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THE COST OF RIGHTS: IMPLICATIONS FOR CENTRAL AND EASTERN EUROPE —AND FOR THE UNITED STATES*

Richard A. Posner†

A central issue of our times is the contest between Western-style liberalism and rival ideologies. A central arena of that contest is the newly liberated nations of Central and Eastern Europe. And a central question for those nations is the role of rights in the political, economic, and legal structure of society.

I am going to discuss a number of specific rights, but only after discussing the general issue of rights and their enforcement. I will keep to a pretty theoretical plane and thus will not discuss the bearing of the European Convention on Human Rights, which, as I understand it, nations must sign, submitting to the jurisdiction of the European Court of Human Rights in Strasbourg, in order to be accepted as members of the European Union.

My approach is an economic one. The nature of economic analysis is often misunderstood, and this misunderstanding will prime some readers to reject the applicability of economics to the subject of rights. It is widely believed that economics is about money and markets and that when it is applied to political or social matters it kills them by reducing things of the spirit to objects of trade. That is a mistaken understanding. Economics is about the management of scarcity. Where there is scarcity there is a need to make tradeoffs, and econom-

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† Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the revised text of the John W. Hager Memorial Lecture, delivered as part of a conference on "Religion, the New Tribalism, and the Future of Democracy" at the University of Tulsa on March 16, 1996. An earlier version appears as Richard A. Posner, The Costs of Enforcing Legal Rights, E. EUR. CONST. REV., Summer 1995, at 71. I thank Stephen Holmes for suggesting the topic and making many contributions to my treatment of it.
ics is the science of rational tradeoffs. Some goods really are free, such as air (if you're not too particular about its quality), and there is no need to worry about trading them off against other goods. Legal rights are not free goods, unless society is willing to let them remain purely aspirational, paper rights. The enforcement of legal rights consumes real resources, including the valuable time of highly educated professionals who may be in particularly short supply in poor countries, which includes most of the countries of Central and Eastern Europe. In addition to the direct costs of rights there are indirect costs to the extent that rights are enforceable against socially productive activities, or impose socially burdensome duties, or protect socially harmful activities. The costs of rights must not be ignored in the design of legal and political institutions of fragile, transitioning societies such as we find in the ex-communist world. Reflection on these costs may even help us with the design and redesign of our own institutions.

One of the major points that I shall make, and it too resonates beyond my specific topic, is that jurisprudence, and perhaps political theory generally, ought to be considered a local rather than a universal topic of inquiry. By this I mean that we should not expect the same institutions to "work" for societies in different stages of economic and social development. I do not mean anything so crude as that democracy is only for rich countries and the poor ones must settle for authoritarian regimes. I do mean that the extraordinarily complex and ramified system of legal rights that exists in the United States, and the body of political and legal theorizing that has evolved to explain and justify it, may not be transportable across national boundaries—certainly not lock, stock, and barrel.

I.

I take "right" to mean simply a claim or entitlement normally enforceable through courts or equivalent agencies; and I assume—much more controversially, but consistently with taking an economic approach to the issue—that rights are instruments for promoting social welfare rather than things of value in themselves. This is not to deny the existence of moral rights, or even to treat them, in defiance as it were of Kant, as mere instruments. It is obvious that the law does not enforce all moral rights, but only a subset; and the selection of the subset is decisively influenced by instrumental considerations.

Isaiah Berlin, echoing the distinction in German legal theory between Sozialstaat and Rechtsstaat, distinguished in a famous essay between positive and negative liberties. I offer a version of that distinction, not identical to his, to advance my analysis. A positive liberty is a right to demand a service from the government. A negative liberty is a right not to be interfered with by the

1. This is a theme of my Clarendon Law Lectures. See RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA (forthcoming 1996), particularly Lecture One.
government, or for that matter—here I am going beyond Berlin—by anyone else. Positive liberties are associated with the modern welfare state, negative liberties—most compendiously expressed in Brandeis’s famous phrase as “the right to be let alone”—with classical liberalism. Negative liberties are less of a burden on the public fisc. Indeed they are often assumed, especially in theoretical analyses, to be costless. Consider the basic right of property: if I own a good, say my automobile, you (private person or government official) cannot take it without my consent. To make my property right meaningful, about all that is—or at least seems—necessary is a simple registration system for automobile titles, a criminal penalty severe enough to deter theft, and appropriate remedies against governmental takings. Not only do the costs of negative liberties seem slight, but the benefits are immense, such rights being the cornerstone of a system of free markets and democratic political governance.

Positive liberties are more costly, and their benefits often are elusive. Many positive liberties, such as financial assistance to the poor, public education, and publicly subsidized health care, are largely redistributive in purpose and effect rather than directly productive of valuable output, and they may affect incentives in a way that reduces output.

But on further reflection the distinction between negative and positive liberties begins to waver. Every negative liberty, especially when the term is understood to include liberty from private as well as public aggression or expropriation, can be seen to imply a corresponding positive liberty. The rights of property and of personal safety, which are negative liberties enforced by criminal and tort laws, imply a public machinery of rights protection and enforcement, a machinery that includes police, prosecutors, judges, and even publicly employed or subsidized lawyers for criminal defendants who cannot afford to hire their own lawyer. This implied right to government protection may or may not be legally enforceable (usually not, because it would require budgetary and administrative decisions that courts are poorly equipped to make), but without it the negative liberties may have little practical significance. It is true that much of the protection and enforcement of rights is carried on privately rather than publicly; the role of arbitrators, mediators, and private lawyers and police is particularly important. But with all due respect for the ingenious and forcefully articulated views of “anarcho-capitalists” such as Murray Rothbard and David Friedman, it is difficult to believe that negative liberties could be made meaningful without intervention by the public sector.

