The U.S. Constitution: tough on tyranny, not soft on crime

by Edward Spannaus

The way William Rehnquist and the Department of Justice tell it, the current crime wave is the result of the liberalism of the Warren Court in the 1960s. By creating a new set of "rights" that are nowhere found in the Constitution, the Warren Court "handcuffed the police" instead of the criminals, and made it impossible for the good guys to convict the bad guys. The parade of horrors always starts with the famous *Miranda* case and its warnings to suspects that they have a right to remain silent; it continues through the "exclusionary rule" and a long list of rulings which, they say, showed more concern with the rights of criminals than the rights of their victims.

The Department of Justice and Rehnquist seem to agree: The Bill of Rights is nothing more than an impediment to conviction. The DoJ's misnamed "Truth in Criminal Justice" series (see accompanying article) argues that such provisions as restrictions on interrogation (*Miranda*), or the requirement that prosecutors not deal directly with an accused who is represented by counsel (*Massiah*), or the exclusionary rule prohibiting the use of illegally obtained evidence, simply prevent the obtaining of confessions which would reveal the "truth" about crimes. The Supreme Court, in this view, has simply made up rules which make it more difficult to get at the truth.

Crime *has* risen, but the principal causes are the long-term economic collapse, the loss of any sense of progress and hope in the population, and the promotion of the drug trade by sections of the political and financial establishment. As a nation, we have written off an entire generation of youth, particularly poor and black youth. But as crime rates have risen, so have rates of conviction, length of sentences, and rates of incarceration. Rates of conviction of suspects have never been higher, and, most telling, almost 90% of convictions result from guilty pleas. The jury trial is almost an anachronism.

But still, frustrated and angered by the obvious moral and physical decline of the United States, many people look to the courts to get "tough on crime," and to get rid of those bothersome "technicalities" which keep criminals on the streets. Overlooked—until it's too late—is the fundamental notion that these constitutional protections ("technicalities") exist to protect the innocent against arbitrary prosecutions and unjust convictions. The fact is that the Framers of the Constitution and the Bill of Rights did place a higher value on protecting the innocent than on convicting the guilty. They were well aware how criminal prosecutions could be used for political or other nefarious purposes.

As Alexander Hamilton put it in Federalist No. 83: "Arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism."

But nevertheless, Hamilton and many others were less than enthusiastic about codifying the rights of the citizens into a Bill of Rights. An enumeration of certain rights, they thought, might be interpreted as appearing to disparage others. "They would contain various exceptions to powers which are not granted; and, on this account, would afford a colorable pretext to claim more than were granted," Hamilton argued. The Framers knew (unlike our academic experts today) that the Constitution in its broad sweep was not an enactment of positive law (except as to the specific structure of the government, and the allocation of powers), but rather it was declaration of pre-existent natural law and natural rights.

Self-incrimination

The Fifth Amendment, with its prohibition against compelling anyone in a criminal case "to be a witness against himself," is a good example of the legitimacy of such concerns about the dangers of enumerating a Bill of Rights. This prohibition has come to be interpreted as merely barring the use of torture or coercion to compel self-incrimination, usually on the grounds that such coerced testimony is unreliable. But it was regarded as "self-evident" at the time of the enactment of the Bill of Rights, that natural law prohibited making one a witness against himself—voluntarily or involuntarily, and irrespective of the evidentiary issue of whether or not such testimony is reliable.

The prohibition against self-incrimination is not an invention of the Warren Court. It even goes back to Talmudic and Roman law (Matt. 27:11-14; Acts 22:24-30), and Thomas Aquinas. (The Jewish philosopher Moses Maimonides said it was a "divine decree" that an accused could not be convict-

ed upon his own admission.) In early English law, a confession made prior to an indictment could not be used; but for centuries English law, while barring self-accusation before indictment, did permit coerced testimony after indictment. But by 1838, English courts said that authorities could not entrap a prisoner into making statements against himself, and that he must be advised that such statements could be used against him. Despite complaints by Jeremy Bentham, the requirement that such "Miranda" warnings be made to a prisoner was enacted into English law in 1848.

