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Feature: An Economic Perspective on Basic Rights

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Richard A. Posner

I am not an expert on the formerly communist states of Central and Eastern Europe. What I bring to this conference is a theoretical model (cost-benefit analysis) of general applicability to problems in social ordering, some knowledge of the history and practice of rights enforcement in the Anglo-American legal culture, and my experience as a federal judge involved in such enforcement.

The organizers of this conference asked the participants to concentrate on five specific rights, and I will discuss each of these but only after discussing the general issue of rights and their enforcement. I will not discuss the bearing of the European convention on human rights, which, I understand, nations must sign, submitting to the jurisdiction of the court of human rights in Strasbourg, in order to be accepted as members of the European Union.

1. I take "right" to mean simply a claim or entitlement normally enforceable through courts or equivalent agencies; and I assume—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 distinguished in a famous essay between positive and negative liberties. I offer a version of that distinction to help frame 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 government, or, more broadly, by anyone. 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, unless one is discussing national defense. 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 that 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, rights being the cornerstone of a system of free markets and democratic political governance. Positive liberties are more costly, and their benefits often 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 productivity.

But on further reflection the distinction between negative and positive liberties blurs. 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 be largely ineffectual. It is true that much rights protection and enforcement 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 David Friedman, it is difficult to believe that the negative liberties could be made meaningful without intervention by the public sector.

The costs of the 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 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. Even in principle, it is difficult to allocate the costs of law enforcement across rights enforced, 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 as part of the sphere of negative liberties. Consider the right, found in the Fifth Amendment to the U.S. Constitution, not to be compelled to be a witness against oneself. Is this a negative liberty, or an impediment to the enforcement of the negative rights of potential victims of crime?

Third (and related to the preceding point), some rights straddle the line between negative and positive. The right to counsel and the right to abortion are examples. For an affluent person, both rights are negative: they are rights against the government’s interfering with the hiring of a lawyer and of an abortion doctor respectively. But for a poor person, these have to be positive liberties, because without public assistance the poor person cannot hire a lawyer or purchase an abortion.

Fourth, many of the costs of rights are not public budgetary costs at all. They are 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.

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

Finally, 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. Who talks of the cost of a Platonic form?

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 basic negative liberties is much higher than one. A suggestive although
far from definitive statistic is that the total public
expenditures on the administration of justice in the
United States—expenditures on police, the courts,
prosecutors, public defenders, and prison administra-
tion—are only $61 billion a year, which is less than
one percent of the Gross National Product. So the
question arises: why do any countries committed to
the principle of free markets and democratic govern-
ment not have effective systems for the protection
and enforcement of the liberties that undergird a
democratic free-market system?
II. Poverty cannot be the answer, or at least the
complete answer. Few countries outside of sub-
Saharan Africa cannot afford the relative handful of
minimally honest and competent judges, lawyers,
prosecutors, and police that is necessary to operate a
legal system whose only job is to protect and enforce
the fundamental rights to property, contract, and
personal safety. Two other answers are more plausi-
ble. 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 essen-
tial negative liberties that they have become
extremely costly, and some nations cannot afford the
cost. In these nations the legal system is asked to do
too much and fails at everything, including the pro-
tection of negative liberties.
A. An effective system of property and personal
rights requires an apparatus for deterring crime, espe-
cially acquisitive crime. Not just theft, robbery,
embezzling, the forging of wills, certain types of
fraud, and other familiar acquisitive crimes, but also
bribing officials, including judges, police, and officials
in charge of registering titles to real or personal prop-
erty, must be prevented, or, more precisely, must be
kept within tolerable bounds. It is pretty easy to
think up ways of maximizing deterrence: impose sav-
age punishments, deny procedural rights to persons
accused of crime, require citizens to carry identifica-
tion 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 it would be an effec-
tive method of minimizing the crime rate and thus
maximizing the protection of rights, provided that the
judges, police, and other administrators of the crim-
inal justice system acted competently and in good
faith. 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.
To check these dangers it is necessary either to
alter the incentives of law enforcers or to create coun-
tervailing rights, or to do both—and the countervail-
ing 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 cas-
tle"). These two features of the criminal justice sys-
tem 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, emancipat-
ing 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 and they had no right to counsel
either, so constraints on law enforcement were in
effect offset by constraints on defendants. The state
had limited power but defendants had limited rights.
Criminal proceedings were short and cheap.
The criminal justice system of twentieth-century
America furnishes parallel illustrations. By the begin-
ning of the century there were large police forces,
which frequently abused citizens. Prison conditions
were often brutal. Indigent defendants often had no
counsel, even though criminal proceedings were
more complex than they had been in the eighteenth
Figure 1: Homicide Rate in United States per 100,000 Inhabitants, 1933–1990