The costs of positive liberties have been studied extensively, but little is known about the costs of protecting and enforcing negative liberties in any society. The reasons for this ignorance are numerous.

First, the costs of law enforcement, adjudication, and the private legal profession are not broken down in existing sources of data according to the rights enforced. For example, today in the United States a large part—but no

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2. They may be indirectly productive. Public education, for example, may overcome the unwillingness or inability of parents to invest optimally in the human capital (earning capacity) of their children.
one is sure how large a part—of the total resources devoted to criminal law enforcement is aimed at suppressing the traffic in illegal drugs; and this suppression makes no obvious contribution to securing the negative liberties. From an economic standpoint, the market in illegal drugs is no different—except of course for its illegality—from other markets, many of which also cater to “destructive” personal habits. But even if this accounting hurdle (the need to separate market criminal activities from coercive criminal activities) could be overcome, it would be difficult to allocate the costs of law enforcement across particular rights. This is simply because many of their costs are joint; the same judges, police, prosecutors, and private lawyers enforce them.

Second, it is not clear what rights ought to be counted among the negative liberties. The right to a drug-free environment may not be a good candidate, as just explained, but what about the right, found in the Fifth Amendment to the United States Constitution, not to be compelled to be a witness against oneself? Is this a negative liberty, or an impediment to the protection of the negative liberties of potential victims of crime?

Third (and again related), some rights straddle the line between the negative and the positive liberties. The right to counsel and the right to abortion are examples. For an affluent person, both rights are negative: they are rights against governmental interference with the hiring of a lawyer and of an abortion doctor, respectively. For a poor person, however, these have to be positive liberties or they are not meaningful, because without public assistance the poor person cannot hire a lawyer or purchase an abortion but must depend on the vagaries of charity to obtain these services.

Fourth, many of the costs of rights are not public budgetary costs at all. They are (or arise from) such things as erroneous convictions and acquittals, police brutality and other abuses of power by rights enforcers, and, above all, private nonlegal expenditures on rights protection and enforcement, including such mundane but cumulatively expensive items as locks and car alarms.3

Fifth, rights are a preoccupation mainly of wealthy countries, in which the purely budgetary costs of enforcing rights are not a significant factor.

Sixth, some rights are so cheap compared to their benefits that the costs are obviously well worth bearing and hence not an appealing issue for reform. The right to vote is a good example, since without it there is no democracy; likewise the right to free speech. In a religiously pluralistic society, basic religious liberty is another unquestionable good, as are the basic procedural rights encapsulated in the term due process.

Lawyers have difficulty distinguishing between the core and the periphery of rights. The reason is that—

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3. Aggregate private expenditures on preventing crime in the United States have been estimated to be in the area of $300 billion a year, see Amy Kaslow, The High Cost of Crime, CHRISTIAN SCIENCE MONITOR, May 9, 1994, at 9, which far exceeds public expenditures, as we shall see. The importance of private self-protection against crime is emphasized in Tomas J. Philipson & Richard A. Posner, The Economic Epidemiology of Crime, 39 J.L. & ECON. 405 (1996).
Seventh, there is a good deal of rights fetishism. We romanticize rights. We—and I am speaking now of almost the entire Western legal and political community—even sacralize them. The religious feelings of secular moderns have been displaced onto various aspects of “civic religion,” including the protection and enforcement of rights. Rights are treated as Platonic forms, universalized and eternalized. They are treated (in the famous expression of Ronald Dworkin’s) as trumps, rather than as tools of government and hence as subject to the usual tradeoffs.

Eighth and last, lawyers, judges, and political theorists and activists believe in a “forward defense” of rights. They would rather fight over the rights of pornographers than over the rights of newspaper editors, for the same reason the United States wanted to defend itself against the Soviet Union on the Elbe rather than on the Hudson. There would be more room to retreat in the event of an initial defeat. The legal community becomes very exercised over any challenge to rights, even rights (such as the *Miranda* rights) that are far removed from the rights that are fundamental to a liberal society, hoping to localize rights controversy at a safe remove from the heartland of democratic liberties.

All this said, it is pretty obvious that the benefit-cost ratio of the public and private machinery for the protection and enforcement of the negative liberties is much higher than one. A suggestive although far from definitive statistic is that total public expenditures on the administration of justice in the United States—expenditures on police, the courts, prosecutors, public defenders, and prison administration—are only $61 billion a year, which is less than 1 percent of the Gross National Product. So the question arises: why are there any countries committed to the principle of free markets and democratic government that do not have effective systems for the protection and enforcement of the liberties that undergird a democratic free-market system? Investigation of this question will uncover the hidden costs of rights and explain why the ex-communist nations of Europe should be concerned with an excess, as well as an insufficiency, of rights.

II.

I propose two answers to the question why a liberal democratic regime might not have an effective system of protecting rights. The first is the paradox of power. A government need not be large, but it must be strong, in order to protect and enforce rights, but strong government is a threat to those rights. Second, legal systems have become encumbered with so many functions besides the protection and enforcement of the essential negative liberties that they have become extremely costly, and some nations cannot afford the costs. In these nations the legal system is asked to do too much and fails at everything, includ-

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ing the protection of negative liberties. Let us examine both points more closely.

