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Rights of the Accused

(The following article is taken from the U.S. Department of State publication, *Rights of the People: Individual Freedom and the Bill of Rights*.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

– Fourth Amendment to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law. . . .

– Fifth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

– Sixth Amendment

Nor shall any State deprive any person of life, liberty,

or property, without due process of law....

– Fourteenth Amendment

We normally think of a trial by jury as one of the individual rights afforded to persons accused of a crime. It is also, as we have seen, a right that is institutional as well – one that belongs to the people as a whole as well as to the individual. But jury trials, as has been all too evident in dictatorships, can be meaningless unless that trial is governed by rules that ensure fairness to the individual. A trial in which the judge allows illegally seized evidence to be used, or in which the defendant has no access to an attorney, is forced to testify against himself, or is denied the ability to bring witnesses favorable to his cause, is not a trial that meets the standard of due process of law. The men who drafted the Bill of Rights knew this, not only from their experience during the Colonial era, but also from the history of Great Britain, which ever since the signing of the Magna Carta in 1215 had been committed to expanding the rule of law.

Today we tend to emphasize the relationship of rights to individual liberty, but even those rights which are most identified as individual – such as the rights of persons accused of crimes – still have a community basis. Rights in American history are not designed to free the individual from community norms; rather, they exist to promote a responsible liberty, to allow each and every one to be free from arbitrary power. In the areas of free expression, the Bill of Rights carves out a space where dissenting voices may be freely heard, both for the benefit of the individual as well as for the sake of the community. Rights of any kind are the community's protection against the unwarranted interference in daily life by an all-powerful central government. Rights liberate both the community and the individual.

Regarding the rights of the accused, the basic outlines of due process are spelled out

in the Constitution, and their specifics have been refined in local, state, and federal courtrooms for more than two centuries. Many of these questions seem to deal with minute, some would even say mundane, details of procedure. But as Justice Felix Frankfurter once declared, "The history of American freedom is, in no small measure, the history of procedure." His colleague on the Supreme Court, Justice Robert H. Jackson, agreed, and once noted that whatever else "due process" might mean, procedural fairness "is what it most uncompromisingly requires."

What is due process of law? There is no absolute agreement on the meaning, and over the past two centuries courts have found that the phrase encompasses not only procedural but substantive rights as well. For our purposes, due process of law is what the Constitution, as interpreted by the courts and supplemented by legislation, has created to protect the integrity of the criminal justice system. It does not mean that in every case every defendant is treated identically. Rather, every defendant, no matter what the charge, is entitled to certain processes to ensure that at the end of the day, he or she will have had a fair trial, conducted under the rules of law, openly, and in such a manner that the public can rest assured that the system is working fairly. While this sounds simple to accomplish, the history of criminal procedure in the United States and elsewhere shows that it is not. Only in democratic societies confident of their rights can such a system develop. Military justice is different, out of necessity – this essay treats of the vast majority of cases referred to civil courts.

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At the time of the American Revolution, the concept of the rights of the accused had progressed much further than in Great Britain. If we look at the first state laws passed after the American Revolution of 1776, we find a surprisingly modern list of rights, which included a right to reasonable bail, the exclusion of confessions made out of court, the right to know the charges, grand jury indictments in capital cases, trial by jury, and others, many of which would eventually be included in the Bill of Rights (1791). But the Bill of Rights applied only to the federal government until the 1920s, and criminal cases were for the most part tried in state courts under state law. The result was that in the early 20th century there were two separate systems of criminal procedure in the United States.

On the one hand, there were a small number of federal crimes (that is, crimes defined by Acts of Congress), which would be investigated by the small force of federal investigators, and tried in federal courts under the strict requirements of the Bill of Rights. Moreover, relatively early on, if the defendant was too poor to hire a lawyer, the court would appoint one from the local bar to represent him. At least on the federal level, the notion that due process required a lawyer was well established by the early 20th century.