The Supreme Court, beginning in the 1930s but accelerating greatly in the 1960s, took the lead in seeking 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 complaining of police brutality and inhuman prison conditions.

The creation of these countervailing rights made the criminal justice system cumbersome, expensive, and probably less effective in deterring crime. As shown in Figure 1, a great upsurge in crime rates accompanied the “Warren Court’s” adventurous rulings in criminal procedure, although the causality is deeply uncertain, there is some evidence that these rulings did cause crime rates to rise.

Legislators responded by expanding pretrial detention, authorizing more use of wiretapping and other electronic surveillance, extending the length of sentences, reducing judicial discretion in respect of sentencing, hiring more educated police, increasing the scope of pretrial prevention (that is, reducing the right to release upon the posting of a bond), and appropriating more money for prisons and for prosecution. Expanding the rights of criminal defendants, while in one respect fostering negative liberties, in another and possibly more important respect had impaired them by undermining the protection of property and personal rights that were threatened by crime and imposing large indirect costs by making the criminal justice system more costly.

These points are obscured by the historical origins of the rights of criminal defendants. The people who pressed for and obtained the rights of criminal defendants that were recognized first in English law and then in the American Bill of Rights 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, from the Constitution were rights that criminals, and mem-
bers 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 US Constitution, one clause of which entitles criminal defendants to the assistance of counsel. The original understanding was that the clause entitled criminal defendants to hire counsel if they could afford to. Only in the twentieth century has the amendment been understood in addition to entitle indigent criminal defendants to the assistance of counsel furnished at the government’s expense. To speak with perhaps 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 rights *semper et ubique*. 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 (as by flexible interpretation of the Sixth Amendment and other constitutional provisions) of new rights, and the legislatures. Legislatures can neutralize the effect of a new court-created right either by reducing the funding for the defense of indigent criminal defendants, thus making it easier to convict them, or by increasing the severity of punishments, with the consequence 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, and American courts have been unwilling to do either.

The leaders of the postcommunist societies of Central and Eastern Europe, like the leaders of the American Revolution, have, of course, a lively sense of the danger of governmental oppression of the respectable classes. That lively 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 that I want to emphasize in the costs of protecting and enforcing rights is the overextension of the legal system. Suppose that at time \( t \) a nation is communist. 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. Suppose that at time \( t+1 \) the nation converts from communism to 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. What is more, since the transition from communism to capitalism will often involve 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 compared to a communist system, the nation may be unable to maintain, let alone increase, the existing level of resources devoted to law enforcement.

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, often 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 are 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 those defendants, or enforcing them 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 right to fire a worker—will promote the protection of rights by freeing up resources of the legal system for that protection.

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, implying 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 while not poor in the way that many African nations are poor is not wealthy in the way the United States and Germany are, 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 the five rights focused on during the conference.

A. The first is preventing brutal police tactics directed against pretrial detainees. These tactics generally center on 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, of 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 credit criminal defendants over police, since there rarely will be evidence of coercion other than the defendant’s say-so. Even in the United States, and even more in nations that do not have a tradition of civil liberties and that 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, the indemnifying by the state of officers found liable. 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.

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. And by making the job of a policeman more valuable, a 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 with which the conference is concerned is the right of patients in psychiatric hospitals not to be abused by the hospital staff. I take it that "abuse" is meant to comprehend neglect, which is 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, since a hospital staff has less to gain from abusing a patient than the police have to gain from beating a confession out of a suspect. The problem of neglect is largely one of resources 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 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. But like the rights of pretrial detainees, a right to decent treatment in psychiatric hospitals is two-edged. Suppose that a nation's budget for health care is essentially fixed. Increasing the resources devoted to psychiatric hospitals will reduce the resources available for other, and possibly as or more urgent, health-care needs. Once more a difficult tradeoff is inescapable.