A.

An effective system of property and personal rights requires an apparatus for deterring crime, especially acquisitive crime. Not only theft, robbery, embezzlement, the forging of wills, counterfeiting, false claims, certain other types of fraud, and the rest of the familiar private acquisitive crimes, but also the bribing of officials, including judges, police, and officials in charge of registering titles to real or personal property, must be kept within tolerable bounds. It is pretty easy to think up ways of maximizing deterrence: impose savage punishments, deny procedural rights to persons accused of crime, require citizens to carry identification papers, pay informers generously, place judges under the control of prosecutors (or dispense with judges altogether), and allow the police a free hand to use brutal methods in investigating crime. Some of these measures might be countereffective, but as a package—modeled on military discipline culminating in the drumhead court-martial—they would be effective in minimizing the crime rate and thus maximizing the protection of rights, provided that the judges, police, and other administrators of the criminal justice system acted competently and in good faith. But that is the rub. The criminal justice system that I have sketched would be so powerful that it would be a threat to negative liberties. Innocent people would find themselves caught in police dragnets, arrested and detained on suspicion of crime, eavesdropped and informed on, occasionally even convicted and sent to prison, or worse.

To check these dangers, it is necessary to alter the incentives of law enforcers, or to create countervailing rights, or to do both—and the countervailing rights may alter incentives. This process is visible in the history of English criminal procedure in the eighteenth century. By the beginning of that century (in fact earlier) very severe punishments for crime were in place, but there were no police forces, and the right of law enforcement officers to enter a person’s home was severely limited (“a man’s home is his castle”). These two features of the criminal justice system must have greatly undermined the protection of rights yet have seemed justified by the danger of abuse of power if the reins of the law enforcement authorities were loosened. Early in the eighteenth century judges were given secure tenure, emancipating them from control by the prosecutorial authority (the king and his ministers). Yet by the end of the century there were still no police forces and there was still no general right to search a person’s home. At the same time there was no right of appeal by criminal defendants. They had no right to counsel either—not only no right to the appointment of counsel at the state’s expense if they were indigent, but no right to be

5. It obviously would not pay to try to extirpate crime completely. Expenditures on criminal law enforcement must not be carried to the point where the last dollar of expenditures buys less than a dollar’s worth of benefit (however benefits are computed) in reduced criminal activity.
represented even by retained counsel, unless a difficult issue of law was pre-
vented. So the constraints on law enforcement were in effect offset by con-
straints on defendants. The state had limited power but defendants had limited
rights. Criminal proceedings were short and cheap.

The evolution of the American criminal justice system in the twentieth
century furnishes parallel illustrations. By the beginning of the century there
were large police forces, which frequently abused people, though primarily
people drawn from marginal groups in the society. Prison conditions were often
brutal. Indigent defendants often had no counsel, even though criminal proceed-
ings were more complex than they had been in the eighteenth century. Begin-
ing in the 1930s but accelerating greatly in the 1960s, the Supreme Court tried
to rectify these conditions by creating countervailing rights, including the right
to exclude illegally seized evidence from a criminal trial, the right to effective
assistance of counsel in all criminal cases, the right to invoke federal habeas
corpus to obtain review of state convictions by federal courts, and the right to
bring tort suits (free of artificial rules that had made the tort remedy ineffectual)
complaining of police brutality and inhuman prison conditions.

The creation of these countervailing rights made the criminal justice sys-
tem cumbersome, expensive—and quite possibly less effective in deterring
crime. A great upsurge in crime rates followed on the heels of the Warren
Court’s adventurous rulings in criminal procedure. The upsurge actually under-
states the increase in the total costs due to crime, since an increased risk of
criminal behavior will induce increased efforts at self-protection by the potential
victims of crime, dampening increases in the actual crime rate, and also, as we
are about to see, increased public efforts to curb crime. Although the causality
is deeply uncertain, there is a bit of evidence that the Court’s rulings did con-
tribute to the increase in crime. Federal and state legislators responded to the
increase in crime. They expanded pretrial detention, authorized greater use of
wiretapping and other electronic surveillance, authorized harsher sentences, re-
duced judicial discretion over sentences, hired more-educated police and trained
them more, increased the scope of pretrial prevention (that is, reduced the right
to release upon the posting of a bond), and appropriated more money for pris-
ions, police, and prosecutors.

When the dust settled, it was apparent that expanding the rights of criminal
defendants, while in one respect fostering negative liberties, in another and
possibly greater respect had impaired them by undermining the protection of
property and personal rights that were threatened by crime and by stimulating a
legislative backlash that resulted in curtailing some of the procedural rights of

and Law Enforcement: Some Theoretical Considerations and Experimental Evidence, 77 AM. ECON. REV.
criminal defendants. In addition, the criminal justice system was made more costly,\(^8\) implying heavier taxes, which burdened property directly or indirectly.

These points, the downside of the procedural revolution wrought by Warren and his colleagues, are obscured by the historical origins of the rights of criminal defendants. The people who pressed for, obtained, and asserted the rights that first English law and then the American Bill of Rights conferred on criminal defendants were not poor people, let alone members of the criminal classes. They were businessmen, publishers, writers, and politicians. The rights they fought for were rights that a society needs in order to make property and political rights secure against abuse by government. In contrast, the rights that the Warren Court derived by flexible interpretation of the Constitution were rights that criminals, and members of an underclass or lumpenproletariat most likely to be mistaken for criminals by overzealous police or prosecutors, want or need. For the most part, the enforcement of these rights undermines property rights and personal security by making the punishment of criminals less swift and certain.