On the other hand, were the state courts, in which state crimes (defined by acts of the state legislature) were investigated by local or state police, prosecuted by local or state district attorneys in state courts, and in which only state provisions, not federal rights, applied. And the sad fact of the matter is that in most states, there were few procedural rights, and even the ones that existed were not stringently enforced. Searches could often be carried out without a warrant; persons arrested could be subjected to intimidating police interrogation without the presence of a lawyer; if they did not have the money to hire an attorney, then they could be tried without a lawyer; in many states defendants did not have the right to refuse to testify at their trials, and if they decided not to take the stand, their silence could be used as "proof" of their guilt; and if found guilty, they often did not have the right of an appeal.

Because the United States is a federal system, laws do vary not only between the federal government and the states, but from state to state. In those areas where the Constitution does not spell out a clear federal supremacy, the practice has been to allow the states great leeway in how they conduct their business, including investigation and prosecution for crime. Until the early 20th century, federal courts operated on the assumption that the Constitution did not give them any power to review either the procedures or the results of state trials. One should note that in many states, procedural guidelines were as protective of individual rights as that of the federal government. But a wide spectrum existed, ranging from trials that would, under any circumstances, be considered fair to those that could only be described as mockeries of justice. It was one of these latter that finally moved the federal courts to intervene, and which over the next half-century led to a redefinition of criminal procedure in the United States.

William Rawle, a Philadelphia lawyer (1825)

The most innocent man, pressed by the awful solemnities of public accusation and trial, may be incapable of supporting his own cause. He may be utterly unfit to cross-examine the witnesses against him, to point out the contradictions or defects of their testimony, and to counteract it by properly introducing it and applying his own.

The eight young black men (the "Scottsboro boys") who were charged with raping two white girls in Alabama in 1931 may have been innocent, but in the racially charged atmosphere of the Deep South during the Depression they certainly had no knowledge or ability to defend themselves. All eight were tried, found guilty, and sentenced to die in sham trials lasting less than a day. The lawyers assigned to defend them by the judge did little more than show their faces in the courtroom and leave. When news of this travesty of justice reached northern newspapers, civil liberties groups immediately volunteered to provide effective counsel on appeal, and succeeded in moving the case into the federal court system and up to the U.S. Supreme Court.

Justice Oliver Justice George Sutherland, in Powell v. Alabama (1932)

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be out on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

The case of *Powell* v. *Alabama* is notable for two things. First, it launched the federal courts on a new mission, that of overseeing the criminal justice system in the states, and they did this under the Due Process Clause of the Fourteenth Amendment, which specifically applies to the states. It was not then, and never has been, the mission of the federal courts to ensure that criminal procedure in every state is identical to that in every other state. Rather, the courts have attempted to define the minimum protection of rights that the Constitution demands to ensure due process. While some states, for example, have 12-person juries, other states have lesser numbers for certain types of trial. These variations are permissible, the courts have held, so long as the trial and the jury adhere to minimal standards of fairness.

Second, *Powell* established the rule that in capital cases, those in which the death penalty could be imposed, effective assistance of counsel is constitutionally required. The lawyers in the Alabama case did no more than show up; they did nothing to defend their clients, and for all practical purposes might as well have been absent altogether. Not only must a defendant have a lawyer, the Court ruled, but that lawyer must provide real assistance, or as the courts have put it, *effective counsel.*

But the Court that ruled in *Powell* still believed strongly in a federal system, and while it was willing to extend its oversight function, it did so slowly, and only when confronted with a case that so offended it that the justices could not ignore the breach of due process. In 1936, for example, the high court overturned the convictions of three black men who had confessed to committing murder only after they had been severely beaten and tortured. In *Brown* v. *Mississippi* (1936), Chief Justice Charles Evans Hughes denounced the state's use of coerced confessions as a violation of due process. Torture "revolted the sense of justice," and violated a principle "so rooted in the traditions and consciences of our people as to be ranked fundamental."

