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FUNDAMENTAL CASES:
THE TWENTIETH-CENTURY COURTROOM BATTLES THAT CHANGED OUR NATION

COURSE GUIDE

Alan M. Dershowitz

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The Twentieth-Century Courtroom Battles That Changed Our Nation

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Executive Producer
John J. Alexander

Executive Editor
Donna F. Carnahan

RECORDING

Producer - David Markowitz
Director - Matthew Cavnar

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Course Syllabus

Fundamental Cases: The Twentieth-Century
Courtroom Battles That Changed Our Nation

About Your Professor

Alan M. Dershowitz

Alan M. Dershowitz of Harvard Law School has been described by *Newsweek* as "the nation's most peripatetic civil liberties lawyer and one of its most distinguished defenders of individual rights." The Italian newspaper *Oggi* reported that he is "the best-known criminal lawyer in the world."

Dershowitz has been a pioneer in making the legal profession accessible to the general public. Dershowitz is the author of twenty-two nonfiction works and two novels. More than a million of his books have been sold worldwide. Dershowitz has published hundreds of articles in magazines and journals and has written more than one thousand op-ed articles.

Over the course of his thirty-five-year career as a lawyer, Dershowitz has won more than one hundred cases. Dershowitz takes half of his cases on a pro bono basis and continues to represent numerous indigent defendants and causes. He has been a consultant to several presidential commissions and has testified before congressional committees on numerous occasions, including as a witness against the impeachment of President Clinton. He has advised business leaders, presidents, United Nations officials, prime ministers, governors, senators, and members of Congress about legal and political issues. He has also represented and consulted with major media companies on free-speech issues, and he helped to obtain the largest fee in history for lawyers against the cigarette industry.

Alan Dershowitz was born in Brooklyn and graduated from Yeshiva University High School and Brooklyn College. At Yale Law School, he graduated first in his class and served as editor-in-chief of the *Yale Law Journal.* After clerking for Chief Judge David Bazelon and Justice Arthur Goldberg, he was appointed to the Harvard Law School faculty at age twenty-five and became a full professor at age twenty-eight, the youngest in the school's history.

In 1979, Dershowitz was awarded a Guggenheim Fellowship for his work in human rights. In 1981, he was invited to China as a guest of the government to lecture and consult on their criminal code. In 1987, he was named the John F. Kennedy-Fulbright Lecturer. In 1988, he served as Visiting Professor of Law at the Hebrew University in Jerusalem and lectured in Israel on civil liberties during times of crisis. In 1990, he was invited to Moscow to lecture on human rights, and the following year he was selected as a Father of the Year and a recipient of the Golden Plate Award. At Harvard, he is currently the Felix Frankfurter Professor of Law, a chair established in honor of the great justice's work in constitutional law. Dershowitz has been awarded many honorary degrees and medals and has been active in the American Civil Liberties Union and the Anti-Defamation League of B'nai B'rith.

Introduction*

The courtroom trial has fascinated human beings from the beginning of recorded history. Trials are theater, trials are history, and the great trials of the twentieth century and beyond provide a unique window into American history and the sense of America's enduring commitment to law.

It was Alexis de Tocqueville who, when he visited the new republic for the first time, said that America was a unique country when it comes to law. Every great issue eventually comes before the courts. With this in mind, esteemed professor and civil liberties lawyer Alan Dershowitz looks at history through the prism of the trial, because a trial presents a snapshot of what's going on in a particular point in time of the nation's history.

What's a great trial? People will often say the trial of the moment. But those trials are often not enduring. The focus of this course is on landmark trials and the important and dramatic aspects of the history of the time in which they occurred.

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*The material included in the text of this course guide was written by the staff of Recorded Books, LLC. It is based on lectures given and material written by Alan Dershowitz.

Lecture 1:
The Scopes Trial

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part VIII: "The Scopes Trial").

The Scopes trial was set between the two World Wars. During that period of time, American history was marked by a fundamental change in the attitudes of many Americans. America was quickly changing from a Christian country, often a fundamentalist Christian country, to a country based on reason, scientific progress, and the Enlightenment. Inevitably, there was going to be a clash. This clash took place in a courtroom in Tennessee, when the state legislature decided to ban the teaching of Darwin's evolution.

Darwin's evolution was a simple scientific theory that espoused the development of human beings and the evolution of single-celled creatures to other, more complex creatures, and eventually to human beings. But the Bible describes the beginning of mankind very differently: In six days, God created the world, and human beings were part of His creation.

The Bible on Trial

An obscure science teacher had learned evolution in college and felt an obligation to his students to teach it. The problem was that teaching evolution in Dayton, Tennessee, in 1925, was a crime, punishable by a fine and imprisonment. The person who tried to teach evolution, John Thomas Scopes, understood that he was risking the wrath of the prosecutor and decided that it was his obligation to teach the truth and not become submissive to the powers of the law.

This was not so much a trial about people as it was a trial about issues. What was on trial was the Bible, or more specifically, the fundamentalist reading of the Bible.

Many know the story of the Scopes trial from having seen the movie or the play *Inherit the Wind*. It portrayed a clear clash of good versus evil. On the one side were the fundamentalists, who described creation in a way that clearly defied what science had taught over the last hundred years. That side was led by William Jennings Bryan, a great populist, a man who ran for president as a Democrat. He was a hero to many, and many saw Bryan as someone who represented the interests of poor immigrants rather than large corporations. But this time, he was on the side of the Bible and, many people thought, on the side of the fundamentalist reading of the Bible. He thought there was no place for the teaching of evolution in the public school system.

On the other side was another crusading hero, Clarence Darrow, a man who represented labor and a man who represented the people, a man opposed to corporate corruption. Both lawyers were household names.

A Complicated Story

William Jennings Bryan had strong reasons for opposing the teaching of evolution. The school system in Dayton, Tennessee, was completely segregated, and Scopes taught in an all-white school. He was teaching from a text book that presented Darwin's theory of evolution in a skewed manner: Hunter's *Civic Biology*.

The book was a dangerous application of Darwin's theory of evolution. It explicitly accepted what has come to be called the naturalistic fallacy, which maintains that moral conclusions can be drawn directly from descriptions of nature. The book repeatedly drew implications for civic society from mischaracterizations of Darwin's evolution. For example, the book assured the all-white, legally segregated high school students who were taught by Scopes that "the highest type of all, the Caucasians, are represented by the civilized white inhabitants of Europe and America." The book, the avowed goal of which was the improvement of the future of the human race, then proposed certain eugenic remedies.

Remedies of this sort, it claimed, had been tried successfully in Europe (that is, Germany, which was very much in the frenzy of eugenics). These remedies included involuntary sterilizations, which eventually laid the foundation for involuntary euthanization practiced in Nazi Germany.