The difference is illustrated by the changing meaning of the Sixth Amendment to the United States Constitution, one clause of which entitles criminal defendants to the assistance of counsel. The original understanding was that the clause, changing the English practice to which I referred earlier, entitled criminal defendants to hire counsel—if they could so afford. Only in the twentieth century has the Sixth Amendment been understood to entitle indigent criminal defendants to the assistance of counsel furnished at the government's expense. To speak with brutal exaggeration, the twentieth century has witnessed a shift in the legal system of the United States from protecting the rights of the propertied to protecting the rights of the unpropertied who covet the wealth of the propertied.

The rights that are recognized in the United States today are not universal rights, rights for all times and places. They are the culmination of a specific historical process and they are relative to a specific legal and political culture, one shaped by a high level of material wealth. They are not equally well adapted to every society. It is not even clear—this is an especially neglected point in discussions of civil liberties—that the amplitude of criminal rights recognized in the United States today reduces the net costs of erroneous convictions. There is a tug of war between the courts, which are primarily responsible for the creation of new rights through flexible interpretation of the Sixth Amendment and other constitutional provisions, and the legislatures. Legislatures can neutralize the effect of a new court-created right by either reducing the funding for the

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8. A clue is the increase in the educational level of police in the United States. Between 1960 and 1970—the heyday of the Warren Court—the percentage of police with some college education rose from 20 to 31.8 percent. See 5 NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, THE NATIONAL MANPOWER SURVEY OF THE CRIMINAL JUSTICE SYSTEM 138 tbl.IV-1 (1978) [herein-after MANPOWER SURVEY]. The increased complexity of criminal procedure required more educated police, since they are the front-line administrators of the criminal justice system and their legal mistakes can make successful prosecution of criminals impossible.
defense of indigent criminal defendants, thus making it easier to convict them, or increasing the severity of punishments, with the consequence, however, that even if fewer innocent people are convicted, those that are will serve longer sentences. The total suffering of the innocent will not be reduced, unless the courts invalidate statutes that impose severe punishments, or require generous compensation of lawyers for indigent criminal defendants; American courts have been unwilling to do either. The Warren Court may have been running in place. The problem, which is common to most efforts at social engineering by courts, is that the judiciary either does not have, or is unwilling to pull, all the levers that control the legal system, in this case the criminal justice part of that system. Its efforts to expand the rights of a particular class of persons can be offset by executive and legislative measures. The net result may simply be higher costs.

The leaders of the post-communist societies of Central and Eastern Europe, like the leaders of the American Revolution, have a lively sense of the danger of governmental oppression of the respectable classes. That sense may lead to the creation of a costly system of rights invoked primarily by members of the criminal class, as has happened in the United States.

B.

The other factor I want to emphasize that affects the costs of protecting and enforcing rights is the overextension of the legal system. Suppose that at time $t$ a nation is communistic. Its system of law enforcement will presumably be operating at or near its capacity to enforce the society’s existing laws, many of which will be devoted to the enforcement of positive liberties. At time $t+1$ the nation casts off communism for capitalism and it wishes to devote resources to the protection of negative liberties, which have greater importance in a system of free markets. Many of the old laws will remain intact, so it will not be possible simply to reallocate enforcement resources from positive to negative liberties. Moreover, since the transition from communism to capitalism invariably causes an initial drop in net public revenues and an initial increase in criminality because of the disappearance of the police state and the greater inequality of income and wealth in a capitalistic as compared to a communistic system, the nation may be unable to maintain, let alone to increase, the existing level of resources devoted to law enforcement.

\[ E_C = pS, \]

where $p$ is the probability of apprehension and conviction and $S$ is the sentence. If a court-created right leads to a reduction in $p$ for both innocent and guilty defendants (and that is the likeliest consequence, since a right that makes it more difficult to convict an innocent person will also make it more difficult to convict a guilty one), and the legislature wishes to maintain $E_C$ at its previous level, it can do so either by raising $S$ through a law increasing the penalties for crime or by raising $p$ through a reduction in funding for the defense of indigent defendants. Both have, in fact, been legislative responses in the United States to perceived judicial excesses in the protection of the rights of criminal defendants and to the increased crime rates that may be in part, though perhaps only in small part, the consequence of that protection.
Reallocation will be particularly difficult for two reasons. The first is that the benefits of effective enforcement of negative liberties, as distinct from positive ones, generally are diffuse. This makes it difficult to marshal an effective interest group behind the enforcement of negative liberties. Second—a point I mentioned earlier—negative liberties have costs as well as benefits. The rights of criminal defendants are the clearest illustration of this point. Anything that strengthens those rights is apt, by doing so, to weaken the protection of property rights by reducing the expected punishment cost of theft and other acquisitive crimes. The net benefits of a wholesale reallocation of enforcement resources from positive to negative liberties may be small.

One implication of this analysis is that property rights are cheaper to protect than other negative liberties, and in particular the rights of criminal defendants. Expanding the rights of criminal defendants, or enforcing those rights more effectively, makes it more costly to protect property rights, but the reverse is not true; expanding property rights does not make it more costly to fight crime. Another implication is that deregulatory measures unrelated to the protection of rights—for example the removal of price controls, or of limits on an employer’s authority to fire a worker—will promote the protection of rights by freeing up, for use in their protection, resources currently employed elsewhere in the legal system.