A related problem, and one with a sinister resonance in the formerly communist nations, is that of improper commitment 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 difficulty, however, 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. As these examples illustrate, rights impose costs (not all of them monetary) as well as confer benefits. That, indeed, is the essential point that I make in this paper. It is a point that economists are not likely to ignore, but that lawyers, who reverence rights and are not professionally sensitive to cost, are likely to ignore. 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.

C. The third conference topic is the provision of competent lawyers for defendants in criminal cases. For affluent defendants, there should be no problem; the market will provide competent counsel. Most criminal defendants, however, certainly in the United States and presumably to an even greater degree in most other countries, are indigent. The direct costs of providing lawyers for indigent criminal lawyers 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. Granted, the figure of $1.4 billion is an understatement. Some lawyers are pressured by judges to "volunteer" their services to indigent criminal defendants at below-market rates. Others truly volunteer their services, but they do so either to obtain on-the-job training or as genuine charity, so in neither case is there a net cost to the volunteers. Nevertheless the total costs of defending the indigent are slight—and would be even smaller in a country with a lower crime rate 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. But it is not clear 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 very 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, however, in a nation that follows the German practice of mandatory prosecution rather than the U.S. practice of discretionary prosecution. It will also be weaker 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 "Warren Court's" program of 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 the current level at which the defense of indigent criminal defendants in the United States is funded as inadequate, noting the low quality of much of this representation. 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 probably 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 prosecution 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 defend 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 problem with the right to counsel that is unrelated to subsidization is that a wealthy defendant may be able to obtain an unjust acquittal by deploying a flock of pricey lawyers, overpowering a prosecutorial team that is underfunded. Poor countries often contain a number of very wealthy people—and have inadequate resources for prosecution.

Several participants in the conference emphasized the value of a criminal defendant's or suspect's lawyer 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 to substitute arbitration or other nonjudicial methods of dispute resolution for the courts; there also may be greater pressure to settle the case rather than go to trial, though this is not certain. 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 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.

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), which comes out to an average cost of less than $8000 per case. (Of course, these are only budgetary costs; the expense of lawyers 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 specific right on which the conference has focused 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 many inspectors are needed 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 U.S. 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. Employees of food establishments can be hired, or rewarded, as 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.24 The investigation of inspectors can be placed in a separate (and elite) agency from 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,25 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. As Dr. van Rijckevorsel has emphasized in his paper for the conference,26 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. At the same time, it is important to bear in mind that 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 an irresistible, temptation. We have known at least since George Orwell's Down and Out in Paris and London that the kitchens even of distinguished restaurants are often filthy, yet without palpable 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, even when they are rather laxly enforced, in the production of food 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,27 which again is only $4 per American; and perhaps that is enough, though I do not know enough about the subject to express a confident opinion.

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 protection of the water supply is also much cheaper by virtue of its greater concentration.

I have mentioned corruption but the real dangers of corruption to a nation'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 possible.28 The main solution to these problems is lower tax rates and less government regulation, which reduce the incentive to bribe public officials. The cost of this solution, political obstacles to one side, may actually be negative; reducing the size of government may stimulate output directly at the same time that it does so indirectly by reducing the amount of corruption. But that is a story for another day.

IV. I have said nothing about "culture" as a factor in the protection or enforcement of rights, except for a glancing reference to the U.S. civil liberties 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, too. 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; obviously 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 not know how to intervene directly to change a nation'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 both are checks on abuse of official power) is very important, but I do not myself attach similar importance to three of the five rights that were the focus of the conference. Apart from the points I made in discussing each of them, I note that as recently as thirty years ago, these three rights (protection from police brutality in pretrial detention, protection from custodial 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 are also, I believe, 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 they proceed in full awareness that enforceable rights are not costless, or even cheap.

A more sophisticated 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. 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. This conference will have served its purpose if it has helped to launch and to guide this work.

