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In 2016, the nation will mark the 50th anniversary of perhaps one of the best-known U.S. Supreme Court cases, *Miranda v. Arizona*. The *Miranda* warning has become ingrained in law enforcement and has permeated popular consciousness through countless recitations in films and television shows. Yet *Miranda* is only part of the story when it comes to procedures for ensuring justice. With this issue, *Insights* explores how the *Miranda* case, social media, and public policy shaped our criminal justice system.

The issue opens with an article focused on the evolution of the *Miranda* warning. Gonzaga University law professor Brooks Holland explains how, remarkably, *Miranda*’s impact has been minimal, affecting, by many estimates, just 8 percent of criminal cases. Chicago-Kent College of Law professor and novelist Lori Andrews leads readers on an interesting tour of how social media has influenced policing, criminal investigations, and jury duty. She illustrates how these freely available resources may challenge notions of a fair trial. Historian Daniel Holt reminds readers of the evolution of criminal justice policy in 20th Century America. Lawyer Rachel Kunjummen Paulose reflects on some of the long-term consequences of crime, both for those convicted and society at large.

To help you share the rich content of this issue with your students, our *Learning Gateways* provide activities and discussion questions designed to spark and inform classroom conversations. *Teaching Legal Docs* dives into allocution statements, which are detailed accounts of crimes offered by defendants pleading guilty in court, prior to sentencing. Experts weigh in on what they would reform about the criminal justice system in *Perspectives*, and legal scholar David Hudson breaks down the recent Supreme Court term rulings in several cases concerning the death penalty in *Law Review*. To close the issue, *Profile* features Emily Baxter and the We Are All Criminals project.

Don’t forget to visit www.insightsmagazine.org for additional resources, materials, and useful links to help you bring this and other legal-related topics alive in your classroom. At InsightsMagazine.org you will find ready-to-use handouts and other additional instructional supports. There, we also welcome your feedback on this issue and on *Insights* in general. Please let us know if you have any article or issue theme ideas by emailing me or the editor directly. We also invite you to share your innovative strategies for teaching the law in your classroom.

Hope your school year is off to a good start!

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Miranda v. Arizona:
50 Years of Judges Regulating Police Interrogation

by Brooks Holland

“You have the right to remain silent …”

Thanks to countless movies and television shows, these words evoke one of the most well-known Supreme Court decisions of all time, *Miranda v. Arizona* (1966). This decision famously requires the police to give specific warnings to a suspect as a condition to custodial interrogation: that the suspect has the right to remain silent; that statements by the suspect may be used in court; that the suspect may consult with a lawyer during interrogation; and that a lawyer will be provided if the suspect cannot afford one.

A controversial decision, “*Miranda* [nevertheless] has become embedded in routine police practice to the point where the warnings have become part of our national culture.” Even a popular movie like *21 Jump Street* could drop a *Miranda* joke about Officer Jenko’s inability to recite *Miranda* warnings correctly, and count on the fact that most people would know the proper language for those warnings, more or less. “You have the right to remain an attorney.” Everybody knew Jenko dropped the ball with that line.

The nation’s cultural understanding of *Miranda*, however, has not always matched *Miranda’s* reality. For beyond the familiar *Miranda* warnings themselves, the *Miranda* rule includes other important features and limitations to address the constitutional concerns that motivated the *Miranda* decision. *Miranda’s* 50th anniversary in 2016 presents a valuable opportunity to reflect on the history, meaning, and impact of this decision.

*Miranda*’s Origins
The *Miranda* rule is a component of the broader law of interrogation. Police interrogation raises challenging legal questions because of the important but competing interests these practices implicate. On the one hand, confessions by guilty suspects aid the police in solving crimes and promoting public safety. On the other hand, the desire to secure a confession can invite abusive police practices, and these practices can undermine valued individual rights, and even prompt innocent persons to confess.

The *Miranda* decision seeks to balance these interests through the Fifth Amendment to the United States Constitution. The Fifth Amendment, however, contains not a word about warning suspects of constitutional rights. Rather, the part of the Fifth Amendment animating the *Miranda* rule is the right against self incrimination: “No person … shall be compelled in any criminal case to be a witness against himself.” The Supreme Court’s path to
finding *Miranda* rights in this provision covered almost 200 years following the nation’s founding.

For about the first 100 years of the nation, the Supreme Court did not decide major constitutional cases involving police interrogations. Several reasons may account for this judicial inaction. For example, the police initially were not organized as large, well-trained institutions resembling the contemporary police departments where custodial interrogation practices developed. Furthermore, local courts already had some authority in the common law for judging whether coerced confessions should be excluded from trial.

Some reasons for this initial judicial inaction, however, were important to the development of the *Miranda* rule. One of these reasons is federalism. The vast majority of criminal cases are heard in state courts, not in federal court. In the United States’ federal system of government, federal courts cannot dictate evidentiary rules for the states without constitutional authority to require state courts to follow those federal standards. And, until the Fourteenth Amendment came to be applied to the states, the Supreme Court understood the Bill of Rights, including the Fifth Amendment, to apply only to the federal government. As a result, the Supreme Court initially lacked authority to direct interrogation rules for the states.

Another important reason is that prior to the 20th century, the Supreme Court had not fully developed the “exclusionary rule”—the rule that prohibits the prosecution from admitting evidence at a criminal trial if that evidence was obtained in violation of the Constitution. Whether the exclusionary rule bars admission of a suspect’s confession at trial is the whole point of *Miranda*. The Supreme Court refined the exclusionary rule largely in early 20th-century cases involving the Fourth Amendment right against unreasonable searches and seizures, such as *Weeks v. United States* (1914) and *Mapp v. Ohio* (1961).

In 1897, however, the Supreme Court did invoke the Constitution to limit police interrogations. Because the murder case of *Bram v. United States*
In Brown v. Mississippi (1936), the Supreme Court decided that the Constitution does apply to the most abusive of these interrogations conducted by state officers. In Brown, the police interrogated three African American men who were suspected of murdering a white person. The interrogations included brutal whippings, and even efforts to hang one suspect, to force these suspects to confess. State courts upheld the resulting convictions.

The Supreme Court, on appeal, still accepted that the Fifth Amendment right against self-incrimination did not apply to these interrogations. The Court based this conclusion on the Due Process Clause of the Fourteenth Amendment, the post–Civil Rights era provision that protects against state actions that are “cruel and unusual punishment.”

In order to be admissible, [a confession] must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Limited to federal prosecutions, however, Bram did not govern the police interrogations happening in local police stations all around the country. These interrogation practices included “third degree” methods ranging from psychological coercion to outright torture. The most abusive of these interrogation practices often were applied to African American suspects in the South, especially suspects accused of a crime against a white person.

In 1966, the Supreme Court held that statements resulting from police interrogation of defendants could not be used in court unless they demonstrated the use of procedural safeguards “effective to secure the privilege against self-incrimination.” The Court specifically outlined the necessary aspects of police warnings to suspects, including warnings of the right to remain silent and the right to have counsel present during interrogations.

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In 1977, the Supreme Court ruled that the admission of evidence was constitutional. Miranda, the Court ruled, only required law enforcement officials to recite a suspect’s rights when the suspect had been “deprived of his freedom of action in any significant way.” The Court determined that in this case there was “no indication that the questioning took place in a context where respondent’s freedom to depart was restricted in any way.” Even if the police coercively pressured Mathiason during the interview, he came to the police station freely and was free to leave at any time. Therefore Miranda rights did not apply.

was a federal prosecution, the Bill of Rights indisputably applied. In deciding whether the government properly offered Bram’s confession as evidence at trial, the Supreme Court held that the Fifth Amendment’s right against self-incrimination controlled:

In criminal trials … wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person “shall be compelled in any case to be a witness against himself.”

The legal question under the Fifth Amendment, the Supreme Court emphasized, was whether the police compelled the confession:
The Supreme Court considered the admissibility of a statement elicited by a police officer who apprehended a rape suspect who was thought to be carrying a firearm. The arrest took place in a grocery store. When the officer arrested the suspect, he found an empty shoulder holster, handcuffed the suspect, and asked him where the gun was. The suspect nodded in the direction of the gun (which was near some empty cartons) and said, “The gun is over there.” The suspect later argued that his statement about the gun was inadmissible as evidence because he had not first been given the Miranda warning. Since the gun was found as a direct result of the statement, he argued that the presence of the gun was also inadmissible. In a 5-4 decision, the Supreme Court found that the jurisprudential rule of Miranda must yield in “a situation where concern for public safety must be paramount,” thus establishing the “public safety” exception to Miranda.

This voluntariness test, however, required courts to examine the “totality of circumstances.” The admissibility of every confession, thus, was judged on its own unique facts. Consequently, when lawyers argued whether a confession was voluntary, the process could be inefficient, and the results unpredictable and even inconsistent.

During this same time period, the police developed new interrogation methods in response to Supreme Court decisions. These methods relied less on rack-and-screw tactics and more on isolation of a suspect from family and counsel, psychological pressure, and deception. These methods were very successful in obtaining confessions that appeared, in the totality of circumstances, to be “voluntary,” thus raising new questions about the role of the judiciary in regulating police interrogations. The Supreme Court confronted these questions in Miranda.

The Miranda Decision

The Miranda case was comprised of four different cases presenting the same legal question to the Supreme Court: whether custodial interrogation should be judged on a case-by-case basis for evidence of police coercion, or instead should require special procedural protections to ensure that confessions are voluntary. The facts of Ernesto Miranda’s case illustrated the point of this legal question.