A further point is that the borderline between positive and negative liberties is hazy, and not only because of the economic links that I have stressed. In principle, for example, antitrust laws and laws against fraud protect free markets from distortion. But the practice is often different. Since concepts such as monopolization and misrepresentation (and especially “misleading omission”) are vague, laws aimed at preventing or punishing these practices invite manipulation and expansion and historically have often been used to punish efficient practices and express economic resentment. Antitrust laws and laws against any but the most flagrant forms of fraud appeared late in the development of Anglo-American law. The inference can be drawn that such laws are inessential to the achievement of a high level of prosperity. Nonwealthy countries should be cautious about adopting expansive prohibitions against these and other economic crimes, lest they deter aggressive but efficient economic activity.

III.

If I am correct so far that negative liberties, especially when they take the form of rights for criminal suspects, defendants, and prisoners, may be costly for a nation that is not wealthy the way the United States is, we should not be sanguine that these liberties are likely to be placed on a secure footing in the post-communist societies of Central and Eastern Europe any time soon. Nor is it clear that these societies should accord a high priority to securing all the negative liberties. Perhaps those liberties differ greatly among themselves in their value to a poor society. I shall illustrate this point with reference to five rights.
A.

The first is preventing brutal police tactics directed against pretrial detainees. These tactics prominently include the use of third-degree methods to extract incriminating or otherwise useful information (such as identifying confederates) from a suspect before he is formally charged. This abuse, formerly prevalent in the United States, has been curbed by a combination of the exclusionary rule (coerced confessions are not admissible in evidence), tort remedies against the police enforceable in federal court, the Miranda warnings, and increased levels of police training and police “professionalism,” implying good salaries. This combination would be difficult to implement in a poor nation. A rule of evidence against coerced confessions requires that judges be willing at times to believe the testimony of criminal defendants over that of the police, since there will rarely be evidence of coercion other than the defendant’s say-so. Even in the United States, and a fortiori in nations that do not have a tradition of civil liberties or of an independent judiciary and have an inquisitorial rather than an adversarial system of justice, judges hesitate to side with lawbreakers against law enforcers. The effectiveness of the Miranda warnings likewise depends on the willingness of judges to disbelieve police testimony. Without such willingness, the police will not give the warnings but will merely testify that they did. The provision of tort remedies against public officers implies, realistically, state indemnification of officers found liable and ordered to pay compensation to their victims. So the state must appropriate funds to compensate criminal defendants most of whom are in fact guilty of the crime to which they confessed, since most coerced confessions are truthful, though this depends in part on how much coercion is applied. Only in the last quarter century have tort suits provided a meaningful remedy to the victim of coercive interrogation in the United States, and how meaningful remains an open question.

The most effective method of reducing the role of coercion in the interrogation of suspects may simply be to pay police officers very well. That will enable the hiring of educated and competent police who, being intelligent and competent, will not need to rely so heavily on coercion to obtain evidence against suspects. Moreover, by making the job of a policeman more valuable, a

10. By 1974, the percentage of police with some college education had risen to 46.2 percent, compared to only 20 percent in 1960. See MANPOWER SURVEY, supra note 8, at 138 tbl.IV-1.

11. A requirement that all confessions be videotaped might alleviate this problem, though it would be an expensive requirement for a nonwealthy nation and might be ineffective, since the police might not begin the videotaping until they had coerced the suspect’s agreement to confess. This, of course, is why requiring that a confession be signed is not a secure preventive of coerced confessions.

12. This compensation, as in the case of judges, should be “backloaded” to maximize the deterrent effect of the threat to fire the employee for misconduct. If the employee has generous pension benefits that are forfeited if he is fired for misconduct, then even in the last period of his employment, and even if the chance of his actually being detected (if he misbehaves) and fired is quite low, he will have a strong incentive to behave himself. See, e.g., Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. LEGAL STUD. 1 (1974); Richard A. Ippolito, The Implicit Pension Contract: Developments and New Directions, 22 J. HUM. RESOURCES 441 (1987).
high salary will make him more reluctant to jeopardize his job by engaging in misconduct. But it is difficult for a nonwealthy nation to pay its police high wages. Apart from the financial cost, the effect is to divert a disproportionate fraction of what is bound to be a smallish group of educated and able people from other urgent national tasks, such as entrepreneurship, administration, medicine and public health, and defense.

Probably the greatest cost of measures to prevent coercive interrogation is that it undermines negative liberties at the same time that it secures them. Much pious denial to the contrary, coercion, unless taken to the brutal extreme at which it will induce an innocent person to confess, is a cheap and effective method of criminal investigation. It is used routinely in situations in which the need for information is desperate. The idea that it brutalizes the interrogators and thus fosters abuses unrelated to interrogation appears to be unsubstantiated. The more that coercive interrogation is curtailed, the less secure are property and personal rights. This is an unpleasant tradeoff, yet any realistic regime operating in circumstances of poverty must face up to it. I abstract, as I said at the outset, from any constraints that the European Convention on Human Rights may place on the freedom of a nation that wants to belong to the European Union to make such a tradeoff. And I emphasize that I am speaking of the relatively mild forms of coercion, such as protracted interrogation and false promises of leniency, that are unlikely to induce innocent people to confess.

B.

