fight of our lives.”

Rothwax believes cases such as Turriago’s illustrate that the procedural dotting of every “i” and crossing of every “t” has become more important than the crime’s substance. “The bottom line is that criminals are going free,” he says. “There is no respect for the truth, and without truth, there can be no justice.”

While the search for truth should be the guiding principle of our courts, instead, the judge says, “our system is a carefully crafted maze, constructed of elaborate and impenetrable barriers to the truth.”

Practices we have taken for granted—such as the Miranda warning, the right to counsel, even unanimous jury verdicts—need to be reconsidered, says the judge. “You know,” Rothwax confides, “more than 80 percent of the people who appear before me are probably guilty of some crime.”

Rothwax insists there is a fundamental difference between the investigative and the trial stages of a case. The investigative stage is marked by the notion of probable guilt, he asserts, not the presumption of innocence. “Until a defendant goes on trial, he is probably guilty,” the judge says, noting that by the time a person reaches trial he has been deemed “probably guilty” several times.

“When a person is arrested, indicted by a grand jury, held in detention or released on bail, it is all based on probable guilt.” Rothwax adds, “Once on trial, he is presumed innocent.” . . .

The positions the judge has staked out in what he regards as his crusade to bring sense to the criminal justice system have shocked those who long associated him with strong liberal causes. A lifelong Democrat, Rothwax was a senior defense trial attorney for the Legal Aid Society in New York and a stalwart of the New York Civil Liberties Union early in his career.

“I represented Lenny Bruce and Abbie Hoffman, the Black Panthers and the Vietnam war protesters,” he says, “I am today as much a civil libertarian as ever. But that does not mean I must close my eyes to the devastation that has occurred in criminal justice. We have the crime, but where is the justice? It is all tilted in favor of the criminal, and it is time to bring this into balance.”

The interests of the victim weigh solidly in Rothwax’s courtroom in the Criminal Court Building in Manhattan. However, he is troubled by some decisions of the U.S. Supreme Court, saying: “Its rulings over the last 35 years have made the criminal justice system incomprehensible and unworkable.”

Although neither the Supreme Court nor the Courts of Appeals decide the guilt or innocence of a defendant, they do make rulings on the constitutionality of acts by the police and lower courts and thus have a significant impact on our justice system. Key practices of our current system—which have come about as a result of Supreme Court rulings in recent decades—need to be changed, Rothwax believes. Among them are:

The Miranda Warning. In New York, Alfio Ferro was arrested in 1975 in connection with a fur robbery that turned into a murder. In the lockup, a detective—without saying a word—dropped some of the stolen furs in front of Ferro’s cell. Ferro then made incriminating statements that led to his conviction for second-degree murder.

In 1984, an appellate court overturned the conviction, saying that the detective’s action amounted to interrogation and violated Ferro’s Miranda rights. The Miranda warning requires that the suspect be told he has a right to remain silent, that any statement he makes might be used against him and that he has the right to have a lawyer present.

“Miranda came about because of abuses such as prolonged custodial interrogation, beatings and starving in order to get a confession,” says Rothwax. “I think those abuses have been largely dealt with. Now the police officer is put in the position of telling a suspect in a murder or rape, ‘Look, you don’t have to tell us anything, and that may be the best thing for you.’ And it produces a situation in which a proper confession is thrown out because of the way in which it was read or that it wasn’t read at the right time.”

Rothwax believes Miranda can be replaced by the recording of an arrest and interrogation through videotapes, tape recorders and other technology. This would probably show whether a confession or statement was coerced.

The Exclusionary Rule. [In the winter of 1996] Federal Judge Harold Baer Jr. refused to admit as evidence 80 pounds of cocaine and heroin obtained in the arrest of a drug courier in the Washington Heights neighborhood of New York City.
The evidence was excluded because, said Baer, the police had violated the Fourth Amendment protection against unreasonable search and seizure when they searched the car in which the drugs were found.

The police said their search was proper in view of the fact that they saw men hastily loading bags into an out-of-state car in a high drug area in the middle of the night, and the men ran away when the police approached. Judge Baer, however, said just because the men ran off was no reason to suspect them of a crime. In Washington Heights, the judge said, it was not unusual for even innocent people to flee, because police there were regarded as “corrupt, violent and abusive.”