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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, Amy Kaslow, "The High Cost of Crime," Christian Science Monitor, May 9, 1994, p. 9, which far exceeds public expenditures, as we shall see. The importance of private self-protection against crime is emphasized in Tomas J. Philipson and Richard A. Posner, "Public

Notes:

1 I mean in their philosophical sense. I am not referring to the concept of "moral rights" as it is employed in European intellectual-property laws.

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.
Health and the Natural Rate of Crime" (June 1995, unpublished).


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 benefits (however benefits are computed) in reduced criminal activity.

6 See Isaac Ehrlich and George D. Brower, "On the Issue of Causality in the Economic Model of Crime and Law Enforcement: Some Theoretical Considerations and Experimental Evidence," 77 American Economic Review 99 (May 1989). The source for Figure 1 is Figure 2 in Philipson and Posner, note 3 above, at 21, which is based on National Crime Survey (NCS) data. The increase in the homicide rate understates the increase in the propensity to commit homicide and in the total costs of homicide and its prevention, since an increased risk of criminal behavior induces increased efforts at self-protection by the potential victims of crime, dampening the increase in the actual crime rate.

7 A clue is the enormous 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. U.S. Dept. of Justice, National Institute of Law Enforcement and Criminal Justice, The National Manpower Survey of the Criminal Justice System, vol. 5: Criminal Justice Education and Training 138 (1978) (tab. IV-1). 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 make successful prosecution of criminals impossible.

8 In economic terms, the expected cost of punishment, a measure of deterrence, is EC = 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 EC 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, a consequence of that protection.

9 I mentioned the increased educational level of the police. See note 7 above. By 1974, the percentage of police with some college education had risen to 46.2 percent, compared to only 20 percent in 1960. U.S. Dept. of Justice, note 7 above, at 138 (tab. IV-1).

10 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.

11 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, for example, Gary S. Becker and George J. Stigler, "Law Enforcement, Malfeasance, and Compensation of Enforcers," 3 Journal of Legal Studies 1 (1974); Richard A. Ippolito, "The Implicit Pension Contract: Developments and New Directions," 22 Journal of Human Resources 441 (1987).


13 Id.

14 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 principle of compara-
tive advantage. A corporate lawyer might find him-
self assigned to defend a criminal, even though he
had no experience in criminal law.

15 The United Kingdom, for example, with a
population almost a fourth the size of the U.S.
population, has only one-twentieth the number of jail
and prison inmates. A Digest of Information on the
Criminal Justice System: Crime and Justice in England
and Wales 56 (Home Office Research and Statistical
Department, Gordon C. Barclay ed. 1991).

16 In the limit, if the probability of being con-
victed were independent of guilt or innocence, the
prospect of punishment would not provide any
inducement to avoid committing crimes.

17 See Stephen J. Schulhofer and David D.
Friedman, “Rethinking Indigent Defense:
Promoting Effective Representation through
Consumer Sovereignty and Freedom of Choice for
All Criminal Defendants,” 31 American Criminal
Law Review 73 (1993), and references cited there.

18 See Annual Report of the Director of the
Administrative Office of the United States Courts,
various years.

19 Between 1960 and 1994, the percentage of fed-
eral judicial employees who were full-fledged (“Article
III”) judges fell from 10.1 percent to 3.2 percent.

20 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 my book

21 See Richard A. Posner, Economic Analysis of

15 Id. at 579.

23 The source for these statistics is, again, the
Annual Report of the Director of the Administrative
Office of the United States Courts for various years.

24 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.

25 As suggested by the fact that in 1990 Mexico
reported 6323 cases of cholera, the United States 6,
and Canada 1. Donna U. Vogt, “NAFTA: Cross-
Border Health and Food Safety Concerns,” Mexico

26 Jan L. A. van Rijckevorsel, “On Food Law
and Its Enforcement” (June 16, 1995).

27 See William Patrick, The Food and Drug

28 The economics of corruption is the subject
of an extensive literature well represented by
Andrei Shleifer and Robert W. Vishny,
“Corruption,” 103 Quarterly Journal of Economics 599
(1993).

29 This is just the point in note 5 that expendi-
tures on the protection and enforcement of rights
should be guided by a comparison of marginal
benefits and costs.