William Tucker

BRING BACK THE JURY

A Founding institution flounders.

Last March the Supreme Court upheld the murder conviction of a man who confessed to Rhode Island police after the police tricked his attorney into thinking the man wasn't going to be interrogated. The defendant had been arrested on an unrelated burglary. He contacted his sister, who called a public defender. The attorney phoned the police, who assured him the man would not be interrogated until the next day. Meanwhile, the police went ahead and questioned him, obtaining a confession.

The Supreme Court, holding its nose, said the confession could stand. "[The Court] shares a distaste for the deliberate misleading," said Justice Sandra Day O'Connor, writing for the majority. "But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."

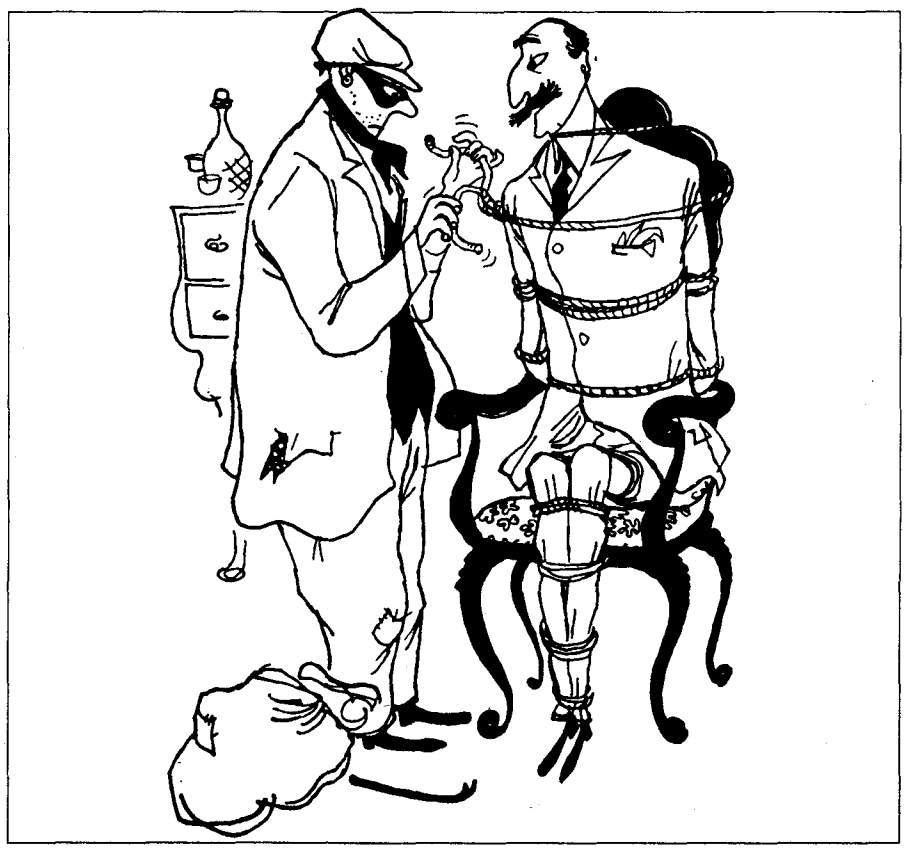
I don't know about you, but I am getting pretty sick of all these hairsplitting efforts to interpret the Bill of Rights on criminal procedures. Exactly thirty years ago the Supreme Court painted itself into a corner by adopting the *Miranda* doctrine, which says that criminals cannot be interrogated unless they are advised of their rights to an attorney. Yet any attorney worth his law degree will not let his client confess. In fact, the courts have occasionally ruled that an attorney offered "incompetent counsel" by allowing his client to confess.

So how are the police supposed to interrogate a suspect? Well, they can mumble the *Miranda* warning, hoping the defendant really doesn't understand. They can recite it casually and bait the suspect into bluffing it out. Or they can use deception and trickery and try to hang on through the appeals process.