Under a growing chorus of criticism, Judge Baer first reversed himself and then asked that the case be assigned to another judge. It was. Rothwax says this is the sort of muddled episode which arises from the exclusionary rule, producing “truth and justice denied on a technicality.”

“The Supreme Court has consistently ruled that evidence seized in violation of the Fourth Amendment should be excluded from a criminal trial. But if you read the Fourth Amendment, nowhere does it say that illegally obtained evidence must be excluded,” says Rothwax. “In my view, when you exclude or suppress evidence, you suppress the truth.”

Judge Rothwax has a remedy: “Make the exclusionary rule discretionary instead of mandatory. If it was at the discretion of the judge, there could be a test of reasonableness. A judge could consider factors such as whether a police officer acted with objective reasonableness and subjective good faith. As it is now, the exclusionary rule is irrational, arbitrary and lacks proportion. No wonder that in 90 percent of exclusionary cases, the police don’t know what the law is.”

The Right to Counsel. In 1982, Kenneth West of New York, an alleged drug dealer, was suspected of being involved in killing a man who had taken his parking place. His lawyer, at a police lineup, told the police not to question West in his absence. Nothing came of the case for three years. Then police arrested a former cohort of West who said West had been one of the shooters. The informer secretly taped West talking about the killing. West was convicted, but in 1993 the New York Court of Appeals reversed the conviction, saying the secret taping amounted to questioning him without the presence of counsel.

The right to counsel is provided by the Sixth Amendment. “It is essential there be a right to counsel,” Judge Rothwax says. “But the amendment doesn’t say it has to be during police questioning and investigation. As a result of technicalities over this issue of counsel, I have seen murderers go free. Make it clear that the right to a lawyer shouldn’t be a factor in the investigative stage but only in pre-trial and trial stages.”

Instructions to the Jury. After closing arguments in the O. J. Simpson murder trial, Judge Ito took great care in telling jurors that Simpson’s failure to take the stand in his own defense should in no way be taken to mean anything negative or to draw any other adverse conclusion.
This instruction to the jury occurs in all cases in which the defense asks for it, because of a Supreme Court ruling in 1981 that said not to do so amounted to a violation of the Fifth Amendment. [The Fifth Amendment states that no person shall be forced to testify against himself.] “The Fifth Amendment does not say that one might not draw reasonable inferences from the silence of a defendant,” Judge Rothwax says. “I think we must find a way to return to the standard that existed before, that the judge could tell the jury that the failure to explain could amount to an inability to explain.”

The judge would like to see other changes made to the jury system. Among them:

1. **Unanimous jury verdicts should no longer be required.** Why? Rothwax cites a murder case he presided over. “It was an overwhelming case of clear guilt. Yet there was a hung jury. One juror was convinced the defendant was not guilty. How did she know? Well, as she explained it, ‘Someone that good-looking could not commit such a crime.’ We had to retry the case, and the man was quickly found guilty.”

   By allowing verdicts to be decided by a vote of 11–1 or 10–2, Rothwax says, there could be a reduced risk that a single juror could cause a retrial or force a compromise in the face of overwhelming evidence of guilt.

2. **Peremptory challenges to prospective jurors should be strictly limited or abolished.** Peremptory challenges allow lawyers to knock someone off the jury without giving any reason. “As we saw in the Simpson case,” Rothwax says, “it makes it possible to stack a jury so that the most educated juror is excused, and you end up with a jury that can be manipulated to accept innuendo as evidence.”

Judge Rothwax regards the entire conduct of the Simpson trial as an unspeakable insult to the American people, one that left them “feeling wounded and deeply distrustful of the system.” He adds: “There was an opportunity to show a vast audience the potential vitality of justice at work. Instead we are assaulted by an obscene circus. We saw proof that the American courtroom is dangerously out of order.”

To sit with Rothwax in court, as this writer did, is to get a sense of his urgency for reform. In three hours, there was a procession of men and women charged with felonies from murder to drug dealing. Rothwax was all business, and he was tough with everyone. After 47 cases had been considered and dealt with, the judge turned to me and asked, with irony, about the defendants we had seen: “Did you notice the huge display of remorse?” There hadn’t been any. “That’s why” he said, “we are in the fight of our lives.”
Crime is a significant problem in this country. In 2000, 15,517 Americans became victims of homicide.\(^1\) Property loss and medical expenses related to crime approach $20 billion per year. Responding to these and other troubling statistics, Congress has “federalized” dozens of crimes that were formerly only state offenses, and state legislatures have passed mandatory-minimum sentence laws that require convicted criminals to spend more time in prison. The U.S. Bureau of Justice Statistics reports that as a result of these changes the number of people incarcerated in federal and state prisons more than quadrupled, increasing from 319,600 in 1980 to 1,406,031 in 2001. In addition, Congress has made it much more difficult for prisoners to use the federal courts, the Constitution, and writ of *habeas corpus* to appeal their convictions. All of this is evidence of a concerted national effort, some might argue excessive effort, to deal with the crime problem.