Bryan opposed the teaching of this kind of misuse of evolutionary theory to segregated school children. He thought it was wrong, morally and religiously. Many people thought that evolution (social Darwinism, at least) was being misused, and that it should not be viewed uncritically in all of its applications and misapplications.

Bryan vs. Darrow

Bryan was not a know-nothing literalist, as he was portrayed in *Inherit the Wind*. In many respects, he got the best of Clarence Darrow, an acknowledged atheist who despised biblical teachings. The interesting side point is that Clarence Darrow decided to call as one of his witnesses a leading expert on the Bible, none other than William Jennings Bryan.

Darrow expected to befuddle Bryan. He asked Bryan, for example, whether he thought the Earth was created in six days, as stated in the Bible. But Bryan did not fall into the trap, suggesting that each of these days was really a period, or an epoch, and that creation may have taken six million years or six hundred million years.

The transcript of the actual trial shows Bryan doing quite well defending himself, while it is often Darrow who comes off poorly, as something of an anti-religious bigot, or at least an anti-religious cynic. Bryan won the case (after all, it was being tried in a place that was called the buckle of the Bible Belt).

The Historical Verdict

The historical verdict, for many years, went against the banning of evolution in the schools in Dayton, and if you asked people who won the case, most would probably say Clarence Darrow. They forget that the verdict went against Darrow and that the teaching of evolution was in fact banned.

Scopes had to pay a fine and had to stop teaching evolution. Years later, the Supreme Court essentially overruled that verdict and said the teaching of evolution or of any kind of science in school could not be banned. Recently, religious fundamentalists have gotten much smarter. They don't want to ban the teaching of evolution. What they want is to simply criticize it and question it. In some schools around the country, stickers have to be placed on textbooks that say that evolution is not a fact, that it's just a theory, and alternative explanations should be considered.

But what are these alternative explanations? Plainly, what the people who put the stickers in the books have in mind is creationism. The alternative to evolution is that human beings were created as human beings. They were not preceded on any evolutionary scale from other beings or ape-like beings. They did not evolve from single-celled beings, but rather were created by God consistent with the Bible. The William Jennings Bryans of today are not trying to ban evolution. They're trying to include the teaching of the theory of creationism.

The courts held several years ago that the teaching of creationism could not be permitted in public schools under the establishment clause of the First Amendment to the Constitution, which prohibits any law respecting an establishment of religion, and teaching one form of religious view of creation is a form of establishing religion. Creationism could, however, be taught in private schools.

An excerpt from Hunter's *A Civic Biology: Presented in Problems*, from which Scopes was teaching his students about evolution.

Evolution of Man. — Undoubtedly there once lived upon the earth races of men who were much lower in their mental organization than the present inhabitants. If we follow the early history of man upon the earth, we find that at first he must have been little better than one of the lower animals. He was a nomad, wandering from place to place, feeding upon whatever living things he could kill with his hands. Gradually he must have learned to use weapons, and thus kill his prey, first using rough stone implements for this purpose. As man became more civilized, implements of bronze and of iron were used. About this time the subjugation and domestication of animals began to take place. Man then began to cultivate the fields, and to have a fixed place of abode other than a cave. The beginnings of civilization were long ago, but even to-day the earth is not entirely civilized.

The Races of Man. — At the present time there exist upon the earth five races or varieties of man, each very different from the other in instincts, social customs, and, to an extent, in structure. These are the Ethiopian or negro type, originating in Africa; the Malay or brown race, from the islands of the Pacific; the American Indian; the Mongolian or yellow race, including the natives of China, Japan, and the Eskimos; and finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America.

Hunter, George William. *A Civic Biology: Presented in Problems*. Pp. 195–196. New York: American Book Company, 1914.

Intelligent Design

So along come teachers of intelligent design (ID) who maintain that if you look at the logic of the universe, it is far more logical and consistent with science to postulate a rational intelligent design than the teaching of evolution. The ID theory says there was a designer, though it doesn't name one.

Of course, the ID people want you to assume that there was a designer and then make the leap to God. And ID people push hard for evolution not to be taught without being compared to ID.

A Different Country

The Scopes case is a great exercise in legal history, American history, and in understanding how courts work. It sheds light on the period of time between World War I and World War II, the clash between biology and religion, and what was going on in America in a period from massive immigration of different groups into this country.

The last part of the nineteenth century and the early part of the twentieth century opened the doors to immigration, and the United States became a different country. It became the most multicultural country in the world, and the 1920s was a testing period. The Scopes case was part of that test. It juxtaposed religious fundamentalism against modernity. It also teaches much about where the Court is likely to go in the future.

But times change, people change, and the law changes. The one thing that remains clear and will remain clear is that the trial is significant as a prism into the history and attitudes of a country. And as we look at the trials, we look at ourselves. As we look at the trials in America, we look at America.

FOR GREATER UNDERSTANDING

Questions

1. How did *Inherit the Wind* differ from the actual Scopes trial?
2. How was Hunter's *Civic Biology* a dangerous application of Darwin's theory of evolution?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Caudill, Edward. *The Scopes Trial: A Photographic History*. Intro. Edward J. Larson. Knoxville, TN: University of Tennessee Press, 2000.

Larson, Edward J. *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion*. Cambridge, MA: Harvard University Press, 1998.

Moran, Jeffrey P. *The Scopes Trial: A Brief History with Documents*. New York: Bedford/St. Martin's, 2002.

Lecture 2:
The Case of Leo Frank

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part VII: "The Trial of Leo Frank").

The trial of Leo Frank is one of the most transformative events in American legal history. In one respect, it was an ordinary murder case. Leo Frank ran a pencil factory outside of Atlanta, Georgia. It was the beginning of the twentieth century, 1913, and one of his employees was found murdered, perhaps sexually molested. It was on April 26, Confederate Memorial Day, and people were out having parades commemorating the Civil War, from a Southern point of view.

An Assumption of Guilt

A young girl, twelve-year-old Mary Phagan, went to the factory to collect her pay and never emerged alive. She was the personification of Southern womanhood, and the person accused of killing her was exactly the opposite. He was a Jewish man who had come south from New York City to earn a living and had done well. He was a young man, married into a decent Jewish family, and the case took on enormous religious, racial, and political overtones.

In fact, during the trial, people would sit outside the courthouse and sing the ballad of "Little Mary Phagan." If there were a *Hit Parade* at the time, this song would have been number one in Atlanta, Georgia, in 1913.

With people singing early versions of that ballad, which obviously assumed the guilt of Leo Frank, there was not much chance of a fair trial. And he didn't get one. Crowds demanded justice. The major witness for the state was the factory's janitor, an African-American man named Jim Conley. Conley testified that he saw Frank kill the young girl and that Frank ordered him to dispose of the body and then dictated notes that were designed to place blame on a "negro."