Here again the Court was not ready to extend the protection of explicit Bill of Rights guarantees, but relied on the Due Process Clause of the Fourteenth Amendment. It made clear that states had great leeway in how they structured their trials; they did not even have to have jury trials provided whatever procedure they did adopt conformed to the principles of fairness demanded by the ideal of due process.

Chief Justice Charles Evans Hughes, in Brown v. Mississippi (1936)

Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness chair.

Although *Powell* established the rule that states had to provide counsel in capital cases. It did not address the question of whether counsel had to be provided to indigent defendants in felony cases that did not carry the death penalty. That issue would not be decided in the United States until 1963, in one of the most famous cases in American history – *Gideon v. Wainwright.*

A drifter, Clarence Earl Gideon, had been convicted of robbing a pool hall. At his trial he maintained his innocence, and asked the judge to assign him a lawyer, since he believed the Constitution of the United States assured him of that right. The judge responded that under Florida law he was not entitled to a lawyer in this case. Gideon did the best job he could defending himself, but was found guilty primarily on the basis of circumstantial evidence. In prison he went to the library and looked up how to appeal his case, first to the Florida Supreme Court (which turned him down), and then to the U.S. Supreme Court.

As it turned out, Gideon's "pauper's appeal" (in *forma pauperis*) arrived at the Court in the midst of the "due process revolution" of the Warren Court. The Supreme Court, under the leadership of Chief Justice Earl Warren, was in the process of determining that the Due Process Clause of the Fourteenth Amendment also "incorporates" other elements of due process found in the Bill of Rights. The Court had not yet determined whether the Sixth Amendment right to counsel was to be incorporated, and Gideon's appeal gave it the opportunity to make that decision. And as it does whenever it accepts a pauper's appeal, the Court assigned counsel to represent Gideon, in this case one of Washington's most prominent attorneys, Abe Fortas, later to be a member of the Court itself. (Law firms consider it a high honor when asked by the Court to do this type of service, even though they are not reimbursed a cent for the thousands of dollars they expend in preparing the case.)

At oral argument, Fortas convinced the justices that there could never be a truly fair trial, and that the requirement of due process could never be met, unless a defendant, no matter what his or her financial resources, could have the services of an attorney. The Court agreed, and in its decision extended this basic right to all persons charged with a felony. A few years later, the Court under Chief Justice Warren Burger, extended this protection to misdemeanor charges that could lead to a jail sentence.

Attorney General Robert F. Kennedy on the Gideon case (1963)

If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the Court had not taken the trouble to look for merit in that one crude petition among all the bundles of mail it must receive every day, the vast machinery of American law would have gone on functioning undisturbed.

But Gideon did write that letter, the Court did look into his case; he was retried with the help of a competent defense counsel, found not guilty, and released from prison after two years of punishment for a crime he did not commit – and the whole course of American legal history has been changed.

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The role of the lawyer is considered central to protecting the rights of a person accused of a crime, but the lawyer standing alone would be of little use were it not for the bundle of codified rights that are there for the accused person's protection. What evidence may be used in a criminal case, for example, is governed by the protections against unlawful search and seizure established in the Fourth Amendment. Here again the colonists' experience under British rule in the 18th century shaped the concerns of the Founding generation.

Although British law required that warrants be issued for the police to search a person's residence, the British Colonial government relied on general warrants, called writs of assistance, which gave officials a license to search almost everywhere for almost everything. The notion of a general warrant dated back to the Tudor reign under Henry VIII, and resistance to its broad reach began to grow in the early 18th century. Critics attacked the general warrants as "a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched by persons

unknown to him." But the government still used them, and they became a major source of friction between His Majesty's Government and the American colonists. The problem with the general warrant was that it lacked specificity. In England in 1763, for example, a typical warrant issued by the Secretary of State commanded "diligent search" for the unidentified author, printer, and publisher of a satirical journal, *The North Briton*, and the seizure of their papers. At least five houses were subsequently searched, 49 (mostly innocent) people were arrested, and thousands of books and papers confiscated. Opposition to the warrants was widespread in England, and the opposition gradually forced the government to restrict their usage.