But efforts such as these are not enough for New York Judge Harold Rothwax. He wants to shock us into taking action in the criminal courts, and in so doing he uses arguments that are based on fear.\(^2\) Judge Rothwax warns Americans, as they read their Sunday papers, of the ominous threats of such dark predators as Leonardo Turriago, who cart murder victims around in the trunks of their automobiles, and who walk the streets thanks to legal “technicalities.” But as Judge Rothwax spins his frightening yarn, he fails to tell the reader that the crime rate is actually dropping, in spite of the alleged flaws of the criminal justice system. Violent crime, for example, dropped 10 percent in 2000–2001. Why the paradox? A *reduction* in crime, while Judge Rothwax thinks we are in “the fight of our lives”!

Judge Rothwax offers us a new system of criminal justice that assumes that all police officers and prosecutors do their jobs in a fair and objective manner, free of any systematic bias against groups or individuals in society. The Rothwax system assumes that prosecutors will base their prosecutorial decisions strictly on legal grounds, ignoring other factors such as political gain or racial animus. Judge Rothwax believes that as a society we have largely solved the problem of police brutality; that American law enforcement officials no longer use uncomfortable detention, physical violence, or psychological coercion to secure convictions.

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The Rothwax system assumes that criminal defendants in the United States have more legal representation than they deserve, and that the system would benefit from reducing the formal rules that lawyers bring to the pre-trial process. Unfortunately, the real world of American criminal justice is far more complex than the “good vs. evil” morality play suggested by Judge Rothwax.

THE GOVERNMENT VS. THE CRIMINAL DEFENDANT: A FAIR FIGHT?

The legal system in the United States is based on the belief that the best way for a court to discover the truth in a legal dispute is to allow the parties to battle it out in the courtroom before a jury or judge. The judge acts as an independent and objective arbiter or referee who makes sure that the disputants battle fairly by following the rules of law. The disputants are responsible for developing the case they will bring into the courtroom, and they understandably have a strong incentive to seek out any evidence or witnesses that might assist them. The disputants also have the right to challenge the veracity of their opponents’ presentations. The confrontation in court between these two competing sides, each presenting a very different version of a contested dispute, will, in theory, maximize the likelihood that the truth will come out. Of course, the difficult job for the judge or the jury is sifting through the two accounts to arrive at a sense of what actually took place and what justice should be.

When applied to disputes involving a crime, the disputants in the adversarial system are the defendant, or the person charged with committing the crime, and the state. The state, rather than the victim, is the litigant in criminal cases because, by definition, crimes not only harm victims, they also harm and threaten society as a whole. In a criminal case, therefore, the battle to be played out in the courtroom is between a person charged with a crime and a prosecutor who represents the interests of society—a battle that strains the notion of a fair fight. The government clearly has a lot more advantages than the criminal defendant. The extent of this mismatch is underscored by the fact that prosecutors have available to them the machinery of government, including the vast investigative powers of law enforcement, whereas defendants must do it on their own.

The American justice system takes into account this disparity, however, by providing the defendant with certain procedural rights and advantages that are intended to equalize the courtroom battle in criminal cases. This system assumes that when a powerful litigant, the state, faces a weaker litigant, the defendant, there is a high probability of a wrongful conviction of an innocent person unless the state follows procedures designed to make it a fair fight. And in our criminal legal tradition, there is no greater miscarriage of justice than sending innocent individuals to prison or to their death. Modern-day criminal procedure protections seek to prevent such an outcome.

Among the equalizers built into the American legal system are the presumption of innocence, the beyond-a-reasonable-doubt standard of proof; the prohibitions against unreasonable search and seizure, forced self-incrimination,
excessive bail, excessive fines, double jeopardy, and cruel and unusual punishment; and the right to counsel, to a trial by jury, to a public and speedy trial, to speak at trial, to confront and cross-examine hostile witnesses, to present favorable witnesses, and to access the writ of habeas corpus. Some of these “equalizers” have been incorporated into our system as part of formal documents, or constitutions, that act as the blueprints for our American governments, while others were added as our criminal justice system evolved and became part of our legal tradition.