When the jury convicted Leo Frank, it was the first time that a white man had been convicted on the uncorroborated testimony of a black man. But even at the time, it wasn't seen as progress for racial justice, because this is the way it was explained by a local juror: "That wasn't a white man convicted by that nigger; it was a Jew." It has even been written that prosecutor Hugh Dorsey deliberately chose to prosecute a Yankee Jew, for purposes of sensationalism, regardless of Frank's innocence. Frank was described as a pervert and as a sodomite, and anti-Jewish stereotypes were used to confirm the theory that a man who didn't believe in Jesus, a man who had come down to the South to exploit young women in his factory, was precisely the kind of man who would commit this crime.

The Aftermath

After Frank was convicted, a number of groups formed around this case. The first group was the reincarnation of the Ku Klux Klan, and the Klan became influential in American life and eventually moved to many Northern cities. There was a time when no Democrat could get nominated without the support of the Klan. In fact, a member of the Supreme Court, Hugo Black, had become a member of the Klan as a young Alabama legislator and had to renounce the Klan when he was formally appointed to the Supreme Court. But the Klan became a prominent organization and had its beginnings in this case.

Little Mary Phagan

Lyrics by Rosa Lee Carson, 1913

Little Mary Phagan
She went to town one day
She went to the pencil fact'ry
To get her little pay

She left her home at eleven
When she kissed her mother good-bye
Not one time did the po' child think
She was goin' right to die

Leo Frank met her
With a blues we hardly know
He smiled and said
"Lil' Mary, now you go home no mo'"

He sneaked along behind her
'Til she reached the little room
He laughed and said
"Lil' Mary, you met your fatal doom"

She fell upon her knees
To Leo Frank she pled
Because she was virtuous
He hit her across the head

The tears rolled down her rosy cheeks
The blood flowed down her back
She remembered tellin' her mother
What time she would be back

He killed lil' Mary Phagan,
Was on one holiday
Then called for ol' Jim Conley
To take her body away

He took her to the basement
Bound hand and feet
Down in the basement
Lil' Mary lay asleep

Newt Lee was the watchman
When he went to wind the key
Down in the basement
Lil' Mary he could see

He called for the officers
Their names I do not know
They came to the pencil fact'ry
Saying, "Newt Lee, you must go"

They took him to the jailhouse
Locked him in a cell
The poor ol' innocent nigger
Knew nothin' for to tell

I have a notion in my head
When Frank came to die
He took his damnation
In the courthouse in the sky

The astonished asked the question
The angels they do say
Why he kill lil' Mary
Upon one holiday?

Come all of you good people
Wherever you may be
Supposin' little Mary
Belonged to you or me?

Her mother sets a-weepin'
She weeps and mourns all day
She prays to meet her baby
In a better world some day

Judge Roan passed the sentence
You bet he passed it well
The Christian doers of heaven
Sent Leo Frank to hell

Another organization that had its beginnings in this case was the B'nai B'rith, which has become a human rights organization over the years, but was formed in part out of concerns over the anti-Semitism directed at Leo Frank by so many public officials.

As with many instances in this course, the people involved were important, but the case transcends the people. It represents a period of time in American history, a period of time following the large-scale immigration from Eastern and Southern Europe. With the opening of immigration came massive bigotry and a kind of know-nothing attitude that some old-fashioned Americans represented.

By the time of the Leo Frank case, the doors to immigration were beginning to close, and they closed shut following the First World War. But just before, there was a counterreaction to the influx of people of different cultures, backgrounds, and religions, particularly into parts of the United States that seemed less tolerant than other parts. So the case reflected that very questionable period in American history.

A Terrible Dilemma

Prominent civil rights lawyers all over the country began to raise questions about the guilt of Leo Frank, and the case went to the Supreme Court. Finally, an important incident affected the case. It was not much known, but it raises one of the most profound questions of legal ethics that anyone can ever confront.

When Frank was on death row, there was a prominent lawyer in town named Arthur G. Powell. Jim Conley approached Powell and, assured of lawyer-client confidentiality, confessed to the murder and asked for representation in the event the case was reopened. Powell refused to represent Conley, but was left with a terrible dilemma.

If Powell goes to the authorities, he violates his oath as an attorney never to disclose a legal confidence. On the other hand, if he doesn't disclose the legal confidence, he is complicit in an innocent man's execution. What Powell did can't be verified because he put his records in a secret file and said they should be made public when he died, but no one has ever found the records. Still, the consensus is that he went to the governor of the state, John M. Slaton, who was a friend of his, and said that Leo Frank was innocent. The governor believed him and issued a statement commuting Leo Frank's sentence from death to life imprisonment. He didn't let him go free. He didn't think he could get away with it, because he couldn't tell the public why he took this action. Two things happened as a result of that. Governor Slaton was driven out of office and had to move to California. Second, people in Atlanta and Marietta, Georgia, formed a lynch gang, went to the jail where Leo Frank was serving his life sentence, broke him out of prison, and hanged him. Hundreds of people came to the lynching. Photographs were made. Postcards were distributed of the lynching. The rope was cut into hundreds of pieces and souvenirs of the rope were sold. People bragged of having been in the lynching party.

A grand jury was convened and announced they had no evidence of any particular person involved in the lynching, though there were photographs and

admissions of people. To this day, the family of Mary Phagan believes that Leo Frank was guilty. However, the verdict of history has concluded beyond any doubt that Leo Frank was the victim of an improper prosecution and conviction, and certainly an improper lynching.

The verdict of a trial is not necessarily the historical verdict. A trial is not always a search for truth. If it was, it would be done by scientists using the scientific method. It wouldn't be done by twelve jurors who are picked primarily for what they don't know rather than for what they do know. If they were witnesses or if they knew anything about the case, they'd be disqualified, so one can't expect that the verdict of the court will accurately reflect the verdict of history. In this case, in a time of bigotry, it shouldn't surprise anybody that the verdict of the court reflected the temper of the times.

The Leo Frank case is important because more was at stake than the life of Leo Frank. What was at stake was whether America would become a place where people from parts of Europe were fully integrated into American life. This was a testing case, and America failed the test. But in the years to come, there were future tests and the Leo Frank trial stood as an object lesson on how not to conduct trials. The Supreme Court's decision, even though it was against Leo Frank, sent out the powerful message that having trials inside a courtroom with crowds outside demanding blood and crying for vengeance was not the way to conduct a trial in America.