The second right I examine is that of patients in psychiatric hospitals not to be abused by the hospital staff—or neglected, the more serious problem. Instances of brutality toward patients are not unknown. But they are less common than in the parallel case of pretrial detention because hospital staff has less to gain from abusing a patient than police have to gain from beating a confession out of a suspect. The problem of neglect is largely one of resources, however, and so cannot be solved simply by giving patients legally enforceable rights, especially since an individual suffering from a severe mental illness is an unlikely candidate to bring and win a lawsuit. So here is another example of the merger of positive and negative liberties: the right to be decently treated in a psychiatric hospital depends as a practical matter on the allocation by society of adequate resources for psychiatric facilities. And like the rights of pretrial detainees a right to decent treatment in psychiatric hospitals is two-edged. If a nation’s budget for health care is fixed or largely so, increasing the resources devoted to psychiatric hospitals will reduce the resources available for other, and possibly as or more urgent, health-care needs.

A related problem is that of improper commitment of persons to mental institutions, or, what is closely related, that of failure to release a committed person when he has ceased to be a danger to himself or others. The problem here is that a generous construal of due process, designed to prevent improper
commitment or retention, will also impede proper commitment and retention, resulting in more murders, other crimes, and suicides by the insane.

A similar tradeoff is required in the case of bail. Admitting criminal suspects to bail reduces the cost of jails and the costs to the innocent of being incarcerated mistakenly, but increases the amount of crime since many of the people released on bail are in fact criminals. This is just another example of my point that rights involve costs as well as benefits. It is a point that economists are not likely to ignore, unlike lawyers, who revere rights and are not professionally sensitive to cost. And it illustrates the important role of economics in value clarification. By showing how much some much-desired good such as "rights" will cost in some other desired good forgone (all that the word "cost" means to an economist is what must be given up to obtain something desired), the economist forces society to decide how much it really values the good.

I have stated this as a normative point, but it also has positive implications. The weak footing of rights in the ex-communist states is typically thought a legacy of the totalitarian past. It may instead be a matter of economics—of cost, not culture. I return to that issue in the conclusion.

C.

The third right I want to discuss is that of defendants in criminal cases to the assistance of counsel. For affluent defendants there should be no problem; the market will provide competent counsel. But most criminal defendants, certainly in the United States and presumably to an even greater degree in the ex-communist countries, are indigent. The direct costs of providing lawyers for indigent criminal defendants are unlikely to be high. In the United States, Congress appropriates some $400 million a year for retaining or employing lawyers for indigent defendants in federal criminal cases. Although only a small fraction of all criminal cases, federal cases are disproportionately complex, with the result that the total bill for the defense of the indigent, state and federal, is only $1.4 billion a year. This is little more than $5 per American per year. Granted, the figure of $1.4 billion is an understatement. Some lawyers are pressured by judges into "volunteering" their services to indigent criminal defendants at below-market rates. Others truly volunteer their services, but do so either to obtain on-the-job training or as genuine charity; in neither case is there a net cost to the volunteers. Nevertheless, the total costs of defending the indigent would be small—and would be even smaller in a country with a lower crime

13. See EXPENDITURE AND EMPLOYMENT, supra note 4, at xix tbl.F.
14. See id.
15. This is a less efficient measure than using tax revenues to hire lawyers to represent the indigent, since it interferes with the allocation of lawyer time in accordance with the principles of comparative advantage. A corporate lawyer might find himself assigned to defend a criminal, even though he had no experience in criminal law.
rate\textsuperscript{16} or with an inquisitorial rather than an adversarial system of criminal justice, since lawyers play a smaller role in an inquisitorial system—were it not for indirect effects of the sort that I have mentioned. A represented defendant is more difficult to convict than an unrepresented one, so the provision of representation to indigent criminal defendants makes the criminal justice system more costly, and possibly less effective in deterring crime.

I say possibly less effective because a system of criminal justice in which innocent persons are frequently convicted may actually reduce the expected punishment cost of crime, since that cost is net of the expected punishment cost of not engaging in crime.\textsuperscript{17} But it is unclear that denial of an automatic right to counsel in criminal cases would result in the frequent conviction of the innocent. When the crime rate is high in relation to the resources allocated for prosecution, prosecutors will tend to select for prosecution only the strongest cases, and in general these will be the cases in which the defendant is least likely to be innocent. This selection effect will be weaker in a nation that follows the German practice of mandatory prosecution rather than the U.S. practice of discretionary prosecution, or if the nation contains a disliked minority that has a high crime rate, such as gypsies in Hungary and Romania. It may be easier to convict an innocent member of that group than a guilty member of the majority. This was a serious problem in the southern states of the United States with respect to blacks as late as the 1950s and was an unacknowledged motive for the Supreme Court’s expanding the rights of criminal defendants.

Notice that if criminal law and procedure were so simplified that a person could defend himself without a lawyer’s assistance, and if the resources allocated to prosecution were kept down so that prosecutors would be discouraged from pursuing (and were not required, by a principle of mandatory prosecution, to pursue) borderline cases, the overall costs of a criminal justice system might be extremely low yet the risk of convicting the innocent might also be low.

An extensive literature criticizes as inadequate the current level at which the defense of indigent criminal defendants in the United States is funded, noting the low quality of much of this representation.\textsuperscript{18} I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hardheaded we must recognize that this is not entirely a bad thing. The lawyers who represent indigent criminal defendants are good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or the state would have to devote much greater resources to the prose-

\textsuperscript{16} The United Kingdom, for example, with a population almost a fourth the size of the U.S. population, has only one-thirtieth the number of jail and prison inmates. See Home Office Research and Statistics Department, A Digest of Information on the Criminal Justice System: Crime and Justice in England and Wales 55-56 (Gordon C. Barclay ed., 1991); Posner, supra note 1, Lecture Three.