The same technical chicanery has come to dominate searches and seizures since the Court adopted the "exclusionary rule" in *Mapp* v. *Ohio* (1961). The rule says that physical evidence seized by the police cannot be used in court if the search violated the defendant's constitutional rights. Since then "violations of constitutional rights" have been refined to the point where they now include spelling and typographical errors on search warrants. If the police make a technical mistake, the warrant is invalid and the search unconstitutional.

In 1984, the Supreme Court tried to backtrack by carving out a "good faith" exemption, which says that small mistakes can be overlooked if the police were acting in "good faith." But the results have been ambiguous. This year the New York State Court of Appeals announced it was going to ignore the Supreme Court's good-faith exemption and go on looking for spelling errors. The judges acted under a novel thesis currently emerging from the law schools, which says that while the state courts must obey the Supreme Court in *expanding* criminals' rights, they do not necessarily have to follow the Court's lead in *limiting* the rights of criminals.

How did the nation's criminal justice system ever turn into such a farce? To my mind, it all stems from a tragic—albeit deliberate—misreading of the Bill of Rights. The courts have continually put the defendant and his desires to avoid punishment at the heart of criminal procedure. All this is justified as being written in the first Ten Amendments. But that is not the way the Bill of Rights was written. For the Founding Fathers, the heart of the justice system lay in that ancient common-law institution, the jury.



Over the past year and a half I have had the opportunity to read through much of the literature surrounding the adoption of the Constitution—including James Madison's transcript of the entire Constitutional Convention. Perhaps not surprisingly, I found very little concern among the Founding Fathers for the "rights of criminal defendants." Instead, their main concern revolved around the rights of the jury.

The Founding Fathers had a very simple formula for avoiding abuses in the criminal justice system: *Juries* should have the last word at criminal trials. The Founders' basic concern was that the common-law rights of juries be carried over into the new republican government. They wanted to keep questions of criminal justice in the hands of twelve randomly chosen members of the community.

To be a little more specific, the Founding Fathers did not particularly trust *judges*. Ironically, it was Thomas Jefferson—the greatest civil libertarian of the generation—who held the strongest brief against the judiciary. (Jefferson did not participate in the Constitutional Convention, but campaigned extensively for the Bill of Rights.) Jefferson had a clear, lifelong view of the judiciary as an essentially aristocratic institution strongly inclined toward taking power out of the hands of the people. This view was later confirmed when Jefferson spent most of his eight-year administration clashing with the federal courts, which had been stacked by the outgoing Federalists. "All our democratic institutions are for nought," he complained bitterly, "and the Constitution is nothing but clay in the hands of the judges."

There was much in Colonial history to support the Founders' wariness of the judiciary. During 150 years of British rule, both the executive and

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judicial branches had been perceived as extensions of the Crown. On the other hand, the Colonial legislatures—immensely popular institutions—represented the will of the people. Whenever differences arose, the legislature and that other popular institution—the jury—had stood the Colonists in good stead. In the famous freedom-of-the-press trial of John Peter Zenger, for example, two grand juries originally refused to bring indictments. The case went forward anyway under a rare "prosecutor's information." The judge specifically instructed the jury to bring back a verdict of guilty, but the randomly selected jury of citizens once again stood its ground and voted acquittal—to the immense displeasure of the British authority. All this endeared both the jury and the grand jury in the hearts of the people.

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When the Colonists started defying the British Stamp Act of 1765, they once again learned the value of local juries. Seeking convictions against protestors, the British parliament unearthed an old statute from the era of Henry VIII which said that rebelling colonists could be brought to England for trial. There, before unsympathetic juries, they were almost always convicted.

On the other hand, the Colonists found that when American juries reached verdicts on local crimes, the crown-appointed judiciary would override the proceedings and impose its own will. This became such a common grievance that Jefferson wrote it into the Declaration of Independence. He accused King George of "quartering large bodies of troops among us [and] protecting them, by a mock trial, from Punishment for any Murders which they should commit on the Inhabitants of these States."