The other important point is that the dominant society will sometimes play groups against each other. Here, the Jewish community was juxtaposed with the African-American community in Atlanta. African-Americans were interested in seeing that Conley was not prosecuted. Then again, if he had been accused, he would never have been prosecuted. He would have been lynched. And so the black community understandably had an interest in protecting the welfare of an African-American accused of a crime.

The Jewish community was concerned because they thought they were welcome in America. The Leo Frank case was called an American Pogrom, because Jews began to fear what it meant to be a Jew in parts of America. The Anti-Defamation League and B'nai B'rith were founded around the tragedy of the Leo Frank case, but again, Leo Frank now stands not for what happened to Leo Frank, but as an object lesson in how to avoid such miscarriages of justice in the future.

Another important thing that Leo Frank taught is that having good lawyers involved with the case at the earliest possible time is absolutely essential in avoiding injustice. In the Leo Frank case, the lawyers who were involved at the very beginning were not the kind of lawyers one would expect to be involved in high-profile cases of this time. It was only later, when it was too late, that good lawyers were introduced. But even they were from the North, and it's hard to win a case far from home if you try to put the entire community on trial.

FOR GREATER UNDERSTANDING

Questions

1. What dilemma did Arthur G. Powell face when he was approached by Jim Conley?
2. How did the Leo Frank case reflect the temper of the time in which it was set*?*

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Dinnerstein, Leonard. *The Leo Frank Case*. Athens, GA: University of Georgia Press, 1987.

Melnick, Jeffrey Paul. *Black-Jewish Relations on Trial: Leo Frank and Jim Conley in the New South*. Jackson, MS: University of Mississippi Press, 2000.

Oney, Steve. *And the Dead Shall Rise: The Murder of Mary Phagan and the Lynching of Leo Frank*. New York: Pantheon, 2003.

Lecture 3:
Leopold and Loeb

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part VIII: "The Trial of Leopold and Loeb").

A case involving the murder of a young man by two neighbors has become a signature case about the middle of the twentieth century. The two murderers have gone down in infamy. Their names are Nathan Leopold Jr. and Richard Loeb. The murder victim, a fourteen-year-old boy named Robert Emanuel "Bobby" Franks, was selected quite by accident. The murderers had in mind killing someone else, but he was not available that day, and so Franks was killed.

A Random Act

The perpetrators committed murder just to see whether or not they could commit a perfect crime. These were two bright, well educated, wealthy young men. Leopold was nineteen and Loeb was eighteen at the time of the murder. They had read Nietzsche and various other philosophers and thought of themselves as supermen, men so intelligent and so above the constraints of law that they could do anything they wanted. They were too smart to get caught. But it turned out that they were easily caught, prosecuted, and convicted. They were fortunate, however, because they were wealthy and their parents were able to hire the world's greatest lawyer at the time, Clarence Darrow, the same lawyer who conducted the defense of John Scopes in the Scopes trial.

Leopold and Loeb simply got into a car and picked up Franks, a friend of theirs, and brutally murdered him in cold blood, left his body, and figured that was the end of it. What they didn't realize was that Leopold left his glasses behind, and they were easily traced to him. Leopold immediately confessed to the crime, as did Loeb. By the time Clarence Darrow came into the case, it was obvious they were guilty.

The only real question was whether they would get the death penalty. Clarence Darrow decided to use the case as a vehicle for sensitizing Americans against what he regarded as the barbarity of capital punishment. In one sense, he had a good case. He had young clients. They were not seasoned criminals. They were not likely to do it again, and they seemed to be remorseful once they were caught (though who knows whether they would have been remorseful had they not been caught; they were proud of what they had done and proud of what they had gotten away with).

On the other hand, it seemed a terrible case to challenge the death penalty. These were not poor defendants. They had not lived miserable or difficult lives. They were not discriminated against. They had not killed for money.

These were wealthy people who killed for thrills. It could have been an ordinary case had another lawyer been involved, but this was Clarence Darrow at the peak of his career.

A Brilliant Argument

This was 1924, the Roaring Twenties. These were spoiled brats, and their families were incredibly wealthy and influential in Chicago social life and politics. All of the participants in the trial were Jewish: Loeb, Leopold, and Franks. Perhaps because the victim was also Jewish, this wasn't seen as an interreligious or racial conflict. It was seen as two rich kids killing another rich kid and rich parents hiring a rich and able lawyer to defend them.

This was a spectacle, a great event in American history. The great lawyer Clarence Darrow was going to try to persuade a judge that the death penalty was not appropriate in this case. The brilliance of his arguments lay in their obviousness. He makes it easy for listeners to agree with him. He never asks for long logical or moral leaps. He appeals to common sense, to everyday experience, and to a kind of moral consensus.

Consider the following excerpt:

> *"I say again, whatever madness and hate and frenzy may do to a human mind, there is not a single person who reasons, who can believe, that one of these acts was the act of men of brains that were not diseased. There is no other explanation for it. And had it not been for the wealth and the weirdness and the notoriety they would have been sent to a psychopathic hospital for examination and been taken care of instead of the state demanding that this court take the last pound of flesh and the last drop of blood from two irresponsible lads."*

In other words, he's not trying to defend them. He's taking the very absurdity of their act and turning it into an argument for their insanity. So why didn't he plead insanity? There was no technical insanity, because Leopold and Loeb were not actually psychotic. They were just, in Darrow's words, diseased.

Now Darrow was not there only on behalf of these two boys. He thought that if he could get this judge to refuse to impose the death penalty on these defendants, then perhaps he could change the atmosphere involving the imposition of the death penalty throughout the country.

He said to the judge, "I am not pleading so much for these boys as I am for the infinite number of others to follow, those who perhaps cannot be as well defended as these have been, those who may go down in the storm and the tempest without aid."

Darrow won the case. The judge refused to impose the death penalty and imposed life in prison, but Darrow was wrong about the long-term future. The death penalty is increasingly popular, even though there is evidence of innocent people being subjected to it.

The word "Jew" never came up in the trial. There was another word that never came up, and that was "homosexual." The evidence seems overwhelming that Leopold and Loeb were gay lovers. In fact, Loeb was killed in prison, stabbed to death, in a homosexual encounter. Leopold, on the other hand, became asexual in prison, to the extent possible in prison, and became

a major research scientist and helped to discover cures for various illnesses. In fact, he was eventually released from prison toward the end of his life, because he volunteered to become a subject in experiments in how to cure various illnesses (malaria, among others). If ever there was a case proving that rehabilitation can work, the Leopold case probably demonstrates that. But there is a dark side to the story.