For Judge Rothwax the balance between the state and the criminally accused is fundamentally flawed. Criminal defendants are not the “weak sisters” in a criminal trial; the state is. For Judge Rothwax, a “liberal” judiciary led by the U.S. Supreme Court has conspired to create new and extreme rights for the defendant. These extravagant rights, moreover, make it extremely difficult for the prosecutor and the police to do their jobs. Seemingly guilty defendants are released from custody because their defense lawyers exploited some constitutional technicality. The murder trial of O. J. Simpson is given as a case in point. Overworked, underpaid, and inept prosecutors fumbled before a group of highly paid “dream team” defense lawyers, who exploited every procedural technicality to achieve a verdict of innocence.

Judge Rothwax offers up an alternative system of criminal justice that tips the balance in the courtroom battle toward the side of the prosecution by limiting a defendant's right to counsel, altering the presumption of innocence, increasing the power of the police to search for proof of criminality and to interrogate defendants, allowing more evidence favoring the prosecution’s case to be admitted in court, and altering the nature of jury deliberations in criminal trials. In short, the Rothwax system makes it easier for the prosecution to prove to a jury that a criminal defendant is guilty as charged and deserving of punishment.

THE “SUSPECT RIGHTS” OF SUSPECTS

The Presumption of Innocence

Our legal system recognizes that a criminal dispute is more serious than a civil dispute. In criminal law, society has the capacity to publicly punish the convicted criminal, using several forms of punishment. First, the defendant faces the shame and consequences associated with being declared a convicted criminal, including the loss of certain freedoms and rights as, for example, access to a variety of licenses or the freedom to perform certain jobs. Second, criminal conviction can bring with it the possibility of substantial monetary fines, often in the thousands of dollars. Third, criminal conviction can result in a complete loss of freedom through incarceration, with all the unintended consequences of life behind bars, a violent world often filled with physical assault, rape, and other indignities. Finally, in thirty-eight states and at the federal level, defendants charged with capital crimes face the ultimate punishment of being put to death by the state.
Given the seriousness of being charged with a crime, the American legal system confers on the defendant an important protection: the presumption of innocence. The primary purpose of this rule is to prevent a wrongful conviction that sends an innocent person to prison or to death. There is a simple yet profound logic behind this rule. When a criminal victimizes an individual, society intervenes to find, try, and punish the criminal. The harm suffered by the victim can never be undone, but some solace comes from the fact that the state takes a direct interest in resolving the criminal dispute. On the other hand, when the state wrongfully punishes an innocent defendant, the victimization is absolute. There is no solace available to the innocent person since the perpetrator is the state. This perspective gives rise to the old saw that it is better to let ten guilty persons go free, than to send one innocent individual to prison or death. For Judge Rothwax, however, that old saw is apparently a bit rusty and should be replaced by a new motto: The criminal justice system almost never convicts the wrong person; and those guilty individuals who are set free are threatening us all.

Judge Rothwax makes a distinction between the investigative (pre-trial) and trial stages of the criminal process. Rothwax argues that, during the investigative stage, defendants are assumed to be guilty by the police and the prosecutor or they would not have been arrested and indicted in the first place. He concludes that when defendants appear before his bench, they are probably guilty of the charges or their cases would never have reached his court. In short, Judge Rothwax gives the state the benefit of the doubt that it only prosecutes clearly guilty people. This perspective is troubling because it ignores the basic idea behind adversarial justice: Legal conflicts are not pre-judged but decided through the courtroom battle.