Thus, the delegates who came to Philadelphia for the Constitutional Convention in 1787 arrived with a firm conviction that the best way to avoid abuses in the criminal justice system was to protect the prerogatives of local juries. During the Constitutional debates, faith in the jury system was almost a byword. "I stand by this as I stand by trial by jury," proclaimed Madison at one point. As a result, the federal courts were given original jurisdiction only in cases involving ambassadors, maritime issues, and interstate disputes. Article III states: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes have been committed. . . ."

Still, many people were unsatisfied. In particular, they worried that federal judges might be tempted to intervene in state criminal proceedings. As Broadus and Louise Mitchell wrote in *A Biography of the Constitution* (1964), "The judicial power as it stood in the Constitution gave special dissatisfaction in the states, where many believed the federal courts would intrude, or, in appealed cases, would override determinations of local juries." Many noted the habit of appeals courts to retry cases on their facts, rather than limiting themselves to interpretations of the law. After reading the proposed Constitution, Jefferson wrote Madison that he would like to see "appeal in fact as well as law" specifically prohibited in the Bill of Rights.

It was these concerns, among others, that came before the First Congress when it convened in Philadelphia. Madison had been converted to the need for a Bill of Rights during the ratification campaign and made it the first order of business. When Congress asked the state legislatures to propose possible amendments to the Constitution, all thirteen listed "trial by jury." Only nine mentioned freedom of speech.

Thus, the criminal portions of the Bill of Rights were all built around the framework of the rights of jury. Other particular concerns also mirrored historical experiences. The Fourth Amendment's strictures on searches and seizures, for example, arose in reaction to infamous "writs of assistance"—general search warrants specifying no particular crime which the British had used to conduct house-to-house searches. The wording of the amendment reflects a concern against *random* searches—"the people shall be secure from *unreasonable* searches, and no warrant shall be issued without specifying the places to be searched and the things to be seized" (my emphasis).

The Fifth Amendment began by laying out the privileges of grand juries, which bring indictments under English law. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The amendment then prohibits double jeopardy, and holds that no person "shall be compelled in any criminal case to be a witness against himself" (the basis of *Miranda*), nor "deprived of life, liberty, or property without due process of law." The last clause adds that "private property [shall not] be taken for public use without just compensation." (The progression may seem somewhat disjointed, but the First Congress was, after all, a committee.)

The Sixth Amendment expanded on Article III of the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The emphasis here is on the *information* that is to be brought before the jury. The amendment does not suggest—as the courts currently claim—that criminal defendants must be given every conceivable benefit of the doubt, and that a guilty person should benefit from inconsequential errors in criminal proceedings. The locus of attention is not the criminal but the *jury* and its right to hear as much information as possible in deciding the case. Only under the most bizarre misinterpretations could these clauses be read to mean that a criminal has a right to escape detection and that the public has no right to seek out the truth in a criminal matter.

Then comes the Seventh Amendment. I will simply quote it in full: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law*" (my emphasis).

I have talked to attorneys who have spent decades in the criminal justice system without ever hearing of the Seventh Amendment. "It's a dead letter," one told me. "They never said a thing about it in law school." Another told me that the Seventh Amendment was adopted "so that English common law rather than French or Spanish law would be established in the Louisiana Territory." (It may have been used in that way at some point, but that was certainly not the original intent.)

Other attorneys argue that because the clause comes after a description of trials it should apply only to civil trials. But the clause occurs at the climax of three long amendments dealing with criminal procedure. It is obviously meant to cover all jury proceedings. The continuously expressed concern of the Founding Fathers throughout the adoption of the Bill of Rights was that judges should be restrained from retrying the facts in both criminal and civil cases.

What ever happened to this jury-centered vision of a criminal justice system? Essentially, it was abolished during the Warren era. The Court accomplished this through a doctrine called the "selective incorporation of the Bill of Rights."