Corruption

Clarence Darrow was a great lawyer: a very political lawyer and, unfortunately, a corrupt lawyer. His corruption began in the early part of the twentieth century, when he represented labor unions against corporations and against the Pinkerton cops who were hired by the big corporations. He saw that the process had been corrupted, that the corporate side sent messages to jurors indicating that their relatives might suffer consequences if they voted against the corporation. Early in his career, Darrow was actually prosecuted for bribing witnesses in a labor union trial and in another trial involving the *Los Angeles Times*. Darrow hired a great lawyer to defend him against charges of bribery, but the lawyer didn't do a very good job, so Darrow made his own closing argument, and won one count of his case and had another result in a hung jury.

He was never successfully prosecuted for corruption, but he allegedly told friends that he had done it to level the playing field. He did it for labor and poor people to get a fair shot in an already corrupt system, but this is no justification. Lawyers are not entitled to pursue their own form of corruption as an antidote to other kinds of corruption.

A large portion of the legal fee that was given to Clarence Darrow was never accounted for. It was supposed to be used for expenses, and he would not account for how the expenses were used. Some people believed that the brilliance of his argument was made somewhat easier to accept because the judge had received some consideration for having an open mind about the case. Nobody can ever prove or disprove that, but that's the problem with having once been corrupt. If you once paid off a witness, or a judge, or a juror, there will always be suspicions throughout your life that you did it again.

The Future of the Death Penalty

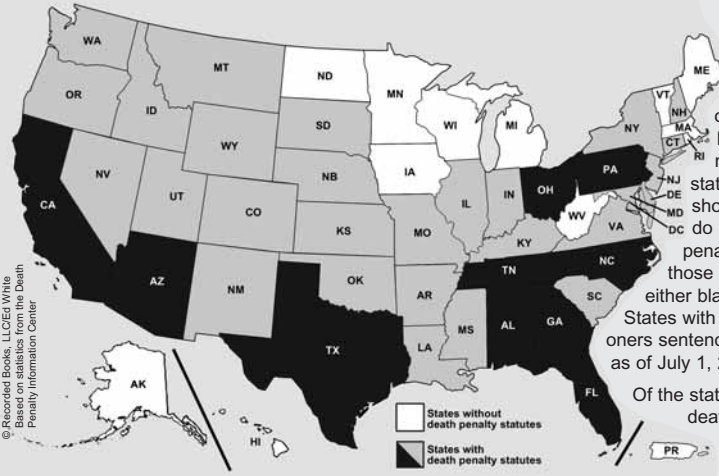
What lessons can be drawn from the Leopold and Loeb case? First of all, wealth matters. Having no money almost ensures that you will not get justice, but having all the money in the world doesn't ensure you will win. Many wealthy people have gone to jail, but many more poor people have gone to jail undeservedly because they haven't been able to afford good lawyers. The vast majority of people on death row were represented by lawyers who were not paid fees or public defenders who didn't have the resources to mount the kind of defense necessary for justice to be done.

Wealthy people cannot be denied the right to use their resources by hiring experts. The playing field has to be leveled by making resources more available to poor people. In a few states, the death penalty has been conditioned on a dollar-to-dollar availability of funds to the defendant. For every dollar made available to the prosecution, that same dollar is made available to the defendant—at least in theory.

The other important issue involving the Leopold and Loeb case is that the debate over capital punishment in America began in a case involving two guilty, frivolous young men who deserved no sympathy and no compassion. It began because a great lawyer (putting aside the issue of corruption) made an extraordinarily eloquent plea, and that plea was published around the world. Unlike trends against segregated schools, trends in favor of women's reproductive rights, or trends in favor of equality for gays, the trend that started with Darrow's eloquent opposition to the death penalty has not continued in America. Americans are still overwhelmingly favorable to the death penalty. Politicians who run against it do so at considerable risk to reelection. Every Westernized country has abolished the death penalty, and the United States stands alone in favor of not only imposing the death penalty, but seemingly imposing it more and more frequently.

The Leopold and Loeb case, and particularly Clarence Darrow's eloquent speech, is still quoted as one of the strongest statements against the death penalty, though it's been replaced more by arguments in favor of innocence. Yesterday's Clarence Darrow has become today's Barry Scheck, who has helped to bring about the vindication of dozens of people on death row. The nature of the campaign against the death penalty has changed from Darrow's appeal to emotion and science and goodness and charity to an appeal that asks what kind of country risks executing innocent people. Tactically and strategically, that's probably a good direction for an argument to go, because Americans would be deeply offended by the knowing execution of innocent people. The greatest issue in the Leopold and Loeb case is not the issue of innocence or guilt, but the issue of whether anybody deserves the death penalty, whether America should be joining the rest of Europe and most of the rest of the Westernized countries in abolishing the death penalty.

CAPITAL PUNISHMENT IN THE UNITED STATES



Thirty-eight states have the death penalty. Twelve states, the District of Columbia, and Puerto Rico have no death penalty statute. The map shows the states that do not have the death penalty in white and those states that do in either black of darker gray. States with more than 100 prisoners sentenced to death as of July 1, 2005, are in black.

Of the states that have the death penalty, eighteen states banned the imposition of the death penalty on defendants who are mentally retarded (AZ, AR, CO, CT, FL, GA, IN, KS, KY, MD, MO, NB, NM, NY, NC, SD, TN, and WA). The federal government has such a ban in place as well. On June 20, 2002, the Supreme Court ruled in a 6–3 decision (*Adkins* v. *Virginia*) that a national consensus had formed that the execution of the mentally retarded was cruel and unusual, and banned such executions in every state; only two states had banned such executions when the Supreme Court last considered the issue in 1989. However, the Supreme Court did acknowledge that there was still disagreement as to which offenders are in fact retarded, and left that definition to individual states.

CAPITAL PUNISHMENT IN THE UNITED STATES SINCE 1976

Jurisdiction	Executions	Inmates on Death Row
TX	355	414
VA	94	23
OK	79	97
MO	66	55
FL	60	388
GA	39	112
NC	39	192
SC	35	77
AL	34	191
AR	27	38
LA	27	89
AZ	22	128
OH	19	196
IN	16	30
DE	14	19
CA	12	648
IL	12	10
NV	11	85
MS	7	70
UT	6	10
MD	5	9
WA	4	10
NB	3	10
PA	3	233
KY	2	37
MT	2	4
OR	2	32
CO	1	3
CT	1	8
ID	1	21
NM	1	2
TN	1	108
WY	1	2
KS[1]	0	7
NH	0	0
NJ	0	14
NY[2]	0	2
SD	0	4
US Fed. Gov't	3	36
US Military	0	8
US TOTAL	**1,004**	**3,415**[3]

No current death penalty statute: AK, HI, IA, ME, MA, MI, MN, ND, RI, VT, WV, WI, DC, and Puerto Rico

[1]KS: On December 17, 2004, the death penalty statute of KS was declared unconstitutional.

[2]NY: On June 24, 2004, the death penalty statute of NY was declared unconstitutional.