While it is true that the great majority of police officers and prosecutors are honest people who play by the rules and who have no desire to harm innocent people, Rothwax’s position ignores a number of very real problems. The most obvious problem of the proposed system is that it fails to take into account that justice officials can and do make mistakes, and the importance of the trial process in detecting these honest errors. Second, Judge Rothwax ignores the fact that a minority of justice officials, however small, are lazy, dishonest, corrupt, racist, or some combination of these. Examples of these troubling behaviors abound in our criminal justice system. In 2003, the Republican governor of Illinois, George Ryan, took the unprecedented action of commuting the death sentences of all men and women on death row, 167 prisoners, to life imprisonment. Governor Ryan based his decision on his research into the machinery of Illinois’ capital justice system, which left him with serious questions about its inherent fairness. Ryan cited misconduct by prosecutors and police officers as factors that can lead to unjust capital sentences. A year earlier in Los Angeles, police officers admitted to systematically committing crimes to convict innocent individuals. The Los Angeles District Attorney’s Office took the unprecedented action of seeking the reversal of forty felony convictions, because it had clear evidence that those convictions were based on the false testimony of the errant officers.
In 1997, an internal U.S. Department of Justice investigation revealed that agents of the highly respected F.B.I. crime laboratory altered evidence and skewed testimony to assist prosecutors. In Texas and West Virginia false testimony given by an incompetent and dishonest medical examiner sent at least six innocent men to prison. To avoid the embarrassment and political fallout of being unable to convict the perpetrators of an arson fire with multiple deaths in New York and the killing of a police officer in Houston, prosecutors in both cities tenaciously pursued capital murder charges against apparently innocent individuals, while ignoring or concealing exculpatory evidence in the prosecution's possession. And evidence that some police officers and prosecutors targeted young black and Hispanic men for questionable arrest and prosecution comes to light with alarming clarity, as in the case of Carlton Brown.

The case of Carlton Brown is particularly enlightening. Mr. Brown, who is black, is paralyzed from the chest down following injuries he sustained while under arrest in New York City's 63rd Precinct. Charged with driving with a suspended license, Mr. Brown contended that the arresting officers, after becoming irritated with his demands for information on his arrest, smashed his head, while he was handcuffed, into a bulletproof, double-plate glass window and severely injured his spine. The two police officers involved with his arrest countered that Mr. Brown had hurt himself falling down in the police station. The police officers were charged, tried before a judge, and acquitted. In a subsequent civil proceeding, however, the city of New York agreed to pay Mr. Brown $4.5 million in civil damages, a record-setting pre-trial settlement. Needless to say, such a settlement calls into question Judge Rothwax's confidence in the criminal justice system's ability to function in an unbiased manner.

Our system of justice assumes that people, including law enforcement officials, are not angels or saints; nor are they infallible; and it builds in protections, like the presumption of innocence, accordingly. The Rothwax system depends on an angelic conversion among these officials, an unlikely occurrence now or ever.

**Miranda, the Right to Remain Silent and the Right to Counsel**

Judge Rothwax reserves some of his harshest criticism for the U.S. Supreme Court's 1966 decision in *Miranda v. Arizona.* In that decision the Court ruled that a confession made by Ernest Miranda, who was charged with kidnapping and raping an eighteen-year-old woman, was unconstitutionally obtained by police interrogators. Extending its ruling beyond the immediate circumstances of the arrest and interrogation of Miranda, the Court required that henceforth all police officers and prosecutors must inform defendants of their rights to remain silent and to have counsel. Commenting on state law enforcement officials, the Court observed,

The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County [Brooklyn Borough], New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.
The Court added that, although not using physical violence, other police interrogators use psychological abuse and lies to trick defendants into confessing to crimes.

Seen as an indictment against all police officers and prosecutors, the decision in *Miranda* was, and, as highlighted by Judge Rothwax, still is very unpopular within the law enforcement community. This is unfortunate because, as Chief Justice Warren argued in the opinion, the *Miranda* requirements do not prevent good law enforcement officers from doing their job. Indeed, as pointed out by Warren, agents of the F.B.I. had already been using the warnings and were still able to investigate and assist in the conviction of federal defendants. What the warnings were designed to do was prevent an innocent defendant from confessing in order to bring an end to an abusive interrogation. The fact of the matter is that police officers who do not abuse defendants have nothing to fear from the *Miranda* requirements.

The *Miranda* decision also sought to make effective two important equalizers in the Bill of Rights: the prohibition against self-incrimination and the right to counsel. The right against self-incrimination, or the right to remain silent, is based on an old common law principle that the state cannot force defendants to testify against themselves. Rather, the state makes the charges and must prove its case. Although the right to counsel came later in the Anglo-American legal tradition, it is based on the belief that it is unreasonable to expect ordinary persons to understand the legal implications of statements they might make or actions they might take in the pre-trial stage, actions that might again lead to their wrongful conviction. The *Miranda* requirement was based on the reasonable assumption that illiterate or uninformed defendants probably are not aware of these protections and therefore the state has a responsibility to inform them.