Chief Justice Sir Charles Pratt, on general warrants (1762)

To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; [it is] a law under which no Englishman would wish to live for an hour.

Despite its restriction in the mother country, the use of general warrants remained widespread in the colonies, and constituted one of the colonists' major complaints against Great Britain. In a famous speech against the writs of assistance, James Otis, a member of the colonial Massachusetts assembly, charged that they went "against the fundamental principles of law, the privilege of house. . . . [It is] the worst instrument of arbitrary power, the most destructive of English liberty, that was ever found in an English law-book." Following the Revolution, the states enacted a variety of laws limiting the use of such warrants, and when James Madison drafted the Bill of Rights, the Fourth Amendment spelled out further restrictions on the use of warrants.

In order to get a warrant under the U.S. Constitution, police must present evidence in their possession pointing to a specific person they wish to arrest or a place they wish to search. And they must be specific. The person must be identified by name, not just "the man who lives in that house." Police must specify what it is they are searching for – contraband, drugs, weapons – and not just indicate that they wish to search a suspected person's house. In order to get that warrant, they must have what the Fourth Amendment identifies as "probable cause." This does not mean overwhelming proof that there is contraband in a certain house or that a particular person did in fact commit a crime. Rather, they must show that it is more likely than not that the person did commit a specific illegal act, and that it is more likely than not that a search of the premises will yield particular evidence of a crime.

The Fourth Amendment is silent about any enforcement of these provisions, and for many years police in the states often did, in fact, search houses and arrest people either without having any warrant at all or having secured one without really showing probable cause. Courts held that federal law enforcement officials had to abide by the high standards of the Constitution, and created what came to be known as the "exclusionary rule." Under this standard, evidence seized without a proper warrant could not be introduced at a trial. When the federal courts expanded the reach of the Bill of Rights to apply to the states as well, they also applied the exclusionary rule to state police and trial courts.

Justice Tom Clark, in Mapp v. Ohio (1961)

[Without the exclusionary rule] the assurance against unreasonable searches would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties. So too, without that rule the freedom from state invasion of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

Although there have been some critics of the exclusionary rule – Justice Cardozo once famously said that because of the rule "the criminal is to go free because the constable has blundered" – there is also general agreement that it is the only means to enforce the requirements of the Fourth Amendment. It makes sure that the state, with all the power behind it, plays by the rules. And if it doesn't, then it cannot use evidence illegally gained in prosecuting a person, even if that person is in fact guilty. While this may seem extreme to some, it serves a higher good – ensuring the proper behavior of the police.

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The Sixth Amendment right to counsel is also often tied to what some scholars have called "the Great Right" in the Fifth Amendment that no person shall be compelled in any criminal case to be a "witness against himself." The origins of the right go back

to objections against the inquisitorial proceedings of medieval ecclesiastical tribunals as well as the British Courts of Star Chamber. By the late 17th century, the maxim of *nemo tenetur prodere seipsum* – no man is bound to accuse himself – had been adopted by British common law courts and had been expanded to mean that a person did not have to answer any questions about his or her actions. The state could prosecute a person, but could not require that he or she assist in that process. The colonies carried this doctrine over as part of the received common law, and many states wrote it into their early bills of rights. Madison included it as a matter of course when he drafted the federal Bill of Rights.

The privilege came under heavy criticism during the early 1950s, as witnesses refused to answer Senator McCarthy's questions at hearings of the congressional "Un-American Activities" committee, a quasi-judicial inquiry into Communist activity in the United States, on grounds of possible self-incrimination. "Taking the Fifth" became associated with Communists in the public mind, and commentators asserted that a truly innocent person would not hesitate to take the stand and tell the truth in criminal trials or before investigating committees. The popular press carried articles on whether this constitutional right, which allegedly sheltered only guilty persons, ought to be amended.