[3]Seven inmates are on death row in more than one state.

Source: Death Penalty Information Center at www.deathpenaltyinfo.org

FOR GREATER UNDERSTANDING

Questions

1. Why was Leopold and Loeb not a good case for challenging the death penalty? Why was it?
2. How did Leopold and Loeb affect the long-term thinking in America about the death penalty?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Higdon, Hal. *Leopold and Loeb: The Crime of the Century*. Chicago: University of Illinois Press, 1999.

Younger, Irving. *Clarence Darrow's Sentencing Speech in* State of Illinois *v.* Leopold and Loeb. Minnetonka, MN: Professional Education Group, 1988.

Lecture 4:
Julius and Ethel Rosenberg

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part X: "The Trial of the Rosenbergs").

In the 1950s, the most important case of the era was the trial of Julius and Ethel Rosenberg, who were accused of stealing the secret of the atomic bomb and giving it to the Soviet Union. People were terrified of the Soviet Union dropping an atomic bomb and most were very anticommunist and very frightened of the Russians. People were pleased to see that the couple who stole atomic secrets from the United States were being prosecuted.

A Great Division

For years thereafter, the division was great. There were groups of people who said the Rosenbergs were guilty, that they got a fair trial and they deserved to be executed. And there was the other group that said the Rosenbergs were innocent, that they got an unfair trial and they didn't deserve to be executed.

In the years following the trial, secret documents have been revealed, classified information has been declassified, and Justice Department files have been made available to the public. As the result of these documents, it is apparent that Julius Rosenberg was guilty. He tried to steal the secrets of the atomic bomb from the United States and give them to the Soviet Union. He was a fervent communist who believed that the Soviet Union should have an atomic bomb and that if both the United States and the Soviet Union had atomic bombs, it would be less likely for there to be a war, and if there were a war, the Soviet Union would prevail.

There are wire taps and other evidence that conclusively show that there was a spy who fit the description of Julius Rosenberg, and that spy conveyed information from Los Alamos and from the Manhattan Project to the Soviet Union. Of course, it turned out that the Soviet Union had already stolen the secrets of the atomic bomb. But Rosenberg believed he was stealing atomic secrets and that he was committing a disloyal act against the United States. He clearly deserved to be prosecuted and convicted. Having concluded that, however, he still did not get a fair trial. But even more serious is that Ethel Rosenberg was innocent and was not involved in her husband's spying. At most, she may have known about it and may have typed a paper or a document. The United States government exaggerated her role to get the death penalty imposed on her as leverage against her husband. The prosecution knew that Rosenberg was a fervent communist and would take his punishment without revealing information about his superiors and the spy network in the United States. If his wife was also convicted and sentenced to death, and

he was offered her life in exchange for giving secrets, then it would be an offer he couldn't refuse. But they underestimated the fervency of his and Ethel's commitment to the Communist Party. They both were executed, because he refused to disclose information that would save their lives.

McCarthyism

The Rosenberg case is a microcosm of the debate over McCarthyism. Some people maintain that there was a terrible threat of communism and McCarthyism was justified. Other people maintain that there was no threat of communism and therefore McCarthyism was not justified.

There was never a threat that the United States was going to be overthrown by communism or that communists would get elected to major office. There was never more than a tiny handful of citizens who supported communism. But there was a powerful Soviet spy network in the United States, a very influential one and a very successful one, and they did steal the secrets of the atomic bomb. There were Americans spying for the Soviet Union, but the means used to ferret out communists by McCarthy and others were not fair means. Many innocent people were captured in its broad net and many unfair practices were employed. The Rosenberg case represents both the truths of some of the underlying arguments that were made by those who supported various aspects of McCarthyism and the truths of the critics who thought that McCarthyism went way beyond any legitimate concern about Soviet spying in America.

The facts of the Rosenberg case were fairly simple. Ethel Rosenberg's brother was a low-level operative who worked at Los Alamos on the Manhattan Project. He did get some sketchy, primitive drawings and give them to Julius Rosenberg, who then conveyed them to his chain of Soviet spies, and they eventually got to the Soviet Union. I think they could have made a convincing case that he was guilty of espionage and perhaps other crimes as well. The problem is that they uncovered this net of spies by using means that they were not prepared to publicly disclose, including tapping of distant European embassies and other surreptitious activities.

The people who prosecuted the Rosenbergs knew for sure that Julius Rosenberg was guilty. They also knew for sure that Ethel Rosenberg was not. Her name appears in none of the correspondence. In fact, the best proof that they knew she was not guilty is that at the very end, when they were giving the Rosenbergs the last chance to save their lives, they presented Julius Rosenberg with a list of questions about who the other spies were and said that if he would answer those questions, his and Ethel's lives would be saved. They never presented that list to Ethel, because they knew she didn't have any answers. They knew she was not guilty of a conspiracy to steal atomic secrets from the United States.

The president of the United States at the time of the executions was Dwight D. Eisenhower. Eisenhower expressed concern to some of his friends and colleagues about permitting the execution of a woman. Remember, it was absolutely essential to J. Edgar Hoover's plan that they threaten to kill Ethel Rosenberg. To make sure that the president didn't ameliorate the threat and commute the sentence of Ethel Rosenberg, the FBI

had to concoct a story, and the story they concocted was that Ethel Rosenberg was the brains behind the operation, which was an out and out lie. But it was an important lie designed to prevent the president from commuting the sentence of Ethel Rosenberg.

One of the Worst Periods in American History

Even the staunchest defenders of the Rosenbergs, including their own children, now have to acknowledge that Julius Rosenberg was guilty, though that doesn't in any way vindicate the United States government. Yesterday's threat was atomic warfare. Today's threat is terrorism. And we do hold hostages today. When the United States arrested Sheik Khalid Mohammed, according to press accounts, his nine-year-old son was also taken into custody. Nobody has heard since what has happened to that child. Hostage taking is a common technique in fighting terrible enemies, whether they be atomic enemies or terrorist enemies, and if the Rosenberg case stands for anything, it stands for the proposition that the FBI believed that the ends justified the means.

The atmosphere of McCarthyism made it difficult for any lawyers to stand up and defend the Rosenbergs. In fact, the Rosenbergs had terrible lawyers. One was a libel lawyer named Emanuel Bloch, who was selected to defend the Rosenbergs by the Communist Party. Executed Rosenbergs are not capable of disclosing the names of other spies. Executed Rosenbergs could become martyrs to the system and martyrs of communism. So there is some suspicion that those in the top leadership positions of the Communist Party were just as happy to see the Rosenbergs die at the hands of an unjust capitalist America, than to have America show the world it had a fair legal system that could differentiate between Julius and Ethel and between the death penalty and other sentences.