Judge Rothwax argues against this necessity, contending that, because defense attorneys step in and convince their clients to do otherwise, *Miranda* prevents the police from securing confessions from cooperative defendants. Apparently Judge Rothwax is opposed to the general principle of informed consent; that is, that defendants should know what they are doing before they say anything or confess. Judge Rothwax also seems to believe that the abuse of defendants while in police custody, cited by Chief Justice Warren in *Miranda*, is no longer a problem. Unfortunately, evidence suggests that, in his zeal to get tougher on crime and criminals, Judge Rothwax is ignoring the fact that abuses continue in the interrogation stage of the pre-trial process. An example from Rothwax's own hometown underscores this conclusion. Police officers in New York's 24th Precinct arrested a seventeen-year-old white male for a misdemeanor. He refused to confess. The defendant was held in a jail cell for two nights. At one point, he was placed in a van and chained in the sweltering heat. At another point a police officer waved his gun in front of the defendant and threatened to "shoot his d**k off." One wonders if the cameras in the precinct, called for by Judge Rothwax to protect against such abuse, would have captured this particular "Kodak moment"! The evidence suggests that this incident is not a random occurrence, in New York or nationally. Amnesty International
has cited ninety cases of police brutality allegedly perpetrated by officers of the New York Police Department alone. Similar charges by other watchdog groups have been leveled at other departments around the country.18

Sometimes law enforcement officers use less violent forms of coercion in the interrogation room. For example, in 1999, F.B.I. agents lied to Wen Ho Lee, a Department of Energy employee suspected of spying for China, by informing him that he had failed a lie detector test, when, in fact, he had registered a score indicating he was telling the truth.19 Building on this lie, the agents then told Mr. Lee that if he did not provide them with a confession, he would likely die in the electric chair.

For most first-time defendants the pre-trial process can be a very frightening experience. Defendants, innocent or guilty, who cannot post bail are held in jail until their trial. The pace of some criminal justice systems can be glacial, taking up to two years for a case to make it to trial. This delay, moreover, can be used to entice or coerce a defendant into making a confession, even a false one. For example, a prosecutor can offer defendants awaiting trial a plea bargain that gives them credit for time served while awaiting trial in exchange for a guilty plea. Given this offer, an innocent defendant might make a false confession, assuming that the conviction is a small price to pay for immediate release from prison.20 The deal may be especially appealing if the defendant considers that a guilty verdict by jury at trial could yield an even stiffer sentence. Interrogations are also daunting for a defendant unfamiliar with the law. And although the great majority of questionings are conducted by professional officers observing all relevant constitutional requirements, the fact remains that police officers have substantially more experience in the process than do defendants, thereby increasing the probability that defendants will unwittingly damage their own case. In these and every other pre-trial situation, defendants would be at a severe disadvantage without legal representation.

In the end, the Rothwax system would punish the ignorant, the weak, and the poor. Wealthy or more highly educated defendants, who have a basic understanding of the legal system, are more likely to know they have the right to remain silent and to make informed choices about its use. Likewise, sophisticated defendants who are not intimidated by pre-trial detention and rough treatment are also more likely to refuse to assist the police in developing the state’s case against them. Moreover, defendants with long-standing criminal records are also likely to be especially cognizant of their right to remain silent. In addition, multiple offenders who have experienced the daily violence of the corrections system are probably less likely to be frightened into confessing as the result of a difficult interrogation.

The most troubling aspect of Rothwax’s system, however, from the point of view of equal justice for all, is that it rewards wealthier criminal defendants. Individuals who can afford to hire a lawyer and post bail are able to avoid the various forms of pre-trial pressure since they can await trial in the comfort of their own homes; and, with the advice of counsel, they are more likely to remain silent, thereby putting the government to its full task of convicting them without their assistance. It is quite possible, therefore, that the system proposed
by Judge Rothwax will have the unintended consequence of convicting more innocent, first-time criminal defendants, while releasing those defendants with experience and/or money. These potential biases do not seem to concern Judge Rothwax. Like some American generals in Vietnam, Judge Rothwax seems to be singularly concerned only with body counts: So what if these new convictions are gained at the expense of fairness? They’re convictions; and that’s what counts! A justice system that operates in this manner has abandoned any pretense of being blind to a defendant’s wealth or social status. It is a justice system more likely to convict an innocent defendant whose real crime is that he or she lives in the South Bronx rather than on Long Island.