\textsuperscript{17} In the limit, if the probability of being convicted were independent of guilt or innocence, the prospect of punishment would not provide any inducement to avoid committing crimes.

cation of criminal cases. Especially for a nonwealthy country (though possibly even for the United States), a "barebones" system for the defense of indigent criminal defendants may be optimal.

Here, though, is a complicating factor. If the law entitles a defendant to effective assistance of counsel, then paying lawyers too little to attract competent lawyers to the defense of indigent defendants may cost the system more in the long run by leading to retrials following a determination that the defendant's lawyer at his first trial was incompetent. But this observation is consistent with my suggestion that a nonwealthy nation may want to set a level of compensation generous enough to induce moderately, but not highly, competent lawyers to represent indigent criminal defendants.

A criminal defendant's or suspect's lawyer also has a separate value as a witness to improper behavior by police or to substandard conditions in jails and prisons. This value is genuine, but is largely independent of the lawyer's quality.

D.

Delay in court is an old story, and a sad one; the slogan "justice delayed is justice denied" states an important truth. Remarkably, the enormous upsurge in case filings in the federal courts of the United States since 1960 has led to no increase in the court queue, even though the increase in the number of judges has been much smaller than the increase in the number of cases. There are three reasons why the queue has not grown: judges work harder; they delegate more of their work to nonjudges, such as law clerks; and they have become more summary in their dispositions. These adaptations, though the last two have been widely criticized, appear not to have lowered significantly the average quality of federal judicial output; and they may provide a model for other countries that encounter an upsurge in litigation.

A qualification is necessary, however. Court queues are to some extent self-limiting. The longer the queue, the greater the incentive of the parties to a dispute to substitute arbitration or other nonjudicial methods of dispute resolution for the courts; there may also be greater pressure to settle the case rather than go to trial, though this is uncertain. Conversely, the shorter the queue, the greater the demand for judicial services. The analogy is to adding lanes to a highway in order to relieve congestion. The resulting reduction in congestion

21. As creating "assembly-line justice." I think it is wrong to denigrate the analogy of the assembly line, which marked a big advance over previous methods of production. On the resistance of the legal profession to modernization, see RICHARD A. POSNER, OVERCOMING LAW, ch.1 (1995).
will make the highway a more attractive travel route, drawing travelers from other roads and other modes of transportation. The net decrease in congestion may be slight. Similarly, a large investment in increasing judicial capacity in order to meet surging demand may have little effect on the court queue because the increase in capacity will attract people from other methods of dispute resolution into the courts.\(^\text{23}\)

A judiciary is pretty cheap, even for a nonwealthy nation. The federal courts of the United States are generously funded. Federal judges are well paid (especially when their pensions are taken into account as of course they should be) and have large offices, large staffs, modern equipment, and tolerable although heavy workloads. Nevertheless, at a cost of only $2.3 billion, the federal courts in 1992 handled some 320,000 civil and criminal cases (not to mention an even larger number of bankruptcy filings),\(^\text{24}\) which comes out to an average cost of less than $8,000 per case. (Of course, these are only budgetary costs; the expense of the lawyers who practice in federal court is much more.) Court queues are short, except for civil jury trials in some of the larger cities; and the quality of the justice dispensed is certainly tolerable, and often distinguished.

E.

The last right that I shall discuss is the protection of health by public inspectors of restaurants and producers of food products. This example differs from the others in involving bureaucratic rather than judicial regulation. Here the danger of corruption is acute, because there have to be numerous inspectors and they deal face to face with the managers of the establishments being inspected, which lowers the transaction costs of bribery.

There are many techniques for dealing with the danger. Inspectors can be shifted about to avoid developing stable relationships with the establishments that they inspect. "Sting" tactics can be used to weed out dishonest inspectors (this is commonplace in the United States Postal Service). Severe punishments can be prescribed for both giving and accepting bribes. Standards of cleanliness can be set at minimum rather than optimum levels, so that it is easy for the establishments to satisfy them and therefore less urgent to bribe the inspectors to excuse noncompliance. Generous tort remedies can be provided for victims of food poisoning. The discretion of inspectors can be minimized, since it is easier to detect the violation of a rule than it is to detect an abuse of discretion. The sale of tainted food can be made a strict liability crime (as has frequently been done in the United States), so that the seller's intent or even negligence need not be proved and his lack of evil intent and even his due care are not defenses; the result is a lower cost of prosecution and higher probability of conviction. Employees of food establishments can be hired, or rewarded, as

\(^{23}\) See id. at 579.

informers. The number of restaurants and other food producers can be limited in order to generate monopoly profits for them and thus increase the cost of being forced to close by a food-poisoning incident. The investigation of inspectors can be placed in a separate (and elite) agency from that of the inspectors themselves, to minimize fraternizing. And as in the case of the police, generous compensation, heavily backloaded, of inspectors can be used to increase the expected punishment costs of bribe-taking.

So many are the techniques for preventing the widespread corruption of food inspectors, and so obvious the social benefits from preventing lethal or epidemic diseases caused by bacteria in food, that failure to prevent such corruption would be difficult to attribute to hardheaded economic tradeoffs such as the ones I have discussed in connection with other rights. I add that unless a society is completely disorganized, a food inspector is unlikely to accept a bribe to overlook a lethal danger, since if the danger materializes he is bound to be in very serious trouble.