As you may recall from the recent controversy between Attorney General

Jury Liability

One objection frequently raised against returning power to juries is that juries themselves are already responsible for the nation's insurance crisis through huge damage-award giveaways.

The truth is that juries are far less the cause of the problems than is popularly perceived. On a recent tour of the Justice Department, I asked both Attorney General Edwin Meese and Richard Willard, head of the Justice Department's civil division, whether they thought judges or juries were to blame for the insurance crisis. "Judges," they both responded without hesitation.

The situation has become a vicious cycle. As judges have expanded the legal concepts of liability, juries have been invited to give away ever-larger damage awards for less and less reason. But juries are not pulling these concepts out of thin air. They are carefully following the instructions of a judiciary that has come to see the courts as a forum for undoing life's misfortunes and redistributing the nation's wealth.

Faced with increasingly unreasonable verdicts, the appeals courts have become much more active in reducing damages and overturning jury verdicts—usually in complete disregard for the Seventh Amendment's prohibition against retrying cases on "the facts." Indeed, many juries now award even larger damages with the certainty that the appeals courts are going to reduce them anyway.

The result is a further decline of the jury's prestige and powers. Juries are viewed as irresponsible, while appeals judges are the guardians of common sense. Many judges and legal professionals now talk openly about restructuring the jury system or abolishing it altogether.

—W.T.

Edwin Meese and Justice William Brennan, the Bill of Rights originally applied only to the federal government. The states wanted to remain free to write their own provisions. Madison, for one, thought this was a grievous mistake. The original First Amendment adopted by Congress stated that the Bill of Rights would apply to both the state and federal governments. The states, however—ever jealous of their prerogatives—failed to ratify it, even though Madison called it "the most important one of the whole list." Madison warned the states that if they failed to accept the Bill of Rights as written by Congress they might eventually have to settle for something worse. As it turned out, he was correct.

The question of whether the Bill of Rights should be "incorporated" into state proceedings has become one of the oldest underlying controversies in constitutional law. Under John Marshall, the Court ruled flatly that the Bill of Rights applied only to the federal government. This decision held for some time. Then after the Civil War, the Reconstruction Congress, attempting to forestall the disenfranchisement of Southern blacks, adopted the Fourteenth Amendment, stating that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The question arose once again: Was the Bill of Rights among those "privileges and immunities" now binding upon the states? In 1876 the Supreme Court once again ruled that they were *not*—that the Bill of Rights still applied only to the federal government.

By the 1920s, however, the Court began to find a way around this dilemma. The justices developed the concept of "selective incorporation." This meant that while the entire Bill of Rights did not apply to the states, certain outstanding provisions—the "preferred freedoms," as Justice Benjamin Cardozo called them—could be incorporated into state proceedings. Among these were freedom of speech, freedom of religion, and freedom of assembly.

The criminal-justice portions of the Bill of Rights, on the other hand, remained in limbo. The Supreme Court continually heard appeals from state criminal trials, often overturning "kangaroo-court" verdicts involving unpopular radicals or blacks in the South. The execution of the Scottsboro boys, for example, was halted several times by the Supreme Court.

But the Court did not assume broad supervisory powers, nor did it try to legislate criminal procedures in the states on a textbook basis. Instead, it limited itself to reviewing the "fundamental fairness" of each particular case. Under this doctrine, the Court restricted itself to the ultimate question that underlies every criminal proceeding: Did this person really get a fair trial, or is an innocent man being railroaded by the system?

That ended with the Warren era. In a short period from 1961 to 1967, the Warren Court "selectively incorporated" the Fourth and Sixth Amendments, and *portions* of the Fifth Amendment, into state proceedings. The Fourth Amendment also came encumbered with the "exclusionary rule," first imposed on the narrow sphere of federal proceedings in 1914, and now extended to the vast criminal-justice apparatuses of the states.