In 1963, an eighteen-year-old woman was kidnapped and raped near Phoenix, Arizona. Ten days later, the police arrested Miranda and took him to the local police station. Miranda was twenty-three years old, poor, and educated only to the ninth grade. Miranda
The Supreme Court thus pivoted in *Miranda* from a rule that merely prohibits coercive police conduct to a rule that requires the police to prevent coercion by giving a suspect specific legal warnings. This shift reveals the significance of *Miranda*. No longer were confessions admissible solely because the police abstained from bad behavior in securing the confession. Now, the police must affirmatively warn suspects of their right to remain silent and to have a lawyer. If the police do not give these warnings, a court will presume, *solely from the lack of Miranda warnings*, that the statement was involuntary and exclude it from trial.

For a suspect subject to interrogation who has been properly warned, *Miranda* places a fork in the road. If a suspect voluntarily waives *Miranda* rights and talks, the confession almost certainly will be judged admissible. If, by contrast, a suspect invokes the right to remain silent, the police must "scrupulously honor" this right. Further, if a suspect requests a lawyer, no interrogation may occur without a lawyer present.

The Supreme Court based the need for this protective rule in the nature of modern police interrogation. Modern interrogation practices, the Court observed, are "psychologically rather than physically oriented." The goal is to isolate a suspect to deprive the suspect of every "psychological advantage" and "to subjegate the individual to the will of the examiner." Indeed, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals," and "is at odds with one of our nation’s most cherished principles—that the individual cannot be compelled to incriminate himself." Only *Miranda’s* required warnings, the Court held, can dispel this inherent compulsion.

Importantly, in line with these concerns, *Miranda* applies only during custodial interrogation: “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Accordingly, *Miranda* does not apply to suspects who volunteer statements—*Miranda* does not require the police to put a sock in the mouth of a talkative suspect. Nor must the police warn suspects who are not in police custody. Of course, in none of these cases may the police actually coerce the confession. But, courts will not presume that these confessions were involuntary solely because *Miranda* warnings were not given.

**The Impact of *Miranda***

The impact that law enforcement feared from *Miranda* is that suspects who confess voluntarily would get their confessions excluded from trial on the “technicality” that *Miranda* warnings were not given. Or, after being warned, suspects would invoke their rights instead of confessing. This loss of confession evidence would hamper criminal investigations and even set dangerous criminals free.

Pro-*Miranda* advocates, by contrast, anticipated a world where the police and in-custody suspects would operate on a level playing field. Far fewer individuals would confess during the crucible of custodial interrogation. And, confessions that were obtained more likely would be voluntary.

The post-*Miranda* reality, however, appears to have been more modest between these extremes. For example, one study by an anti-*Miranda* scholar claimed that *Miranda* affected the outcome of less than 8 percent of cases.
Other studies argue an even more minimal impact by Miranda on the ability of the police to secure admissible confessions.

At least three explanations may account for Miranda’s modest impact. One explanation is that the police have adapted their interrogation practices to Miranda’s requirements. Miranda still permits the police to interrogate strategically, and the police are well trained on how to interrogate past Miranda. Any experienced prosecutor or defense lawyer will confirm that plenty of suspects in police custody still talk with the police.

Second, Miranda supplies a simple and efficient template for prosecutors to demonstrate to courts that a confession was voluntary. Jurors also may look to Miranda warnings as evidence that an interrogation was fair and the confession reliable. The police thus know that if they follow Miranda and secure a confession, the confession more likely will be stamped with the law’s version of a gold star. Indeed, the FBI for years prior to Miranda, had given similar warnings as best law enforcement practice.

A third explanation for Miranda’s modest impact arises from how the Supreme Court itself has limited Miranda in the years following the decision. Acknowledging that Miranda’s exclusion of some confessions from trial can be a difficult pill to swallow, the Court has peppered the rule with exceptions. Here are some examples:

- **Exclusionary rule:** The exclusionary rule sometimes can exclude a chain of evidence following a constitutional violation. For example, assume the police beat a murder suspect during interrogation, producing a truly involuntary confession that included the location of the murder weapon. Not only would this confession be excluded from trial as involuntary, but so would the weapon, as a product of the coercive interrogation. This rule is often called the “fruit of the poisonous tree” rule. The Supreme Court, however, has ruled that this “poisonous fruit” rule does not apply to Miranda violations: if all the suspect can show is a violation of Miranda, only the confession is excluded from trial, not other evidence discovered as a result of the improper confession. In this way, the Court does treat Miranda violations as more of a constitutional “technicality” than other constitutional violations.

- **Public safety:** In New York v. Quarles (1984), the Supreme Court decided that Miranda does not apply during public safety emergencies. The police in Quarles interrogated the suspect without Miranda warnings when trying to find a firearm he discarded in a crowded grocery store. The Court held that the suspect’s admission to the gun’s location was admissible at his trial because public safety trumped Miranda. More recently, the government has invoked this public safety exception to interrogate apprehended terrorists without Miranda warnings. The police cannot actually coerce a statement from a suspect because of a public safety emergency, but the police need not give Miranda warnings.

The Supreme Court has also made the Miranda warning catechism more accommodating to police interrogation strategies. For example, the Court has held that the police may begin interrogating a suspect before obtaining a waiver of Miranda rights, so long as a Miranda waiver precedes the confession. The police thus can prime a suspect to confess before the suspect decides whether to waive Miranda rights. The Court further has ruled that a suspect does not invoke the right to remain silent by remaining silent for two hours during police interrogation. Instead, a suspect must affirmatively “invoke” the right to remain silent, which means the suspect must talk. And, a suspect can waive his or her Miranda rights simply by confessing, whether they intend to do so or not, because a confession is seen as proof that the suspect does not want to remain silent. These rulings all draw a roadmap for police interrogation around the Miranda rule.

Despite these limitations, Miranda nevertheless remains a significant constitutional decision in the world of criminal justice. The Miranda rule surely does check the power of the police to coerce their way to a confession. Further, the rule reinforces a fundamental principle: all individuals retain critical rights when in police custody, and the police must work within these rights when interrogating a suspect. This principle in turn reinforces our nation’s commitment to the rule of law, even when the state is pursuing interests as important as criminal justice and public safety.

**Conclusion**

At 50, Miranda may have a few wrinkles and have lost some of its energy. Yet, despite concerted efforts over the years to reverse Miranda, the Supreme Court has remained committed to Miranda’s underlying principle: when the police take a suspect into custody for interrogation, that environment is inherently coercive, and the police must dispel that coercion by ensuring the suspect understands and waives his or her right against self-incrimination. As Deputy Chief Hardy scolded Officer Jenko in 21 Jump Street: “What possible reason is there for not doing the only thing you have to do when arresting someone?” In this light, perhaps Miranda over 50 years has proven itself a win-win for everyone, simply because we all know it as a familiar legal rule that balances public safety with individual rights.
Looking at *Miranda*: Your Right to Remain Silent

In this lesson students will learn about their Miranda rights and the circumstances of “custody” and “interrogation” that require law enforcement to recite a suspect these rights. After reviewing Miranda v. Arizona as a class, students will work in small groups to explore how the U.S. Supreme Court has ruled on Fifth Amendment issues in relation to a person’s Miranda rights by studying several important Fifth Amendment cases.

Key Terms
- **Custodial Interrogation**: police questioning of a detained person about the crime that he or she is suspected of having committed
- **Exculpatory**: evidence favorable to the defendant in a criminal trial that exonerates or tends to exonerate the defendant of guilt. It is the opposite of inculpatory evidence, which tends to prove guilt
- **Inculpatory**: evidence that shows, or tends to show, a person’s involvement in an act, or evidence that can establish guilt

Procedure

**Whole Class:**
Ask students: Think about a television show or movie that you have recently seen that has shown a person getting arrested. What is the first thing that police officers usually say to a suspect as they are placing the person into custody? What rights are mentioned in this warning?

Post answers for the class to see. The class will end up creating a basic version of the Miranda warning. Ask students why they think we have this warning and then share the words of the Fifth Amendment with students.

Explain to students that they will be learning about Supreme Court cases concerning Fifth Amendment rights. Share the “Background on Miranda v. Arizona” with students.

**Background on Miranda v. Arizona**
The U.S. Supreme Court’s decision in Miranda v. Arizona addressed four different cases in which defendants were questioned by police officers, detectives, or a prosecuting attorney in rooms isolated from the outside world. In each of these cases the interrogators failed to give a full and effective warning of the defendants’ rights at the outset of the process. The questioning elicited oral admissions and, in three of the cases, signed statements were admitted at trial.

Then share the facts and case summary of Miranda v. Arizona with students.

Share with students the Definition of Miranda handout, which explains the definitions of “custody” and “interrogation.” Have students read over a sample Miranda warning and answer questions about several different scenarios.

**Small Groups:**
Organize students into four small groups and distribute one case study to each group. Have groups respond to the specific questions that relate to their case. Then each group should prepare to report on their case to the class and include the following:
- Summarize the facts of the case, including the name and the year.
- State the questions before the Court.
- Explain how the Court ruled.
- Discuss the case-specific questions provided.

Case Studies are available as handouts at www.insightsmagazine.org. See list of case studies on the following page.

**Whole Group:**
Reassemble the class and ask each group to report on its case. Each group should ask the rest of the class to respond to the case-specific questions. Groups can share their own responses to the case-specific questions and state why their group thought the case was significant.