The Court, however, continued to take an expansive view of this right, as it had since the late 19th century, when it had defined the privilege against self-incrimination to apply to any criminal case, as well as to civil cases where testimony might later be used in criminal hearings. The privilege is not absolute; persons may not refuse to be fingerprinted, to have blood samples, voice recordings or other physical evidence taken, or to submit to intoxication tests – even though all these may prove incriminating. But at a trial, the accused has the right to remain silent, and any adverse comment on a defendant's silence, by either judge or prosecutor, violates the constitutional privilege.

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Although an accused person may not be forced to testify, he or she may voluntarily confess, and the confession may be used in evidence. In fact, in many criminal cases resulting from acts of passion or drugs where the perpetrator is not a career criminal, the suspect is eager to confess. The old common law rule against confessions obtained by torture, threats, inducements, or promises had been reaffirmed as part of constitutional law by the Court in 1884. In modern times, in spite of the "Red Scare" of the 1950s, the Supreme Court continued to refine the test to give police greater guidance in how to carry out their responsibilities while still respecting the strictures of the Bill of Rights.

The court emphasized that confession must be voluntary, and not be the result of physical abuse or psychological brutality. Then the Court tied the Fifth Amendment privilege to the Sixth Amendment's right to counsel, on the grounds that only if the accused is first informed of his rights, including the right to remain silent, can an ensuing confession be admissible.

Justice Arthur Goldberg in Escobedo v. Illinois (1964)

Our Constitution strikes the balance in favor of the rights of the accused to be advised by his lawyer of his privilege against self-incrimination. . . . No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Then in 1966, the Supreme Court handed down the landmark ruling of *Miranda v. Arizona*. Police and lower courts had wanted a clear rule to help them determine when all the constitutional requirements had been met, and in *Miranda* the Court gave them that rule. According to Chief Justice Warren, a person under arrest had to be informed in clear and unequivocal terms of the constitutional right to remain silent, and that anything said at that point could be used against him later in court. In addition, the officers had to tell the suspect of the right to counsel and that if he or she had no money to hire a lawyer, the state would provide one. If the police interrogation continued without a lawyer present, the chief justice warned, "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and the right to counsel."

The *Miranda* decision unleashed a storm of criticism of the Court for its alleged coddling of criminals, but within a short time the basic soundness of *Miranda* became clear.

The more progressive police departments in the country lost little time in announcing that they had been following similar practices for years, and that doing so had not undermined their effectiveness in investigating or solving crimes. Felons who wanted to confess did so anyway; in other cases, the lack of a confession merely required more efficient police work to find and convict the guilty party. As to charges that the decision encouraged crime, Attorney General Ramsey Clark explained that "court rules do not cause crime." Many prosecutors agreed, and one commented that "changes in court decisions and procedural practice have about the same effect on the crime rate as an aspirin would have on a tumor of the brain."

The Court – and the Constitution – can do very little should a person commit a crime. Their concern, and the concern of the society, is that when the police apprehend a suspect, that man or woman is not sent to jail or condemned to die without due process of law. The prevention of crime is the responsibility of the legislative and executive branches, who make the laws and retain the ultimate responsibility for enforcement. But in the United States they must do so within the parameters drawn by the Constitution. Because the Framers knew too well how the courts could be perverted by an overbearing monarch, they did their best to give the courts complete independence in interpreting and applying the law.

And because they had seen how the criminal law could be used to persecute political opponents of the regime, they made a fateful decision. Not only would they provide persons accused of a crime that bundle of rights that constitute due process, including a fair and speedy trial by one's peers, but they insisted that the entire system rest on the assumption that a person accused of a crime is considered innocent until proven guilty beyond the shadow of a doubt. In a democratic society, no person should have to prove that he or she is innocent when accused of a crime. Rather, the burden is on the state to prove guilt, and to do so convincingly.

Will some criminals escape justice because they have hidden their tracks well and the police cannot make a case? Yes, and that is one of the prices we pay for a system that insists on due process. An occasional criminal may go free, but our goal is to ensure that no innocent person is wrongfully punished. The system is not perfect, but its ideals do in fact govern. Due process in a democracy must be more than a mere phrase if the rights of the people are to be protected.

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