We should not confine our consideration to lethal dangers, however. Non-lethal food poisoning is responsible for many days of lost work, as well as considerable suffering, and these costs may justify a substantial program of public food inspections. Yet if the standards to which food producers are required to adhere are set far above what is necessary to avoid serious food poisoning, corruption will be a great, perhaps irresistible, temptation. We have known since George Orwell's book *Down and Out in Paris and London* that the kitchens even of distinguished restaurants are often filthy, yet without palatable harm being done to the clientele. And recent investigative reporting in the United States has revealed disgustingly unsanitary conditions in the processing of chickens, yet again seemingly with little danger to the public health. So it is possible that minimum standards of cleanliness in the production of food, even when they are rather laxly enforced, are adequate to protect the public health. In 1983, the most recent year for which I have the requisite data, the total cost, state and federal, of food inspection in the United States was only about $1 billion, which is only $4 per American; and perhaps that is enough, though I do not know enough about the subject to express this opinion with any confidence.

The protection of the water supply is a more urgent task. The water supply is at once more vulnerable and more integrated; the same water sources are shared by far more people than share the same source of food. But the protec-

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25. This is a parallel measure to "overpaying" police or inspectors in order to increase the penalty to them of being detected in misconduct and losing their jobs.


27. Jan L.A. van Rijckevorsel, On Food Law and Its Enforcement (June 16, 1995) (unpublished manuscript; contact author for source information).

tion of the water supply is also much cheaper by virtue of its greater concentra-

tion.

I have mentioned corruption but the real dangers of corruption to a

country's prosperity lie elsewhere than in food inspection. When corruption, for

example of tax collectors, drains off public revenues—and incidentally makes it
difficult for the government to pay tax collectors wages generous enough to
discourage them from accepting bribes—or when essential licenses to conduct
business can be obtained only by bribing a sequence of officials, any one of
whom can block the license, substantial macroeconomic consequences are pos-
sible. The main solution to these problems is lower tax rates and less govern-
ment regulation, which reduce the incentive to bribe public officials. The cost
of this solution, political obstacles to one side, may actually be negative; reduc-
ing the size of government may stimulate output directly at the same time that
it does so indirectly by reducing the amount of corruption.

IV.

I have said nothing about culture as a factor in the protection or enforce-
ment of rights, except for a glancing reference to the United States' civil liber-
ties tradition. No doubt, despite my emphasis on the costs of rights, a nation's
political and legal culture affects the extent to which rights are enforced. But, as
no one seems to know how to alter a culture, there is not much to be gained
from dwelling on the point. This is not to say that cultures do not change; obvi-
ously they do. They change with wealth; history teaches that civil liberties are a
superior good in the economist's sense, which is to say a good the demand
for which grows with income. (This observation suggests that efforts to increase
civil liberties without regard to their costs may impair those liberties in the long
run.) My point is only that we do know how to intervene directly to change a
country’s political or legal culture. But within the limits imposed by a nation's
existing culture there is much that can be done—and much that should not be
done—if careful attention is paid to the economics of rights.

I have also not addressed, at least directly, the question of the priority that
the protection and enforcement of rights should enjoy in a country that has a
desperate shortage of resources. I believe that the protection of property rights
and of basic political rights (including the right to vote and the freedom of the
press—and the latter, incidentally, is an important check on abuse of official
power) is very important, but I do not attach similar importance to three of the
five rights that I have discussed. As recently as thirty years ago, the rights
to protection from police brutality in pretrial detention, protection from custodi-

29. The economics of corruption is the subject of an extensive literature well represented by Andrei
30. See John F.O. Bilson, Civil Liberty-An Econometric Investigation, 35 KYKLOS 94, 103, 107 (1982);
the author).
al abuse in public psychiatric hospitals, and provision of a competent defense attorney to indigent criminal defendants were not securely established in the United States, yet the United States was on the whole (granted, an important qualification) prosperous and free. The fourth right (reasonably prompt justice) and the fifth (effective food inspections) were securely established, and they are both important. But they should be entirely feasible even for a relatively poor country.

I am giving my personal view on the priority to be accorded these various rights. Other people, having different values, may accord them a different priority. All that is important is that social planners proceed in full awareness that legally enforceable rights are not costless, or even cheap, and that the cost may have to be paid, not in a smaller consumption of consumer ephemera, but in a sacrifice of goods that have the same moral weight as rights—may in fact be rights.

A more complete analysis would consider not whether to recognize this right or that but how much money to spend on each one. The fact that a right is relatively unimportant is not a good argument for spending nothing at all on it. Large social gains might be obtainable from very modest expenditures.\(^3\) I glanced at this issue in discussing the right to assistance of counsel in a criminal case. I pointed out that a modest level of assistance might be sufficient to attract lawyers competent enough to obtain the acquittal of the innocent, whereas a higher level might, by attracting lawyers skillful enough to obtain the acquittal of many guilty defendants as well, on balance undermine rights, since criminals are rights infringers. I glanced at the issue again when I distinguished between levels of coercion in interrogation. Obviously, however, much more work must be done before the optimal level of enforcing either particular rights or rights in general can be pinpointed, whether for the United States or for the nations of Central and Eastern Europe.

\(^3\) This is just the point in *supra* note 5; expenditures on the protection and enforcement of rights should be guided by a comparison of *marginal* benefits and costs.