The Exclusionary Rule

The exclusionary rule is an American invention, created by the U.S. Supreme Court in 1914. It was designed to resolve the question of what should be done when a police officer or prosecutor violates the constitutional protections of defendants who have been the targets of illegal searches or interrogations. By making this ruling, the Supreme Court, using a classic American “free-market” approach, has ruled that such evidence is tainted and must therefore be excluded from trial. The exclusionary rule, the Court has argued, removes any incentive for law enforcement officials to engage in unconstitutional and illegal activities, since ill-gotten gains cannot be used in court.

Since the Bill of Rights makes no mention of this rule in the Fourth Amendment’s prohibition against unreasonable searches and seizures, Judge Rothwax contends that the rule is an illegitimate hindrance to the criminal justice system’s operation. He argues that excluded evidence prevents the court from getting the total truth surrounding a case. To accept this logic, however, one must, again, accept, as Rothwax clearly does, that in the rule’s absence, police officers or prosecutors are unlikely to violate the Fourth or Fifth Amendments in their search for evidence or confessions. Given the examples of illegal police conduct cited, it is difficult to share Justice Rothwax’s views of the motives and actions of the police.

Judge Rothwax is also upset because the exclusionary rule has, in his view, been used by judges in an overly technical and picky manner, with good cases being thrown out because investigating officers forgot to “dot the i’s and cross the t’s.” He blames the “liberal” U.S. Supreme Court for decisions that favor criminal defendants. The Supreme Court of 2003, however, is, in fact, a very conservative one, particularly in its decisions dealing with the rights of criminal defendants. Since the mid-1970s, the U.S. Supreme Court has consistently shifted the constitutional advantage in criminal matters away from criminal defendants toward the police and prosecution. Specifically, in terms of the exclusionary rule, the Court has ruled in ways that enable prosecutors to use more questionable evidence and confessions against criminal defendants. Two examples highlight this shift. In U.S. v. Harris,22 the Court allowed illegally obtained evidence to be used in trial to discredit testimony during cross-examination. And in Nix v. Williams,23 the Court ruled that tainted evidence can be used against the defendant if the
trial court judge concludes that evidence would inevitably have been discovered. Still, this very pro-police U.S. Supreme Court drew the line by refusing to overturn Miranda when given the opportunity in *Dickerson v. U.S.*

**Peremptory Challenges and Unanimous Jury Verdicts**

Judge Rothwax’s remaining indictments of the present criminal justice system deal with criminal juries. Responding to the controversy surrounding the O. J. Simpson murder trial, he criticizes the defense team’s use of peremptory challenges to eliminate prospective jurors. He argues that the Simpson defense team used such challenges to seat a jury that could easily be fooled by courtroom pyrotechnics. Whether this is true or not is a matter of conjecture, but it should be noted that Judge Rothwax ignores the fact that the prosecution had the same opportunity to affect the makeup of the jury. In reality, peremptory challenges help both sides in the courtroom battle, and thus we can assume that their removal would potentially hurt both sides as well. In 1997, for example, a videotape surfaced that was used as a training device for assistant prosecutors in Philadelphia. The tape shows a senior prosecutor counseling his trainees to exclude black citizens from serving on criminal juries because they are distrustful of the police and therefore less likely to convict. The tape tells the trainees they should especially avoid placing young black women on their juries, because they are very bad for the prosecution’s case. Although this episode remains to be investigated, and the attorney featured in the video vehemently denies having done anything illegal or morally wrong, the advice presented on this tape would appear to violate a Supreme Court ruling prohibiting race from being used as a factor in selecting jurors. More fundamentally, this example calls into question Judge Rothwax’s contention that the justice system has solved the problem of systemic racism.

Judge Rothwax also opposes the requirement that a criminal jury reach a verdict of guilty unanimously, suggesting instead that we should allow a jury to convict a defendant with a substantial majority, such as a vote of 11–1 or 10–2. In fact, the practice of jury unanimity is merely a legal custom and not an explicit constitutional right, and the U.S. Supreme Court has established that, if states choose, they can allow juries to reach their decision with a clear, non-unanimous verdict. Given the Supreme Court’s view on this issue, Judge Rothwax’s gripe, then, is with the legal system of the state of New York, which apparently has decided to continue the practice of jury unanimity, and not with the rulings of the so-called “liberal” U.S. Supreme Court in Washington.