What is important to note, however, is the portions of the Bill of Rights that were *not* incorporated by the Warren Court. They are easily identified. To begin with, there was the first clause of the Fifth Amendment guaranteeing the rights of grand juries. Second, there was the Seventh Amendment, which had never been honored at the federal level anyway, and was now consigned to oblivion. Fred Graham, author of *The Self-Inflicted Wound* (1969), a critique of the Warren era, said the Court found these portions of the Bill of Rights to be "anachronisms."

The Warren Court's real work was to expand the power of judges and take power out of the hands of juries.

Thus, the ultimate thrust of the Warren revolution was slightly different from what has been generally perceived. The popular view is that the Warren Court expanded the rights of criminals. This is indeed true and does not need argument. But the underlying trend was far more significant. The Court's real work was to expand the power of judges and take power out of the hands of juries.

Under the original Constitution and Bill of Rights, jury verdicts were considered almost sacred—easily on a par with the deliberations of representative legislatures. Tocqueville also praised the jury system, arguing that it served as a training ground for the responsibilities of citizenship. Jury decisions from "inflamed" communities occasionally cast a shadow on the system's integrity. But the primacy of the jury verdict was never specifically challenged until the work of the Warren Court.

Juries now hardly even have the next-to-last word in criminal process; the verdict is essentially the beginning of the proceedings. After that come the state appeals, then the federal appeals, then "constitutional challenges" under habeas corpus—all of them offering the possibility of a second and third trial to be followed by further appeals, and only ending if the defendant happens to be acquitted. Criminal attorneys who understand the system best—Alan Dershowitz, for example—don't even bother to go before juries anymore. They concentrate all their efforts at the appeals level.

But that is not the worst. The real undermining of the jury's power has come at the trial level, where juries are continually prevented from hearing all the facts. Because of *Mapp* and *Miranda*, the emphasis in criminal defense work has shifted to using the various exclusionary rules to *prevent* crucial evidence from ever being presented to the jury. Every criminal proceeding now begins with "evidentiary hearings" in which the lawyers and judges decide among themselves what the jury will be allowed to hear. Often this process continues right through the trial, with disputed evidence presented to judges and attorneys, the press and the public—everyone except the jury.

Thus, instead of being the crucial decision-making body, the jury has been reduced to a group of partygoers playing blind-man's bluff. Everyone can see the facts but themselves, and they are frequently the least informed people in the courtroom. Consequently, juries often return verdicts that are completely at variance with the general public's knowledge of the case. This only reduces the prestige of the jury and gives judges more ammunition in expanding their own powers. The result is the continuing decline of one of our oldest and most honored political institutions.

It seems to me entirely mistaken, then, for people like Attorney General Meese to be trying to turn the clock back by arguing that the Bill of Rights should once again be restricted only to the federal government. What we should do instead is to exhume the forgotten portions of the Bill of Rights and incorporate *all* of the First Ten Amendments into criminal proceedings.

If the Supreme Court wants to restore fairness and justice to the American criminal justice system, it should stop picking over the bones of *Mapp* and *Miranda* and begin an entirely new departure that will restore the jury to its historic place.

As Raoul Berger, professor emeritus of constitutional history at Harvard, argues:

> The Founding Fathers had a distinct distrust of judges. They knew that the law professionals tend to become lost in their own subtleties and forget the fundamental purpose of criminal justice—to decide guilt or innocence.
>
> The jury is chosen precisely because of its *ignorance* of precedent. Its contribution to the courtroom is common sense.

In truth, judges and juries are subtle rivals for the same decision-making power. Judges rely on their understanding of and admiration for the complexities of the law. Juries rely on common sense. Today, common sense is losing in American courtrooms. □

Sidney Hook

COMMUNISTS IN THE CLASSROOM

Professor Hook sets the record straight.