After each group presentation, allow students to discuss the scenario and whether they agree or disagree with the ruling.

**Definition of Miranda**
The term “Miranda warning” was not explicitly mentioned in Miranda v. Arizona, but it is the name of the formal warning that is required to be given by police in the United States to criminal suspects in police custody before they are interrogated. The purpose of the Miranda warning is to ensure the accused are aware of, and reminded of, these rights under the U.S. Constitution, and that they know they can invoke these rights at any time during the interview. Miranda rights are given under circumstances of “custody” and “interrogation.” *Custody* means formal arrest or the deprivation of freedom to an extent associated with formal arrest. *Interrogation* means explicit questioning or actions that are reasonably likely to elicit an incriminating response. The police do not need to give the Miranda warnings before making an arrest, but the warning must be given before interrogating a person while in custody.
As a result of *Miranda*, anyone in police custody must be told a version of the four things listed below before being questioned.

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney.
4. If you cannot afford an attorney, one will be appointed for you.

In thinking about the definitions of “custody” and “interrogation,” would the police be required to read you your *Miranda* rights if:
- You were on a public street and they asked you which way someone ran?
- They asked you and several other students questions in the lunchroom?
- They arrest you?

**Miranda v. Arizona (1966)**

**Facts:** Ernesto Miranda was arrested for rape and kidnapping and taken in custody to a police station where he was identified by the victim in a lineup. He was then interrogated by two police officers for two hours. Mr. Miranda signed a confession that included the typed statement: “I do hereby swear that this statement was made voluntarily, without threats or promises of immunity and ‘with full knowledge of my legal rights, understanding that any statements I make may be used against me.’” However, at no time was Mr. Miranda told of his right to counsel. Prior to being presented with the form on which he was asked to write out the confession he had already given orally, the police officers had not informed him of his right to remain silent. At trial, the oral and written confessions were presented to the jury and Mr. Miranda was found guilty and was sentenced to 20–30 years imprisonment on each count. Mr. Miranda’s attorney appealed to the Supreme Court of Arizona, which held that Miranda’s constitutional rights were not violated by the police while they were obtaining the confession. Mr. Miranda’s attorney then appealed to the U.S. Supreme Court who agreed to hear his case along with three other similar cases.

**Questions Before the U.S. Supreme Court:** Are “statements obtained from an individual who is subjected to custodial police interrogation” admissible against him in a criminal trial? And are “procedures which assure that the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

**Court Ruling:** In a 5-4 majority, the U.S. Supreme Court held that “there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” As such, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

**Questions:**
1. What constitutional rights did the Court determine were violated in this case?
2. Why do you think the Court felt that it was important for Mr. Miranda to be made aware of his right to counsel?
3. According to the Court’s definition, would custodial interrogation apply if someone was being questioned while under arrest inside a police car?
The bulk of criminal prosecutions in the United States are brought in state courts, but from the perspective of criminal justice policy, the role of the legislative and executive branches of the federal government has loomed large in recent history. During the 1960s the presidential administrations of John F. Kennedy and Lyndon B. Johnson focused on poverty and crime. Attorney General Robert F. Kennedy’s Committee on Poverty and the Administration of Federal Criminal Justice, appointed in 1961, recommended that a defendant’s finances should not determine the quality of justice received in federal court. Congress responded with the 1964 Criminal Justice Act, which sought to improve representation for poor defendants by providing compensation for court-appointed attorneys. Prior to that law, court-appointed counsel were selected haphazardly and received no pay or reimbursement of costs. By the 1970s, Congress authorized the largest district courts to create government-funded public defender offices.

Reformers also targeted the bail system in the 1960s. Nonprofit organizations investigated bail and pretrial detention and found that defendants who could not raise bail suffered severe economic distress, such as loss of a job or their home. In addition, studies found that detained defendants were more likely to be convicted, either because of the pressure to plead guilty or the inability to work with counsel to mount a strong defense. In response, Congress passed the Bail Reform Act of 1966, which encouraged federal judges to release defendants on their own recognizance pending trial and refrain from using high bail as a method for detaining defendants.

Defense counsel, now compensated by the district courts, had more resources and defendants had new procedural rights—articulated by the Supreme Court in cases like *Miranda*—to enforce at each stage of prosecution. With better representation and greater availability of pretrial release, fewer defendants pled guilty, leading to more trials. This put new strains on the courts and led to backlogs and delay. Congress’s answer, in 1974, was the Speedy Trial Act, which required that charges be dismissed if prosecutors and the courts could not bring a case to trial within a certain period of time. It marked a key turning point in the discussion about the criminal justice system. Leaders in President Richard Nixon’s Department of Justice bristled at Congress’s mandate and publicly objected to what they saw as excessive “legalism” in the criminal justice process that made conviction, and thus enforcement of the law, more difficult.
Daniel Holt is Associate Historian at the Federal Judicial Center. The views expressed in this article are those of the author and not those of the Federal Judicial Center or its Board.
The Right to a Fair Trial in the Age of Facebook

by Lori Andrews

When Utah police tried to serve a warrant on Jason Valdez, a member of the Norteños gang, he barricaded himself in a motel room, taking Veronica Jensen as a hostage. With SWAT officers outside his motel and in the adjoining rooms, Jason used his Android phone to post six status updates to Facebook, add 15 friends, respond to numerous comments on his wall posted by friends and family, and post a picture of himself and his hostage with the caption, “Got a cute ‘HOSTAGE’, huh?” A Facebook friend posted on Jason’s page that a SWAT officer was hiding in the bushes: “gunner in the bushes stay low.” “Thank you homie,” Jason replied. “Good looking out.”

The standoff ended when SWAT officers used explosives to blast through the front door and through the wall from an adjoining room. The hostage was fine, Jason ended up in intensive care, and police are considering whether to charge Jason’s friend with obstruction of justice for warning him about the SWAT officer.

Social Networks and Criminal Investigations

Social networks have become a police officer’s BFF. A 2014 survey by the International Association of Chiefs of Police of 728 law enforcement agencies from 48 states and the District of Columbia found that 82.3 percent of the agencies used social networks in criminal investigations. Nearly half of the law enforcement agencies said that social media had helped them solve crimes. Search requests, too, have helped to identify offenders. Robert Petrick’s conviction for murdering his wife, for example, was secured through evidence from his Google searches, including “neck,” “snap,” “break,” and a search for the topography and depth of the lake where his wife’s body was found.

Social media posts and photos have been used to show a crime was committed, to show that the defendant was prone to violence or lies, to impeach a witness, to show that the defendant or someone close to the defendant intimidated a witness, and to justify a longer sentence. But the use of social media can conflict with a right to a fair trial.

A constellation of rights in the U.S. Constitution work together to protect people’s right to a fair trial. These include the Fourth Amendment, which puts constraints on how evidence is collected; the Fifth Amendment’s protection against self-incrimination; and the
Sixth Amendment’s right to an impartial jury. But our digital world has created new challenges for the implementation of each of those rights.

**The Fourth Amendment**

The Fourth Amendment, which prohibits unreasonable searches of persons and property, was adopted to protect us from police officers coming into our homes and searching for evidence of a crime by reading our private papers and going through our belongings. If law enforcement officials want to obtain evidence, they need probable cause—some reasonable, individualized suspicion—that the particular person has committed a crime or is about to commit a crime. Generally they also need a warrant, which they can obtain if they persuade the judge that their suspicions about the person are reasonable.

With the Fourth Amendment, the Framers privileged privacy over crime prevention. Sure, the cops might miss out on finding an embezzler or blackmailer or wife beater by not being able to march into everybody’s house just in case criminal activity was going on. But they’d probably have to unnecessarily invade the privacy of many upright citizens to find the people whose homes concealed evidence of a crime. And the Framers didn’t want that to happen.

Even though offline searches can’t be conducted without probable cause, cops routinely search social networks. A deputy sheriff in the Chicago suburbs searched the Facebook pages of high school athletes. When the deputy found party photos indicating underage drinking, four boys were suspended from their team and criminally prosecuted. A girl who had shoplifted was caught when she posted a photo of herself in the stolen dress. A sixteen-year-old boy posted a Myspace photo of himself with his father’s guns. Even though it is legal to have a gun at home and his father had permitted him access to the gun, a jury convicted the boy of possession of a gun by a juvenile.

In many instances, citizens send social network information to the police to be vindictive or to gain something
themselves. About half of teenagers post photos of themselves engaging in illegal behavior, mainly underage drinking. Yet not all those teens are prosecuted. Who passes on those incriminating photos to the police? Sometimes it is the parent of a rival to the teen in the photo. If the photographed teen is suspended from school or knocked off the team, the rival will gain a spot.

At sentencing, social network information again comes into play. In a Rhode Island case, a twenty-year-old’s sentence was harsher because of pictures posted to Facebook. Joshua Lipton drove under the influence of alcohol and caused a car accident that seriously injured a woman. Two weeks later he posted photos of himself wearing a Halloween costume that consisted of a bright orange jumpsuit with the phrase “jail bird” written in black. One of the victims of the accident saw the photos and gave them to the prosecutor. At the sentencing hearing, the prosecutor argued that the pictures demonstrated that Lipton was not remorseful and thus deserved incarceration, as opposed to probation, and the judge agreed.