A very good lawyer, a lawyer who was one of the general counsels to the American Civil Liberties Union, Morris L. Ernst, volunteered to join the Rosenberg defense team. Unbeknownst to the Rosenbergs, he was secretly telling J. Edgar Hoover the secrets of the Rosenberg defense. He was a traitor to his legal oath and to his clients. He was a traitor to the American Civil Liberties Union. Not only that, he was the one who actually wrote this memo that suggested that Ethel Rosenberg was really the brains behind the operation. Morris Ernst, who died in 1976, has never been able to respond to these serious charges of perfidy, the legal analogue of espionage and treason, and it's of course possible that the FBI memoranda don't accurately reflect his motivations or his precise words. It's conceivable, though unlikely, that he was using unorthodox measures in a desperate attempt to save the Rosenbergs' lives.

Anything can happen when the atmosphere of the times inclines in this direction. Even good people can be inclined to do bad things. And what Morris Ernst did was a very bad thing.

McCarthyism was one of the worst periods of time in American history. People were being fired from jobs of every kind. Being un-American was the worst thing that could be said about anybody. But it is hard to imagine anything more un-American than deliberately sending a woman to her death to provide an incentive to her husband to become a witness for the government.

The history of the Rosenberg case is a history that should be taught and studied in every history class, in every law school class. McCarthyism was made possible by good and decent people who were not prepared to stand up to the indecency of people who didn't understand the difference between proper and improper means. There were too many good people, too many justices of the Supreme Court, too many judges of the Court of Appeals, and too many honest prosecutors who were willing to close their eyes to what they had to know was a major injustice.

The Supreme Court has recently said that innocence alone may not be enough to find a conviction unconstitutional, which raises the question again of whether there can ever be a fair trial that produces the wrong result. Can a constitutional trial produce the conviction of an innocent person? The answer to that question, tragically, is yes.

One of the strongest arguments against the death penalty is that a case that appears to involve guilty people today may look very different five years from now or ten years from now. DNA evidence was not developed when many people went to their deaths in America, and there is no way now of retrieving the evidence and subjecting it to DNA analysis. The Rosenberg case was the rare case in which it could be conclusively proven that an innocent person was sent to her death for reasons that may be understandable, but that could never, ever be justified.

FOR GREATER UNDERSTANDING

Questions

1. Are there parallels between McCarthyism and the War on Terror?
2. What is the lesson of the Rosenberg case?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Philipson, Ilene. *Ethel Rosenberg: Beyond the Myths*. Brunswick, NJ: Rutgers University Press, 1993.

Radosh, Ronald, and Joyce Milton. *The Rosenberg File*. 2nd ed. New Haven, CT: Yale University Press, 1997.

Roberts, Sam. *The Brother: The Untold Story of Atomic Spy David Greenglass and How He Sent His Sister, Ethel Rosenberg, to the Electric Chair*. New York: Random House, 2001.

Lecture 5:
O.J. Simpson

The Suggested Reading for this lecture is Alan M. Dershowitz's *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System.*

In the O.J. Simpson case, many Americans believed there was a grave injustice. Most Americans, certainly most white Americans, strongly believed that Simpson had murdered his former wife Nicole Brown and her friend Ron Goldman. They believed that the jury verdict was wrong, that it was racially biased by a predominantly black jury in favor of a famous black defendant and that the lawyers, and I was one of them, played an ignoble role in helping to free a guilty defendant. The important question is whether Americans truly believe in the notion that it is better for ten possibly guilty people to go free than for one possibly innocent person to be wrongly convicted.

An Immediate Suspect

Simpson had been married to a beautiful woman. It was a troubled marriage, and he had been accused once previously of having struck her, and the police had been called to their home. They got divorced, and then she was found brutally murdered along with another man, with whom she had only a casual friendship.

Simpson immediately became the primary suspect in the case. The police went to his home in the middle of the night. Mark Furman, a young police officer, climbed over the wall into Simpson's yard and found a glove that later turned out to have tell-tale blood on it. There were also blood spots. DNA evidence matched some of the blood with the defendant and the victims, and it seemed like an open and shut case. The question of Simpson's guilt seemed to be foreclosed for many people, especially when he got into his SUV and engaged in the famous slow-speed chase in California, shown live on national television.

An Assumption of Guilt

In some respects, much like in the Rosenberg case, where the prosecutor, Roy Cohn, believed he was framing a guilty person, some of the police officers believed to a certainty that Simpson was guilty. But they also believed he might get away with it because the search they conducted of his home was an unconstitutional search. They had no warrant and no probable cause. They broke into his house on the false excuse that they wanted to make sure Simpson was safe from the real killer, when they were clearly climbing the fence to find Simpson before he could get rid of the evidence.

They concocted a piece of evidence. They took a sock out of Simpson's hamper and poured blood from Simpson and the two victims on the sock, and

then they took the sock and laid it where it could be easily found on a rug in O.J. Simpson's room. This became a crucial piece of evidence. Unbeknownst to the jury early on in the case, all three samples of their blood was in the possession of one officer, and that's where the forensics came in.

Untrustworthy Evidence

Blood, when it's in a tube being collected for forensic purposes, has a chemical in it—ethylene diamine tetraacetic acid (EDTA)—that prevents it from coagulating. The blood on the sock had EDTA on it, which proved it was poured from vials rather than having occurred naturally in the course of committing a crime. Also, the way in which the blood lay on the sock demonstrated that blood had been poured on the sock and seeped through from one side to the other, whereas, if it had been worn on Simpson's foot at the time, his foot would have prevented it from seeping through. Third, a video tape taken earlier that morning clearly showed the rug with no sock on it. The argument to the jury, essentially, was that the prosecution had planted evidence and that Simpson was not guilty. The essential point was that the government's evidence could not be trusted.

Instead of going after the DNA on the merits of whether DNA is accurate, the evidence-gathering methodology that the police used was attacked. In other words, the police were put on trial. An important part of that strategy was to get the jury to have questionable views about the policemen, so part of that strategy was to prove that Officer Furman was a racist. Hearing tape recordings Furman had made in which he used the "N" word after having denied he had used it softened up the jury and made them more receptive to believing that Furman would lie, that he had animus toward black people, and that he was not a trustworthy or praiseworthy policeman.

Do Not Testify!

It was absolutely essential, for this defense to work, for Simpson not to take the witness stand. The defense consisted purely of experts. The only people put on the stand were people who could testify objectively about science. If Simpson took the witness stand, it would no longer be the trial of police. The only thing the jury would have focused on was Simpson. There was a big fight in the defense team about whether or not Simpson should testify at his trial, which he desperately wanted to do. He did testify, eventually, at the second trial, the civil trial, and the jury immediately rendered a verdict that he was liable and that he was responsible for the killings. There may be other reasons why that second jury rendered a verdict, but part of the reason was that Simpson testified at the second trial.