One of the strangest aspects of American public opinion as reflected in media and television attitudes and judgments is the periodic revaluation of the movement that began in the early forties, and culminated in the period after the Korean War. This movement attempted to free American educational institutions—especially colleges and universities—from the services of teachers who were *present* and *active* members of the Communist party. Currently, because many of the graduates of the New Left in the sixties have graduated to positions of influence in newspapers, television, and universities, a largely mythical picture of what occurred, and why it occurred, is being sedulously cultivated. According to this myth, there were hardly any members of the Communist party teaching in the educational establishment anywhere; and those who were teaching actually engaged in no unprofessional activities. Actions taken against them constituted a blind, irrational purge of scapegoats, a witchhunt comparable to the worst features of repression in American history.

The comparison of any effort to uphold the educational integrity of the teaching process to a witchhunt is doubly instructive and confusing. It implied that since there were no witches, there really were no Communists. And since those who persecuted the witches were ignorant bigots and cruel creatures devoid of compassion and pity, so those who approved of barring *present* and *active* members of the Communist party from school systems were vicious and mindless reactionaries.

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One of the many palpable difficulties in such a position is that the existence of Communist party teachers, and indeed in some institutions, of cells of such teachers, was easy to demonstrate. At this point the retort usually comes—what of it? The Communist party was a legal party like the Democratic, Republican, and Socialist parties. To which the crucial answer is that with respect to the canons of professional ethics, the Communist party was decidedly *not* like the Democratic, Republican, and Socialist parties. The latter did not issue instructions to members to behave in ways that were utterly incompatible with the ethics of teaching and inquiry. For example, the official organ of the Communist party, the *Communist*, May 1937, instructs members of the Communist party who are teachers, among other things, to proceed as follows:

> Party and YCL [Young Communist League] fractions set up within classes and departments must supplement and combat by means of discussions, brochures, etc. bourgeois omissions and distortions in the regular curriculum . . . *Marxist-Leninist analysis must be injected into every class. . . . Communist teachers must take advantage of their positions, without exposing themselves*, to give their students to the best of their ability working-class [i.e., Communist] education.
>
> Only when teachers have really mastered Marxist-Leninism will they be able skillfully to inject it into their teaching *at the least risk of exposure* and at the same time conduct struggles around the school in a truly Bolshevik manner [italics supplied].

It apparently is hard for some individuals to understand that the cardinal charge of unprofessional conduct against members of the Communist party was not their Communist ideas or faith, not even their membership in a Communist party (for *some* Communist parties, like the Socialist Workers party, did *not* instruct their teacher members to act in this way), but the specific directives to violate the fundamental rules of professional ethics.

Another palpable difficulty in the current view that the movement to initiate a witchhunt among teachers was led by the contemporary embodiments of Cotton Mather was the character, views, and lifelong attachment to liberal causes of some of the most eloquent spokesmen who defended the policy to bar *current* and *active* members of the Communist party on the grounds of academic freedom. Among them were Norman Thomas, Elmer Davis, Arthur Schlesinger, Jr. (for elementary and secondary schools), and John B. Oakes, the editor of the editorial page of the *New York Times*. There were very many others. Unfortunately, it is also true that the same position was taken by some notorious illiberals and obscurantists on grounds that were irrelevant and impertinent to the issues of professional ethics. To this very day, those who defend the rights of members of the Communist party to teach usually address themselves to the invalid and untenable arguments of the illiberals but ignore almost completely the position of Norman Thomas and others like him.

The third, and for present purposes, sufficient piece of evidence that the legend of a Communist witchhunt is a myth, is the fact that the pedagogical credo of The New School for Social Research, whose graduate faculty was largely made up of scholars purged by totalitarian regimes, expressed the rationale of a principled position with respect to those who were under instructions to violate the canons of scholarship. Its programmatic declaration, first adopted by the Graduate Faculty, and then by the general faculty, spelled out the liberal premises from which it reached conclusions bearing on the key issue:

> The New School knows that no man can teach well, nor should he be permitted to