The Fifth Amendment

The Fifth Amendment provides that no person shall be “compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” Those constitutional rights help govern what information is admitted in criminal cases. We all have a Fifth Amendment right not to incriminate ourselves. We can “plead the Fifth” and not testify. But can our Facebook and Myspace postings be used against us? And are courts savvy enough to know when someone else has posted something just to incriminate an innocent suspect—or to create a false alibi? How well does the justice system distinguish between the digital self that we create on the Web due to wishful thinking (or the desire to appear tough or rich or young) and our real offline identities?

Judges are supposed to make sure that the evidence is authentic, relevant, and more probative than prejudicial. Yet judges tend to admit the entire contents of a Facebook page or Twitter account, including photos a person has been tagged in by others. Many high school and college students have been prosecuted for underage drinking because they are holding a red cup in a photo. Yet this seems unfair. What if a student had a soft drink, not beer, in the cup?

Prosecutors have used Instagram and Facebook photos of people wearing gang colors or making gang signals to prove that they were involved in gang activity. But should the justice system really make that leap? A junior high student who was being bullied might post those kinds of photos to trick others into thinking he was tough. Under the Los Angeles Police Department’s guidelines on gang colors, virtually all of us would fall into one gang or another. “Plaid shirts in either blue, brown, black or red” are indicative of gangs in LAPD-land. “Excessive amounts of dark clothing or a predominance of one-color outfits are also indicators of possible gang involvement.”

The Sixth Amendment

The right to a fair trial is also protected by the Sixth Amendment right to an impartial jury. Jurors have to wrap their heads around the idea that the legal process is not about truth per se, but a judgment based on admissible evidence. If evidence was obtained impermissibly (for example, through a search without a warrant), it cannot be considered. Evidence that is unrelated to the case and may be prejudicial to the defendant is not allowed to come before the jury. Before deliberation, the judge instructs jurors on how they are supposed to interpret the terms of a statute or the legal responsibilities...
Learning Gateways

Technology and the Sixth Amendment

In this activity students analyze a political cartoon and discuss the impact that digital technology has on one’s Sixth Amendment right to an impartial jury.

Distribute copies of, or project, the cartoon to students. Note: Handout and presentation-ready copies of the cartoon are available for free download at www.insightsmagazine.org.

Ask students to discuss what they see in the cartoon. Students might observe the age of a majority of the jurors. Students might note that all the jurors are using the same type of technology in the courtroom. In depicting so many older jurors, students might infer that the cartoonist emphasizes the potential challenges that the legal system faces as the accessibility and familiarity with technology continues to grow and bridges generations.

Discussion Questions:

1. What do you notice about the jurors in the cartoon? Why do you think the cartoonist chose to include so many jurors who are clearly older in age?

2. What else do you notice? Is this a U.S. courtroom? (Teacher might have to explain to the students that this is a Canadian cartoon and in Canada attorneys wear traditional gowns while in court).

3. In what ways can access to digital technology, and particularly social media, influence a jury?

4. The lawyer in the cartoon assumes that the jurors are googling “the accused.” What reasons might the cartoonist have for showing that a juror is investigating the lawyer?

5. What else might the jurors be doing on their phones? Do they look attentive to the case? What impact might this have on their deliberation?

6. What do you think the cartoonist is saying about the courts’ ability to protect Sixth Amendment rights in a digital era?

7. Do you agree or disagree with the point that the cartoonist is making?

8. What title would you give this cartoon?

Extended Activity

Students might research what courts around the country are doing to deal with the challenges they face in maintaining the integrity of the legal system in a world of rapidly changing technology. What is the prevalence of social media use by jurors during a trial or deliberation proceedings? Is the reality of the situation as extreme as the image presented in the cartoon? Students might also look at this issue from another perspective. In what ways is technology being used by lawyers to inform voir dire (jury selection process)?

Jurors aren’t supposed to be swayed by emotions unrelated to the case (such as their own past dealings with the defendant) or by anything they’ve read in the news media or any other source. They are not allowed to

of the parties. Yet some people are so dependent on social networks that they can’t make a decision about anything—whether to buy a certain car or break up with a boyfriend—without doing Internet searches or running a poll of their friends. When faced with the evidence in a sexual assault and abduction case, a juror posted the facts on her Facebook page and said, “I don’t know which way to go, so I’m holding a poll.”

Pascal Elie, Law Times, June 20, 2015
Ignoring their legal duty, some jurors make up their mind before all the evidence is presented. “Looking forward to a not guilty verdict regardless of evidence,” one person tweeted. Another said, “I’ve already made up my mind. He’s guilty. LOL.” Yet another man, in a jury pool, hadn’t even been selected for the trial. Yet he boldly tweeted, “Guilty! He’s guilty! I can tell!”

Jurors’ misuse of social media to find evidence outside of the courtroom and to spill trial secrets to the world has led to dozens of mistrials and overturned verdicts, costing the government millions of dollars to retry the same defendants. The legal system is struggling with how to deal with such jurors. In some states, the punishments have been minor. When a Georgia juror Googled information in a rape case, the judge fined her $500. When a Michigan juror posted on Facebook, “Gonna be fun to tell the defendant they’re GUILTY,” the judge replaced her with an alternate and made her pay $250 and write a five-page essay about the constitutional right to a fair trial. California, though, has gotten tougher. A new state law provides for a penalty of up to six months in jail for a juror who disobeys a judge’s ban on the use of social networks, tweets, or Web searches to find out about—or discuss—a case.

When Social Media Enters the Courtroom

Social networks increasingly create a challenge for criminal law. When social media enters the courtroom, judges should consider how the information was obtained, whether it was falsified or authentic, and how closely related it is to the issues in the case. Unless the social network posting provides reliable evidence of some element of the crime (not just some prejudicial information about other aspects of a defendant’s or a victim’s life), that posting should not be admitted. The constitutional right to a fair trial has an important place even in the era of Facebook.
A
fter pleading guilty, a defendant is typically offered a formal opportunity to address the court to express remorse, and explain personal circumstances that might be considered in sentencing. This is known as an allocution statement. These statements have a long and important history in the American legal system, serve a variety of functions, and, as "Teaching Legal Docs" explores here, produces an associated legal document.

The allocution statement provides an opportunity for defendants to accept responsibility, humanize themselves, and to mitigate their sentences to ensure that their punishment is appropriate for both the crime and the person who committed it.

From the court's perspective, judges cannot simply accept a defendant's guilty plea. They must determine that there is an "adequate factual basis to support the charge and the plea" and that the plea was "knowingly, voluntarily, and intelligently made." Allocution statements aid in making these determinations. With this in mind, not all defendants exercise their right to submit an allocution statement directly to the court. Lawyers may submit statements on the defendant's behalf, or statements may be waived entirely. According to a 2014 survey of federal judges, 84 percent of defendants in federal court exercise their right to allocution.

Allocution statements are sometimes also used at other times in court, outside of sentencing. For instance, judges might allow allocution at resentence, probation, or supervised release hearings.

While it is difficult to say with certainty, when federal judges were surveyed in 2014 they indicated that, overall, they are hesitant to lower or increase sentences based on allocution.

The Statement

It might seem unusual in today's digital age, but allocution statements almost always originate as handwritten documents, typically 1–3 pages in length. The federal rule does not specify whether the statement should be presented in writing to the court or
spoken directly to the judge, but, at the federal court level, the statement is generally handwritten. This is due in part to practical reasons—the defendant may lack access to a typewriter or computer. But handwriting actually tends to reveal more about the individual. The example here showcases this, as the handwritten version exhibits penmanship, crossed out words, spacing, and lacks punctuation that was included in the typed version. Sometimes it is not practical to include a handwritten statement, if a defendant has injured his or her hand, for example. In these cases, typed statements are arranged. In either circumstance, handwritten or typed, the statement is filed in the court, with case number, parties, and date stamped or attached.

What do the statements actually say? That varies from defendant to defendant, but, typically, the defendant’s lawyer will advise the defendant what to consider or include. The lawyer might provide a list of questions for the defendant to address, such as:

- What are your best accomplishments?
- What are your best attributes?
- What are your long- or short-term goals?
- What is a just punishment for your offense and why?
- How would leniency in sentencing promote your respect for the law?
- Would you benefit from educational or vocational training? How would leniency provide you with additional training?
- How would giving you leniency protect the public from additional crimes committed by you?

In the excerpted example here, the defendant’s statement includes personal goals and reasons for self-improvement that might benefit others besides the defendant.

Do They Have Any Effect on Sentencing?

Allocation statements may or may not have an effect on sentencing, depending on the case, crime committed, or tone of the statement. While it is difficult to say with certainty, when federal judges were surveyed in 2014 they indicated that, overall, they are hesitant to lower or increase sentences based on allocation. Certain crimes, however, elicit trends in sentencing regardless of allocation. For example, judges seemed least likely to lower sentences for crimes involving child pornography, while low-level drug crimes and white-collar crimes inspired them to consider mitigating factors in sentencing.

Outside of sentencing, allocation statements serve several different purposes for the parties involved in a particular case and for society at large. They allow the court to quickly recognize the humanity of the matter before it, and provide the judge with a better understanding of the defendant. Allocation statements also benefit victims and their families, as well as the defendant’s family. They also help defendants accept responsibility for their actions, and make the defendant a meaningful part of the sentencing process. When statements are released, as Bernie Madoff’s was in 2009, they also provide the public with an opportunity to better understand the crime and the defendant and the resolution to the case.