The understanding in revolutionary America was broader than in England, as shown for example by the Massachusetts Declaration of Rights, which said: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish evidence against himself." The version used in the U.S. Bill of Rights, however, was modeled by Madison on the Virginia Declaration of Rights, which was much narrower and not as precise. While early cases recognized the broad privilege (i.e., John Marshall's rulings in *Marbury v. Madison* and *U.S. v. Burr*), by the end of the nineteenth century the privilege became confused with an evidentiary rule, and the Fifth Amendment was reduced to a prohibition against torture to extract testimony. ("Hmmm," says Rehnquist to himself. "A little 'good faith' torture? Sounds like 'harmless error' to me.")

Incredibly, Rehnquist has characterized *Miranda* and related rulings as "creating a new constitutional right," and the Justice Department "Truth" series calls *Miranda* "a decision without a past," which "had no basis in history or precedent."

The right to counsel

We find the same type of situation with respect to the Sixth Amendment's guarantee of the right to counsel.

In the American colonies, the right to counsel at trial was considered a fundamental principle of justice and fairness. In England, the ancient right to counsel had become restricted over time, particularly in the sixteenth century, so that counsel was available to argue questions of law but not matters of fact, and counsel was allowed for misdemeanor trials but not for those involving felonies. This view was rejected by almost all the colonies and by the new states at the time of the Bill of Rights.

The Supreme Court has since extended the right to counsel to include pre-trial proceedings, not just the trial itself. Why? The nature of criminal proceedings themselves has changed enormously over the past two centuries. There were no organized police or investigative forces for most of the nineteenth century. (The Framers never envisioned such a massive—and unconstitutional—federal police force such as the FBI and related agencies have become.) In those days, the critical confrontation between an accused and the state took place at trial. Today, most cases never go to trial, and for those that do, the die is usually cast during pre-trial investigations and proceedings. Thus, the "changes" made by the Supreme Court have done nothing but attempt to keep up with the changes in the nature of law enforcement.

Trial by jury

Probably no right was considered more important by the generation of the American Revolution than trial by jury. Grand juries were regarded an an essential protection against arbitrary and politically motivated indictments, and petit (trial) juries were a protection against unjust convictions. In most jurisdictions, juries were judges of both the facts and the law, and thus could "nullify" an unjust law. And juries did freely acquit defendants, on a much broader scale than today. Concerning the colonial period, historian Roscoe Pound wrote: "Throughout the seventeenth century, the power of juries to render a general verdict was a chief obstacle to the attempt of the crown to use criminal justice for political purposes." Into the nineteenth century, Pound says that American juries were still predisposed to release the accused.

The conviction rates for the past 40 years show that it is getting easier and easier for prosecutors to get convictions from juries. In 1948 the rate of conviction by juries was slightly under 60%. It rose to about two-thirds by 1960, and 80% in 1988.

Even though we tend to think of criminal justice in the old days as much harsher (e.g., many more capital offenses), the reality is that the system was considerably more flexible and equitable than today. Grand juries would often refuse to indict (unheard of today), petit juries would often refuse to convict, and the use of pardons was very widespread—especially in capital cases. During the latter part of the nineteenth century, almost one-half of all pardon applications were granted.

Today, we have given our prosecutors and courts almost unlimited power. Prosecutors can indict whomever they want; as the saying goes, a grand jury today will indict a ham sandwich. If you are indicted in a federal court today, your chances of conviction are higher than 80%, unless you agree to cooperate with the prosecutor, or in the very rare instance that your case is dismissed. If your case is prosecuted, your probability of conviction is an astounding 97%.

The constitutional right to a speedy and public trial by jury is almost a thing of the past. The vast majority of criminal cases in both federal and state courts today are resolved by plea bargains. (It is well known that many innocent defendants often enter a plea bargain under pressure from prosecutors and their own lawyers, who discourage them from going to trial.)

Almost 85% of federal prosecutions result in guilty pleas. Of the other 15% that go to trial (either a judge or jury trial), 12% end in convictions, and less than 3% are acquitted.

We've come a long way over the past 200 years. But not far enough for some. For William Rehnquist, that 3% is probably still too high.