**WE FACE THE CHOICE OF OUR LIVES**

The late Senator Sam Ervin once said, “In a free society you have to take some risks. If you lock everybody up, or even if you lock up everybody you think might commit a crime, you’ll be pretty safe, but you won’t be free.” To this one might add, “And you might end up getting locked up yourself.”
This country was shaped in part by a healthy concern for the potential abuses of governments. The U.S. Bill of Rights and the civil liberty protections of the state constitutions were created to ensure certain fundamental protections for all citizens. These guarantees were designed to withstand the shifting winds created by agitated majorities. Judge Rothwax is not the first American, nor will he likely be the last, to tell his fellow citizens that we live in a particularly dangerous time and that to survive we must forgo the “luxury” of our civil liberties.

Judge Rothwax is wrong. The guarantees created by James Madison and the Constitution are not luxuries. Rather, they make up a very battered constitutional firewall that barely protects us from the police state that he, cynical politicians, and a very conservative U.S. Supreme Court seem to be inching toward. These civil liberties are not excessive; if anything, they provide too little protection for the realities of daily life in an increasingly urban, multicultural society facing the twenty-first century.

Of course, many Americans share Judge Rothwax’s concern over criminal predators like Leonardo Turriago who prey on their fellow citizens. These violent criminals should be punished severely. But the same level of concern ought to be expressed in regard to how today’s criminal justice system treats black, Hispanic, American Indian, poor, and uneducated Americans. Americans ought to be concerned about the rights of innocent, hardworking Americans who are harassed, injured, maimed, or killed every day by abusive police officers for being in the “wrong” neighborhood or driving too “nice” a car. Judge Rothwax’s system will not win the war against the Leonardo Turriagos of the world; it will likely create more Carlton Browns.

NOTES

3. In other countries, such as most of the nations of continental Europe, an inquisitorial system of justice is used. In this system, it is the judge who determines the direction of the trial by calling witnesses, examining evidence and drawing final conclusions of fact. When compared to an adversarial justice system, inquisitorial disputants and, more importantly, their lawyers play a much less active role in affecting the composition of the case. Instead of a courtroom battle, the inquisitorial trial might be likened to a trip to the principal’s office to determine who did what to whom and what should be done about it.
11. James Madison, the leading figure in the development of the U.S. Constitution and Bill of Rights, commented on the need for checks on human behavior associated with the affairs of the state in *Federalist* No. 51: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”
13. Both sides conceded that, during the interrogation, the police did not use any force, threats, or promises of leniency if Miranda would confess. Both sides also conceded that at no point did the police inform Miranda that he had a constitutional right to refuse to talk to the police and that he could have counsel if he so desired.
14. Thus yielding the famous *Miranda* warnings:
   • You have the right to remain silent.
   • Anything you say can and will be used against you in a court of law.
   • You have a right to a lawyer.
   • If you can’t afford a lawyer one will be provided to you.
   • If you say at any point that you do not want to talk to the police the interrogation must cease.
15. 384 U.S. 446.
16. It is worth noting that critics of the Miranda decision often ignore the fact that Ernesto Miranda did not go unpunished as a result of the Court’s action. Instead, he was prosecuted by the State of Arizona in a second trial, without the use of his confession, and was convicted and sentenced to prison.
18. Ibid.
20. It is important to note that only about 10 percent of criminal cases are resolved through the formal trial process. Most criminal convictions in this country are the result of plea bargaining between the defendant and the prosecutor.
25. When a jury is used as the fact finder in a criminal case, the defense and prosecution have a significant role in determining who will sit on the jury.
In the jury selection process both sides can challenge a prospective juror in two ways. A challenge for cause is used when an attorney can show the court that there are tangible characteristics of the prospective jurors that make them biased and warrant their removal from consideration; lawyers have an unlimited ability to challenge for cause. A peremptory challenge allows a lawyer to remove a potential juror without giving a reason; each lawyer in a case gets a limited number of these. But peremptory challenges are not as peremptory as their name implies. The Supreme Court has ruled that lawyers cannot use them to systematically exclude all blacks or women from consideration for jury service.


27. Jury unanimity is another balancer. It is based on the notion that the prosecutor should be required to present a case that convinces all jurors that the defendant is guilty beyond a reasonable doubt.


Internet resources
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