Tiffany Middleton is managing editor of Insights on Law & Society.
Convicted Felons
Face Ongoing Consequences

by Rachel Kunjummen Paulose

Introduction
For the nearly 2.3 million American adults in prison today, incarceration will have a lifelong impact. Convicted felons lose benefits ranging from voting rights to employment consideration to federal assistance. While some commentators and public officials have called for reforms, the American public has been slow to embrace modification of a legal and regulatory system that brands, tracks, and sometimes penalizes criminals for life.

Civic Participation
Voting Rights
The United States Constitution grants states the right to determine who may vote in local, state, and federal elections. While various amendments have extended the right to vote to marginalized groups not protected in 1787 (African Americans and other people of color, women, adults age eighteen and older), Section Two of the Fourteenth Amendment implicitly allows the states to exclude criminals from the voting process:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Consequently, forty-eight states prohibit felons from voting while incarcerated. Many states continue to bar felons from voting even after release, parole, or probation. Some states require felons to petition for restoration of their voting rights.

Grand Juries and Petit Juries
Under 28 U.S.C. § 1865(b)(5), felons may not serve on a federal grand jury or petit jury. This means people convicted of a crime may not participate in the...
process by which the government presents evidence, in a nonpublic proceeding, to a grand jury. The federal grand jury is composed of 16–23 citizens convened to determine whether a person should be formally accused of a crime through an indictment. Generally, a prosecutor will present evidence to the grand jury by questioning a law enforcement agent or a witness in order to build a case to show there is “probable cause” that a person committed a crime.

Felons are also barred from the process of determining guilt at trial. The federal petit jury is composed of twelve persons who sit throughout trial to decide whether the government can prove “beyond a reasonable doubt” that a person committed a crime.

Many states also bar felons from participating in the state grand jury or petit jury process.

**Military Service**

Under 10 U.S.C. § 504, felons are prohibited from enlisting in any branch of the armed forces. This restriction prevents felons from obtaining the lifelong honors and benefits accorded to veterans, including education, job training, and preferential hiring.

**Economic Rights and Access**

Felons convicted of controlled substance violations are singled out for denial of a range of economic benefits. For example, under 21 U.S.C. § 862, drug distributors and possessors may be barred from receiving federal benefits (including cash assistance, educational loans and grants, food stamps, and commercial licenses) for a period of one year to life, depending on the type and number of offenses. Under 22 U.S.C. § 2714(a), drug offenders who crossed the U.S. border in the commission of the crime may see their passports revoked.

Other offenders are also barred from certain government benefits. Further, during their term of incarceration, felons may be denied access to benefits granted to the elderly and disabled. Persons convicted of certain national security crimes jeopardize their pensions and retirement benefits. Rioters...
permits. Scholar Amy Meek catalogued some of the diverse local bans premised on the need to patrol moral character:

The City of Frostproof, Florida, prohibits issuing a peddler’s license to anyone who has ever been convicted of a felony. Indianapolis prohibits anyone convicted of a felony or misdemeanor involving violence towards another person from being granted a taxicab license … New York City requires that general contractors and others engaged in the building trades obtain a license and that they be of ‘good moral character’ … fears about individuals convicted of civil disorder may be stripped of federal office and barred from federal employment.

Employers have the right to ask applicants if they have been convicted of a crime and disqualify felons from employment. One study showed 92 percent of employers ask job applicants about their criminal history. Many employers automatically broadly restrict felons from employment, including some of the nation’s largest employers. Sophisticated and easily accessible databases allow employers to quickly ascertain any applicant’s criminal history. These prohibitions significantly restrict the ability of convicted felons to provide a reliable means of subsistence for themselves and their families. A study by the Pew Charitable Trust showed that offenders generally earn 40 percent less than nonfelons.

Federal law and various state laws also prohibit felons from obtaining certain professional licenses. For example, an accountant convicted of tax fraud may be denied a CPA license. Invoking public safety and the need to control potential nuisance, some localities have barred felons from obtaining commercial licenses to sell alcohol, work as a plumber, and operate a barber shop. Certain states revoke a driver’s license of a convicted felon, which may in turn limit a person’s access to other benefits for which one must travel, including employment. Some states prohibit felons from obtaining street vendor permits. Scholar Amy Meek catalogued some of the diverse local bans premised on the need to patrol moral character:
Learning Gateways

Exploring Felon Reintegration Policies

Finding the most effective way to reintegrate people with criminal records into a community can be challenging for those individuals, their families, and for policymakers. Laws restricting access to employment for individuals with a criminal history have been put in place to ensure public safety, but they can also create economic barriers making it difficult for people to become productive working members of a community. This activity asks students to read several scenarios before reviewing examples of various state reform laws that address collateral consequences of crime. While keeping the situations from the scenarios in mind, students should reflect on the issues that policymakers have to weigh in developing laws that impact individuals and the larger community. What are the implications, benefits, and costs to communities considering changes in their policies? What aspects of these reform policies do they think will be most effective? What issues need to be considered when creating such policies?

Procedure

1. Organize students into pairs or small groups and distribute one of the following scenarios to each group and a copy of State Reform Laws.

2. After reading the scenario and looking at the examples of state reform law, groups should answer the following questions.
   - Which reform policies seem to best address the problem?
   - What issues need to be considered when creating such policies?
   - What benefits will these policies bring to communities?
   - What concerns are raised by these policies?
   - How would you change some of these policies to address these concerns?
   - As a policymaker, what rights would you have to balance when creating these types of reforms?

3. Have all groups come together for a class discussion.

Scenario 1

Anthony is 44 and lost his job last year as a phone line technician. He was unable to find another job within this industry so he went through job training at a local community college, graduated, and was offered an opportunity to join a union as a heating and air-conditioning specialist. During this time he was living on savings and help from friends. He fell behind on child support payments for his eight-year-old daughter and a warrant was automatically issued for his arrest under state law. He was unaware of the warrant until police came to his home, and he was also charged with resisting arrest. This was Anthony’s first arrest and he pleaded guilty to a single felony. He had to pay a fine and now has a criminal felony record. The union helped set up several job interviews for Anthony, and he has submitted over 30 job applications to other employers, many of which required him to disclose his criminal record. He has received no job offers.

Scenario 2

Ellen is a fifty-five-year-old woman who called to have a local cable company come to her home to fix her cable. Two months later one of the workers returned and assaulted and robbed her. The two workers that were sent to her home both had criminal records, but the cable company had not conducted background checks.

Scenario 3

Rachel was convicted for selling drugs when she was twenty years old and has recently been released from prison. Rachel is currently working at a job with a low hourly wage and is in the process of applying to colleges. All of the applications ask her to disclose her criminal history. She has just learned that she is not eligible for federal loans due to her criminal record. What should she do next?

State Reform Laws That Address the Collateral Consequences of Crime

Ban the Box Laws—Known as “ban the box,” this hiring policy removes any questions about the applicant’s criminal history from initial employment applications. Based on the law in a particular state, background checks are deferred until later in the interview process, until after an applicant has been selected as a finalist for a position, or until after an employer has made a conditional job offer.

Examples of State Laws:
   - “Fair Chance” Law
     The law prohibits most private employers from inquiring about criminal history until after making a conditional job offer. The offer can be revoked afterward if the offense is relevant.

   - Private & Public Employer Ban the Box
     This law prohibits employers from using an initial written employment application to ask whether an applicant has been convicted of an offense unless a legal restriction applies to the specific job or occupation. The law requires that applicants receive a copy of their criminal history report prior to being questioned about their history. Individuals will be automatically notified when a criminal history report has been run. Criminal records may only contain felony convictions for 10 years following disposition and misdemeanor convictions for 5 years following disposition.
Training and Job Placement Laws—These laws attempt to support people leaving incarceration or after they have been convicted by providing them with job training and placement opportunities to gain skills necessary to enter and compete for jobs in the labor market.

Examples of State Laws:

• Restorative Justice Responsibility Act
  This law enlists the Department of Labor to work with other agencies and groups to develop rules for placement and training programs for people with convictions. The Department of Corrections is directed to create training and skills programs to prepare inmates for gainful employment upon release.

• Correctional Education Program Act
  This law expanded the eligibility for job training programs to individuals expected to be released from prison within five years. The Department of Corrections is required to assess the vocational needs of individuals and provide training for marketable, in-demand skills.

Automatic Bans of Employment—Job areas that require individuals to work with sensitive populations, such as children or the elderly often have strict bans on employment for people with a criminal record.

Examples of State Laws:

• Direct Health Care Restrictions
  This law requires state and federal background checks and fingerprints to be submitted electronically for direct health care workers and includes fraud-related offenses as disqualifications for employment. Any person who has been designated as a sexual predator, a career offender, or a sexual offender is banned permanently from obtaining work as a direct health care worker.

• Contact with Children
  This law prohibits employment of a sex offender in any position having substantial contact with children where “substantial contact” is defined as any activity involving children.

of sex offenses have spurred several cities to pass licensing ordinances for ice cream trucks that specifically ban individuals required to register as sex offenders.

Critics have questioned whether these bans on entrepreneurial employment, which are less likely to involve dependence on a hierarchy of decision makers, require higher education, or demand the initial outlay of significant capital, prevent felons from accessing the jobs at which they are most likely to succeed.

Jurisdictions have broadly granted authorities the right to rescind licenses or deny permits for a broad array of professions: doctors, attorneys, chiropractors, dentists, architects, psychologists, counselors, paramedics, insurance brokers, real estate appraisers, medical assistants, nutritionists, acupuncturists, embalmers, hairdressers, cosmetologists, electricians, irrigators, sheet metal workers, sanitation employees, pawnbrokers, and technicians. While many professions involve some degree of interaction with the public, the denial to felons of the right to employment in so many vocations severely limits their legitimate employment options.

Familial Rights

Over half the prison population are parents of minor-age children. Various statutes and rules prohibit felons from marrying while serving a life sentence, permit spouses of felons to seek divorce on grounds of “fault,” grant foster care agencies the ability to terminate parental rights, and disqualify offenders from adopting children or becoming foster parents.

Housing Rights

Federal and state laws grant authorities the right to evict criminals and those associated with them from public housing. Zoning laws restrict the ability of felons to live in certain neighborhoods. Some municipalities have also conscripted landlords in the effort, prohibiting them from renting units to certain criminal offenders.

Sex offenders must register with authorities, and some statutes allow authorities to display the locations of offenders’ homes. In particular, sex offenders have been banned from living within a certain distance (typically 1,000 feet) of places where children are most likely to gather: schools, day care centers, playgrounds, parks, churches, and public libraries. Presently, at least 400 municipalities have books on the laws restricting housing for sex offenders.

Second Amendment Rights

Felons are prohibited from possessing, receiving, or transporting firearms or ammunition. This prohibition is not necessarily related to the level of violence associated with any particular conviction; a tax fraudster and a bank robber are both banned from carrying guns ever again. Indeed a stand-alone federal crime exists to punish felons who possess firearms under 18 U.S.C. 921(a)(3) and the Bureau of Alcohol, Tobacco, and Firearms (ATF) aggressively monitors felon firearms activity for federal criminal prosecution referrals.

Calls for Reform

The staggering range of punitive consequences cripples most felons from ever again entering the mainstream of American society. But the consequences of crime also impact society as a whole. The government collects less in tax revenues from felons whose earning power is diminished. Families whose primary breadwinner is imprisoned may experience disruption, dislocation, and poverty. And most controversially of late, the very basis for representative government is challenged when large groups of people are denied the right to vote.

Almost six million people are presently denied the right to vote based on their felon status. A significant percent-
Discussion Questions

1. Do you think that it is appropriate to deny felons from participating in certain civic activities and from receiving certain public benefits? Why?

2. What effects do you think excluding felons from activities such as voting, military service, certain employment, and entitlement to public housing have on our society?

3. If you could select one of the things that the author identifies as a consequence of crime to reform, which would you choose? What reforms would you suggest?

Suggested Resources

- The Ohio CIVICC database and the North Carolina Collateral Consequences Assessment Tools (C-Cat) are free, state-wide databases that allow users to search for criminal offenses and identify the related collateral sanctions associated with the offense. Users may also search for a right or privilege and find all of the offenses that create a barrier to it. Visit http://civiccohoio.org and http://ccat.sog.unc.edu to learn more.

- The Sentencing Project has an interactive map, with data by state, on felony disenfranchisement, collateral consequences, and sentencing policies. www.thesentencingproject.org

- Talk of the Nation (Podcast)—Should Former Felons Have the Right to Vote? http://www.npr.org/2012/07/16/156855043/should-ex-felons-have-the-right-to-vote


age of those felons are people of color. Presently, about 2.2 million African Americans may not exercise the right to vote. Indeed, African Americans are imprisoned at a higher rate than any other ethnic group in the United States. Whatever the basis for this gaping disparity, the imprisonment of so many African Americans has impacted their ability to participate in the political process. Given that African Americans also are the voting bloc most reliably Democratic, some have questioned whether felony disenfranchisement is excessively punitive, politically motivated, or even unconstitutional.

Among those calling for reform are former Attorney General Eric Holder, who at the time was the chief federal law enforcement officer of the land. During a speech Holder gave on February 11, 2014, he described the origin of disenfranchisement in the old Confederacy as the vindictive scheme of a power structure still determined to lock out of power as many former slaves as possible. One generation after the Civil War, African Americans made up 90 percent of the prisoners in Southern jails. Even today, about one in three African American males spends some part of his life behind bars. Holder juxtaposed this history against the struggles of African Americans to overcome centuries of oppression to gain the right to fully participate in the American political process, culminating in the historic Voting Rights Act of 1965. Yet today, one in thirteen African American adults may not vote. In two battleground states, Florida and Virginia, nearly one in five African Americans may not vote. Holder questioned whether this level of disenfranchisement was “unworthy of the greatest justice system the world has ever known.”

Other reformers have joined Holder’s call for an end to disenfranchisement of felons and the institution of a process to expeditiously restore felons’ rights to vote. Simultaneously, some have urged authorities to erase criminal records after a specific duration of time, mandate employers to restrict employment bars to professions most at risk for specific crimes, and lift zoning restrictions to prevent felons from congregating in high-risk areas they suggest are likely to encourage a return to crime.

Critics respond that prisoners tend to reoffend at very high rates, and their invisible reintegration into society could harm innocent victims. For example, the Pew Center on the States described the national recidivism rate at almost 44 percent. The Department of Justice’s statistics are even more bleak. According to a Bureau of Justice Statistics 2014 study of prisoners released in thirty states, about 68 percent were arrested again within three years of their release and a staggering 77 percent were arrested within five years of their arrest. The most likely recidivists were property offenders and younger offenders.

Still, the question remains if all felons (with varying offense characteristics and criminal histories) should be categorically excluded from so many different walks of life. This question should be considered in the context of the disproportionate impact of crime in some minority communities as to both offenders and victims.

Conclusion

The United States incarcerates 3 percent of its population, more than any other civilized nation. While the government must certainly protect society from violent predators, released felons may risk becoming recidivists unless they find jobs, housing, and deep connections to their loved ones and communities. Ultimately, this nation, citizens and leaders alike, must decide how punitive a society we will be, how long we expect felons (including those convicted of nonviolent offenses) to bear the weight of their offenses, and how we intend to meaningfully mainstream the reformed back into our society.
The easier question, I think, is what I would not reform. Virtually every component of our criminal justice systems, from the moment a suspect is stopped by the police to the moment a prisoner is released from prison, is in great need of significant reform, of reimagination, really. And even now in this age of bipartisan agreement about the need to reform our justice systems I fear there is a direct and proximate correlation between the political will to change those systems and the amount of money that change will cost. The higher the cost the less the political will. We’ll see.

But if I had to pick, I would seek three changes, all relating to due process. I would require state lawmakers to give new life to the old constitutional mandate of Gideon v. Wainwright, which is supposed to guarantee criminal defendants an attorney if they cannot afford one. I would require full funding for indigent defense so that every criminal defendant entitled to an attorney would get a reasonably competent one, at the earliest stages of a case, and competent appellate lawyers, too. Just imagine all the wrongful convictions such a rule would prevent—and of all the lives wasted behind bars today because the United States Supreme Court never really followed through on Gideon and then gravely undermined it 20 years later in Strickland v. Washington. That decision, in 1984, set high standards for determining when a defendant’s Sixth Amendment rights were violated due to inadequate counsel. Under the ruling, defendants must demonstrate that their counsel’s performance fell below an “objective standard of reasonableness,” and that if counsel had performed adequately, the outcome of the defendant’s case would have been different.

The second thing I would change would be to abolish broad immunity for prosecutors and bring enforcement teeth to their constitutional obligations under Brady v. Maryland. That ruling, in 1963, recognized the violation of a defendant’s Fourteenth Amendment due process rights were violated due to inadequate counsel. Under the ruling, defendants must demonstrate that their counsel’s performance fell below an “objective standard of reasonableness,” and that if counsel had performed adequately, the outcome of the defendant’s case would have been different.

Finally, I would enact federal legislation that repeals a portion of the 1996 Antiterrorism and Effective Death Penalty Act that eroded Western civilization’s beloved writ of habeas corpus. That Clinton-era law, passed in the wake of the 1995 Oklahoma City bombing, was designed to expedite appeals. It has done that, I suppose, but at a terrible cost to litigants all over the country who have legitimate issues that deserve to be heard, on the merits, in federal courts. That law is responsible for making countless wrongfully convicted men and women to continue to languish in prisons or jails. The failure and refusal of our federal judges to hear these cases, and to bring relief to those presenting manifestly colorable claims, is a stain on the judiciary and self-defeating to the rest of us.

But what happens in the vast majority of these cases? Virtually nothing. Prosecutors know they will get a second chance at a trial and won’t face any professional consequences. Why prosecutors (and the police) cheat in these cases is an epic question. But I submit they would cheat a lot less frequently if they knew that the cases tainted by their cheating would be dismissed, with prejudice, and that they would be subject to significant professional sanctions. Continued judicial and legislative recognition of this immunity does lasting damage to our justice systems and further fosters the widespread perception that the deck is stacked against the individual.

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and the police when they cheat, you will have fewer wrongful convictions for the courts to overturn. And if you free the courts to overturn wrongful convictions more easily, you will have fewer people in prison who ought not be there. There’s your reform right there.

Andrew Cohen is the legal editor and senior analyst and commentator for CBS News. He is a frequent contributor to news and popular media outlets, providing analysis of countless court proceedings, decisions, and other legal news.

Introducing Humanity to Treatment of Poor

by Cynthia W. Roseberry

If I could change one thing about the criminal justice system, I would introduce humanity in our system of treating poor people. I would introduce humanity into laws that criminalize conduct, to arrests and interactions with law enforcement, and the broad discretion afforded prosecutors. I would equip Sixth Amendment lawyers with essentials for a fair defense and provide these well-equipped lawyers poor defendants early in the process. I would introduce humanity in selection and training of judges, and, lastly, humanity in fair sentencing.

At one end of our criminal justice system, poor people are seen as a nuisance—homeless people, many of whom are veterans—and they are swept into the system for infractions such as trespassing. Somewhere along the spectrum is the idea that poor people generate income for communities through incarceration, fines, and fees. In the middle of our system, prosecutors exercise unfettered discretion in charging poor people with crimes more often than any other income group. Indeed, a person with significant financial wealth being charged with a crime makes national headlines.

A prosecutor can choose from thousands of criminal charges, which come with a host of lifelong consequences of conviction. Defense lawyers are provided later in the process, which inhibits mounting a meaningful defense. Pitted against the seemingly unlimited resources of the government, a poor person and his or her lawyer are essentially David versus Goliath. Finally, judges are usually unfamiliar with the communities in their jurisdiction, so they dispense “justice” to a person alien from themselves. The fact of poverty is but an aside in sentencing procedure.

This treatment of our poor is a reflection of our own humanity. Changing how poor people are treated in our criminal justice system, therefore, means changing how we view the role of humanity in the system. Humanity in legislating crime means that being “tough on crime” is not the only goal. It means that studies and empirical data, rather than hyperbole and fear, are employed in deciding what to criminalize and the punishment for what is criminalized. Humanity in policing means a return to community policing and a move away from militarization of police forces. Humanity in prosecuting means citizen oversight of prosecutorial discretion and punishment when prosecutors and police subvert the principles of justice or violate the Constitution. Humanity in providing Sixth Amendment lawyers to defendants means that caseloads are reasonable and training and resources are on equal footing with the prosecutors. Providing a lawyer early in the process allows the defendant to investigate and mount a defense against the government, which generally has a head start on prosecution.

Last, but not least, humanity among judges means people from all walks of life are seated as judges. Judges who come from a variety of communities can share with each other the wisdom of diverse experiences to facilitate a humane view of defendants. Judges would also be given the gifts of training and exposure to the communities in which they work.

People in poor communities are distrustful of the criminal justice system and with good reason. The lack of humanity shown to them means they encounter “justice” that is a dying, waning concept rather than a living, thriving being.

Cynthia Roseberry is project manager for Clemency Project 2014, a partnership among the National Association of Criminal Defense Lawyers, American Civil Liberties Union, the American Bar Association, Families Against Mandatory Minimums, and the Federal Community and Public Defenders. The Project provides pro bono assistance for clemency to federal prisoners who would likely receive a shorter sentence if they were sentenced today.
American prisons, both state and federal, are remarkably overcrowded. The federal prison system was operating at 130 percent of design capacity in 2013. Statistics for that same year show that 17 states were operating at more than 107 percent, while an additional 16 were operating between 98 and 107 percent. Statistics can seem abstract, and many people may shrug off the problem of overcrowded prisons as minor in a criminal justice system with many problems. They should not. Eliminating prison overcrowding is one of the most important steps we could take toward making our system more effective and more just.

Prisons are not hotels or warehouses. They contain human beings, both prisoners and staff, and none of them are there to entertain themselves. Good prison managers rightly fear getting anywhere near 100 percent occupancy. Even at that level, staff and prisoners come under increasing stress as basic operations such as moving to work assignments, conducting family visits, and rehabilitative programming (where it’s available) become prone to interruption or cancellation. If problems arise, and they do, all such operations may come to a halt, or “a lockdown,” and fundamental needs such as medical care and mental health treatment stop, which for many prisoners with chronic illnesses can pose the risk of death and torturous suffering.

Once a prison system is operating at well above 100 percent (as California was for more than a decade until federal courts forced reduction), all semblances of a modern correctional system begins to disappear. Prisoners may be held not in regular rooms or cells, but dormitory style, in repurposed utility spaces such as gymnasiums and hallways. Programming stops. Security operates on the razor’s edge and lockdowns paralyzing operations become routine. In such an environment, degrading treatment of prisoners (being denied basic elements of a human life, such as contact with family, adequate health care, hygiene) becomes a constant, while death from untreated disease and suicide (from mental illness) become regular occurrences.

Providing prisoners and staff with conditions that are free of torture and degrading treatment is not granting them a privilege, but recognizing a constitutional right. Prisoners lose their right to freedom, but in the words of Justice Anthony Kennedy in *Brown v. Plata*, “they retain the essence of human dignity.” Recognizing and conserving that human dignity is not only our most basic legal obligation, it is the only way prisons can actually contribute to public safety. A solid body of empirical research conducted by Tom Tyler of Yale Law School and his colleagues demonstrates that when people feel their dignity has been respected by authorities, their motivation to obey the law increases measurably. When their dignity is disrespected, it goes down. Overcrowded prisons assail the human dignity of both prisoners and staff on a daily basis.

Given these realities, politicians should stop treating overcrowded prisons as an unfortunate consequence of protecting public safety; in fact, it is endangering public safety. Legislatures and Congress need to take action to reform sentencing laws and increase “good time” credits to allow current prisoners to complete their sentences more quickly. The President and most governors should use their pardon powers immediately to reduce sentences for whole categories of prisoners, or across the board, to eliminate overcrowding over months not years. If they fail to act, courts should force them to by ordering population caps. Complacency is not an option. Respect for our Constitution and public safety hang in the balance.

The U.S. Supreme Court—the “Court of Last Resort”—decided several cases on the ultimate punishment, the death penalty, in its October 2014 term. In the three most significant decisions, the Justices’ opinions showed deep divisions and remarkably different approaches in addressing the issues.

The three main cases focused on lethal injection, intellectual disability, and the use of peremptory challenges. Each case was decided by a single vote, all 5-4 decisions. Four justices—Chief Justice John G. Roberts Jr., Antonin Scalia, Clarence Thomas, and Samuel A. Alito Jr.—voted with the government in each case. Four other justices—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—voted for the inmate or inmates in each case. Only Justice Anthony Kennedy, often called the “Swing Justice” on the Roberts Court, voted with the majority in all three decisions.

Lethal Injection Case: Glossip v. Gross (14-7955)

In this decision, the U.S. Supreme Court ruled 5-4 that Oklahoma’s current method of lethal injection did not create an unacceptable risk of severe pain and did not violate the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment.

Richard E. Glossip and several other death-row inmates contended that the use of midazolam as the first of a three-drug protocol creates too much risk of harm for inmates. Several states have turned to the sedative midazolam after not being able to obtain sodium thiopental and pentobarbital as the initial drug used to place inmates in an unconscious state. Anti-death penalty advocates had successfully petitioned the companies that produce those drugs to not make them available for executions.

Justice Sotomayor wrote the principal dissent for three other justices. She termed the method used by the state of Oklahoma as “what may well be the chemical equivalent of being burned at the stake.”

Justice Sotomayor wrote the principal dissent for three other justices. She termed the method used by the state of Oklahoma as “what may well be the chemical equivalent of being burned at the stake.” Sotomayor identified evidence at the District Court that found that the use of midazolam, even at 500 milligrams, was not sufficient to render the inmates in a sufficiently comatose state.

The problem, according to some experts, is that midazolam is not as effective as either sodium thiopental and pentobarbital in creating a coma-like unconsciousness during the execution process. Oklahoma executed Clayton Lockett by first using 100 milligrams of midazolam, but Lockett awoke during the execution process and, by several accounts, suffered a very painful death.

Oklahoma responded by requiring a protocol of giving 500 milligrams of midazolam during the execution process. Glossip and others contended that the use of midazolam is not sufficient even at an increased dosage.

A federal district court ruled against Glossip and other inmates, reasoning that Glossip and other inmates had failed to show that the use of midazolam violates the Eighth Amendment. The 10th U.S. Circuit Court of Appeals affirmed the district court.

On further appeal, a sharply divided Supreme Court also affirmed. Justice Samuel Alito cited testimony from the district court that midazolam can render a person insensate to pain. Alito also explained that the inmates failed to identify a “known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims.”

Justice Stephen Breyer wrote a separate dissent, joined only by Justice Ruth Bader Ginsburg, that may be the most significant opinion of the entire term. That’s because Breyer called for the Court to ask whether the death penalty itself violates the Eighth Amendment. Breyer identified “three
fundamental constitutional defects: (1) serious unreliability; (2) arbitrariness in application; and (3) unconscionably long delays that undermine the death penalty's pedagogical purpose."

This inspired the wrath of Justice Antonin Scalia, who in his separate concurring opinion, accused his colleague of "rewriting" the Eighth Amendment and engaging in an argument of "gobbledy-gook."

**Intellectual Disability Case: Brumfield v. Cain (13-1433)**

In this decision, the U.S. Supreme Court ruled 5-4 that a death penalty defendant should have the opportunity to present evidence that he is intellectually disabled and cannot be executed. Louisiana death-row inmate Kevan Brumfield was sentenced to death for killing female police officer Betty Smothers, the mother of former star NFL running back Warrick Dunn, in 1993.

In *Atkins v. Virginia* (2002), the U.S. Supreme Court ruled that it constituted cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution to execute mentally retarded inmates. (The Court used the term "mentally retarded" in 2002 but now uses the term "intellectually disabled.")

After the *Atkins* decision, Brumfield filed a motion in state court requesting a hearing to prove that he was intellectually disabled and, thus, ineligible to be executed. The Louisiana Supreme Court rejected his request for such a hearing. Brumfield then filed a collateral challenge in federal court—known as a federal habeas corpus petition—arguing that he was entitled to an *Atkins* hearing.

A federal district court ruled that Brumfield was entitled to a hearing and that he was intellectually disabled. The 5th U.S. Circuit Court of Appeals reversed and ruled that Brumfield was not entitled to such a hearing.

On further appeal, the U.S. Supreme Court sided with Brumfield. Justice Sonia Sotomayor reasoned that Brumfield "needed only to raise a reasonable doubt as to his intellectual disability to be entitled to an evidentiary hearing."

Sotomayor reasoned that Brumfield raised such "reasonable doubt" by pointing to the fact that he was placed in special education classes in elementary school, was suspected of having a learning disability, and reads at only a fourth-grade level.

Justice Clarence Thomas wrote for the four dissenting justices. He emphasized that evidence in the record showed that Brumfield had an IQ of 75, which "failed to meet the standard for significantly subaverage intellectual functioning under Louisiana law." Thomas also reasoned that the federal courts should give deference to the factual findings of state courts in such matters.

**Peremptory Challenge Case: Davis v. Ayala (13-1428)**

In this decision, the U.S. Supreme Court ruled 5-4 that death-row inmate Hector Ayala was not entitled to a new trial or
release even though the prosecutor in his case was allowed to explain his reasons for striking African American and Hispanic jurors to the trial judge outside the presence of his defense counsel.

Ayala was convicted of murdering three people and sentenced to death. During voir dire—the legal term for the jury selection process—the prosecutor struck all seven African American or Hispanic jurors from the jury panel. The prosecutor used peremptory challenges, which allow an attorney to challenge jurors on the basis that they would not be good jurors for their side. In Batson v. Kentucky (1986), the U.S. Supreme Court prohibited a prosecutor from using peremptory challenges in a racially discriminatory manner.

Under the Batson proceeding, a party may question the other side’s use of peremptory challenges as racially discriminatory. The other side then must identify a race-neutral reason for the use of the peremptory challenge, such as the prospective juror didn’t answer direct questions or refused to make eye contact.

Ayala claimed during his collateral challenge in federal court that his rights to due process of law were violated because the prosecutor was allowed to justify his use of peremptory challenges without the presence of the defense attorney. Ayala contended that his attorney would have been able to show the trial judge that the prosecutor did not have a valid, race-neutral reason to strike several of these jurors.

A federal district court judge rejected Ayala’s claim. However, a divided panel of the 9th U.S. Circuit Court of Appeals ruled in favor of Ayala and ordered the state of California to give Ayala a new trial or release him. The state appealed to the U.S. Supreme Court, which reversed and ruled in favor of the state.

Alito in his majority opinion assumed that the trial judge erred in having a one-sided Batson proceeding. In other words, the defense counsel should have been present when the prosecutor justified his use of the peremptory challenges. However, Alito determined that Ayala was entitled to relief only if he could show that the trial court’s error created actual prejudice or grave doubt in the outcome of the trial court proceeding. Alito determined that the error was harmless.

“In this case, the conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight,” Alito wrote.

Justice Sotomayor authored the dissenting opinion, joined by three colleagues. She emphasized the failure of the trial judge to hear from both sides before determining whether the prosecutor had valid, race-neutral reasons for striking the jurors. Truth is best discovered in the judicial system by hearing from both parties.

Looking at the evidence, she noted that the prosecutor struck an African American juror based in part on an answer he gave on his juror questionnaire, but noted that the prosecutor did not object to a white juror who gave a very similar answer.

Sotomayor concluded that there were “grave doubts” as to whether the exclusion of Ayala’s attorney from the Batson hearing was harmless.

Another interesting aspect of the Court’s Davis decision was Justice Anthony Kennedy’s separate concurring opinion. While Kennedy agreed with the majority’s outcome that Ayala was not entitled to relief, he wrote a separate opinion after learning that Ayala had spent countless years in solitary confinement.

“Years on end of near-total isolation exact a terrible price,” Kennedy wrote, noting that judges in the proper case should have the ability to review conditions of confinement and determine whether there is a better and feasible alternative to long-term solitary confinement. This opinion prompted Justice Clarence Thomas to respond in his concurring opinion that Ayala’s solitary confinement was better than the fate of Mr. Ayala’s three murdered victims. It will be interesting to see whether the Supreme Court examines a solitary confinement case in the near future.

**Conclusion**

The Court’s decisions on the death penalty revealed deep fissures on the Court on this most sensitive of subjects. That is not surprising, as the justices often have disagreed mightily through the years in other capital punishment cases. In that respect, the justices aren’t that different from the general public.

The Court already has several death penalty cases on its docket for the October 2015 term. Thus, disagreements over the ultimate punishment undoubtedly will continue.

David L. Hudson Jr. is the author, coauthor, or coeditor of forty books. He writes regularly for the ABA Journal and the ABA's Preview of United States Supreme Court Cases. He teaches classes at the Nashville School of Law and Vanderbilt Law School. He also authored Does Capital Punishment Have a Future?: A Resource Guide for Teachers (2002) for the ABA's Division for Public Education.
Q: Could you tell us what the We Are All Criminals project is?
It is a story-based project that examines the disparate impact of our justice system. In brief, I interview people who got away with crimes. Together we look at how different their own lives could be had they been caught, and consider the statutes and broader social stigma that likely would have prevented them from living the lives they now enjoy. I juxtapose these stories with people who have engaged in very similar activity to that of the project participant—but who were caught—and who in the years or decades following that incident find themselves suffering under the burden of a criminal record.

Q: What inspired you to launch the project?
As an assistant public defender, I saw lives irrevocably change after contact with the criminal justice system: long after the sentence was served, men, women, and youth would find themselves caught in a web of policies and practices designed for perpetual punishment. The same was true for clients who received “favorable” dispositions (say, a dismissal or deferred adjudication): they still lost jobs, housing, and professional licensure. After years of reaching out to legislators and landlords, employers, and licensing boards regarding the need for second chances and being told “once a criminal, always a criminal,” I wanted to work to change the narrative.

Q: What have been general reactions to the project?
Generally speaking, the reactions have been more positive than I expected. Some of the most surprising and rewarding reactions have come from people who say that they were offended by the project’s assertion of common criminality—but after listening to the participants’ stories, they have recalled a few of their own.

One gentleman told me about a time in high school when he and several of his closest friends broke into a local liquor distributor. They took a hacksaw to the building and made off with loads of beer for themselves and Schnapps for their crushes. Years later, they are now police chiefs, college professors, nurses, and victims’ advocates. They are all white and middle class. Meanwhile, I’ve represented several people who were caught engaging in similar, though much less severe conduct, and who are forever locked out of those very professions the uncaught burglars currently enjoy.

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The majority of offenses shared with me occurred when participants were students—in middle school, high school, college, or grad school. I think that’s for a number of reasons: (1) criminal activity tends to wane with age; (2) it’s easier to own up to something that occurred way back when; and (3) the more stories of youthful misconduct that are shared, the more similar recollections are triggered for others.

Q: Who are “the 25%”?
What changes to the current criminal justice system might make a difference in the lives of the 25%?
The 25% are the people who have gotten caught and processed through the criminal justice system for acts that are largely indistinguishable from each has been poor, most are people of color.

Q: How many stories concern teens, or a time in the storyteller’s life when they were a student? What do you think this means?
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the acts committed by the 75%. Demographically, they are poor and people of color.

There are broad legal and systemic changes we can and must make:
- Reduce our criminal code.
- Reduce the criminalization of homelessness, mental illness, juvenile behavior, poverty, and drugs.
- Support and increase restorative justice alternatives.
- Ensure time spent in custody is time well spent.
- Reduce the collection, retention, and dissemination of criminal and juvenile records.
- Create meaningful remedies to criminal records. Through expungements, pardons, and certificates of rehabilitation, allow people to move beyond their records.
- Reduce the collateral sanctions and consequences attached to criminal records.

Q: What do you hope your project accomplishes?
I hope people see themselves in the We Are All Criminals photos or in the stories, take note of the context they allowed themselves (I was young, drunk, stupid, in college, hanging out with the wrong crowd, just along for the ride, no one was hurt, I gave it back, or I didn’t mean to do it), and acknowledge that others may have been in a similar situation but were caught. I hope some recognize the privilege they’ve experienced (the cop just told us to go home, the manager didn’t even question us) and appreciate that not everyone has benefited from that same privilege. Finally, I hope the project inspires people to create the capacity for second chances in their own professional and personal lives, and to seek policy changes that do the same.

Q: How can someone get involved in your project?
Follow us on Facebook and Twitter; sign up for our newsletter and keep in touch. Invite We Are All Criminals to your city, campus, or firm. Contact me at emily.baxter@weareallcriminals.org to talk about hosting a presentation or art exhibit. Finally, We Are All Criminals is a nonprofit, nonpartisan organization that relies upon individual donations to spread the message.

Emily Baxter is the creator and director of We Are All Criminals and a Fellow at the University of Minnesota Law School’s Robina Institute of Criminal Law and Criminal Justice. Prior to this, Emily served as the director of advocacy and public policy at the Council on Crime and Justice in Minnesota, and as an assistant public defender representing indigent members of the Leech Lake and White Earth Bands of Ojibwe charged with crimes in Minnesota State court.

The project can be found at www.weareallcriminals.org.
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