What does that say about the privilege against self-incrimination? It's part of the Constitution. It's in the Fifth Amendment and is a fundamental right of the Bill of Rights not to have to testify in one's own criminal case. But most people who don't testify do so because if they were to testify they would have to disclose their guilt, or they would have to lie about it. If a person is innocent, wouldn't he or she want to testify? But people can be convicted because they're unlikable. They can be convicted because they lied about one small thing that didn't affect their guilt but was designed to avoid embarrassment.

It's almost always a good policy to keep clients off the witness stand, particularly if there are other defenses that can be raised.

Is It Better for a Guilty Man to Go Free?

The vast majority of American whites were outraged at the verdict, whereas many African-Americans cheered and showed enormous joy. Many Americans felt that the verdict was racially biased, because the jury was black. It turned out the jury was not all black. The jury had nine minority people on it, and three non-minority. One of the original holdouts was a woman named Denise Ashenback. She originally voted for conviction, but after hearing some of the arguments, she voted for acquittal. She was not black.

Several of the others who voted for acquittal said they thought that Simpson did it, that he was probably guilty, but that the prosecution had failed to prove its case. Several of the other jurors said that if you believe the government's evidence, there was proof beyond a reasonable doubt, but because one piece of evidence was false, they would not convict.

The Simpson case had a negative impact on Americans' perception of justice, though the polls show that people who watched the entire case on television were less surprised and less upset with the verdict. But the typical American came away thinking the justice system was skewed, that the justice system is worthless, that the justice system rewards the rich and punishes the poor, that the justice system is racially skewed and biased.

What people forget is that the nine minority people on the jury were largely selected by the prosecution. They could have conducted the jury trial in a much whiter district, but they didn't. They chose to do it in downtown Los Angeles for the reason that it is the media center. The prosecutor was running for reelection and wanted to be sure there was immediate access to the media and he wanted to show the black citizens of Los Angeles that even a black jury would convict this man. It backfired.

What also backfired was that, instead of starting with the dead body, the way a criminal case is usually begun, the prosecution started by trying to prove that Simpson had abused his wife, and therefore it's likely that he murdered her. There are millions of cases of abuse every year, and very few cases of interspousal murder. A tiny percentage of men who abuse their wives ultimately kill them. So the evidence that he abused her is not particularly compelling. But even without the history of abuse, when a wife has been killed, it's always likely to have been the husband who did it. Most women are killed by people with whom they have a close or personal relationship.

The jury in the first case concluded that there was a reasonable doubt about whether Simpson killed his wife. The jury in the second case concluded he did. Do these two verdicts show that the system is broken, or do the two inconsistent verdicts show that the system really is working?

In some respects, the verdicts show the system is working. It should be harder to convict somebody of a crime than to find them civilly liable. That difference is shown in the burden of proof. In a criminal case, you have to prove guilt beyond a reasonable doubt. In a civil case, all you have to do is prove guilt by a preponderance of the evidence. In a criminal case, the defendant

has a lot of rights. He doesn't have to take the witness stand. He doesn't have to produce evidence that might be incriminating. In a civil case, there are no privileges like that.

The second jury would probably have found Simpson guilty even if they had to find beyond a reasonable doubt. They were a different jury at a different time. They had seen the media reaction. They had seen the criticism that other jurors had gotten for finding the defendant not guilty. Simpson took the witness stand and didn't make a particularly good witness. Also, the prosecution learned from its mistakes. In the first case, they asked Simpson to try on the glove and it didn't fit. They didn't make that mistake the second time.

Can you defend somebody whom you believe is probably guilty? The answer to that has to be yes. The vast majority of people charged with crime in America are guilty. If most defendants were innocent, that would mean lots of people are tried for crimes they didn't commit. It's better to live in a country where very few people are tried for crimes they didn't commit. If lawyers want to keep it that way, they have to defend people whether they're innocent or guilty, especially if they face the death penalty.

Do Americans really want to see guilty people acquitted rather than innocent people convicted? Not all Americans think that way. Many Americans believe it's just as bad to acquit a guilty person as to convict an innocent person. If you don't want to see guilty people acquitted, then we ought to change our standard of proof.

The standard of proof today is proof beyond a reasonable doubt. That means that guilty people go free all the time, and it means that innocent people are only rarely convicted. Innocent people are sometimes convicted. That's why there are appeals. That's why there is *habeas corpus.* That's why we should never stop looking at people in prison and asking, Did we make a mistake?

FOR GREATER UNDERSTANDING

Questions

1. Why is it a good policy for a lawyer to never put a client on the witness stand?
2. Why is it easier to convict someone in a civil case than in a criminal case?

Suggested Reading

Dershowitz, Alan M. *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System*. New York: Simon & Schuster, 1996.

Other Books of Interest

Abramson, Jeffrey, ed. *Postmortem: The O.J. Simpson Case: Justice Confronts Race, Domestic Violence, Lawyers, Money, and the Media*. New York: Basic Books, 1996.

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Schuetz, Janice E., and Lin S. Lilley, eds. *The O.J. Simpson Trials: Rhetoric, Media, and the Law*. Carbondale, IL: Southern Illinois University Press, 1999.

Uelmen, Gerald F. *Lessons from the Trial:* The People *v.* O.J. Simpson. Kansas City, MO: Andrews McMeel Publishing, 1996.

Lecture 6:
Sacco and Vanzetti

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part VIII: "The Trial of Sacco and Vanzetti").

The Sacco and Vanzetti case took place between 1921 and 1927. It started in Dedham and Braintree, Massachusetts, and continued to Boston, where the defendants Sacco and Vanzetti were electrocuted amidst tremendous protests about their innocence.

The Two Anarchists

During the course of a robbery, shootings took place and deaths occurred. The only question was the identity of the people involved and the motive. It did not even matter who fired the shots, because if anybody was killed in the course of a robbery, all the robbers would be equally guilty of conspiracy and felony murder. Suspicion immediately fell on two anarchists from Italy named Nicola Sacco and Bartolomeo Vanzetti, people who spoke with thick Italian accents and were not religious.

This was shortly after the Palmer Raids, when the attorney general of the United States (Alexander Mitchell Palmer) had conducted raids against Americans of ethnic backgrounds from Europe and arrested large numbers of socialists and syndicalists and other such groups. Sacco and Vanzetti were anarchists who hated American capitalism and supported the overthrow of the government. But that's not what they were charged with. They were charged with first degree capital murder.

They adamantly denied their guilt and proclaimed their innocence. They didn't claim they were pacifists. Sacco carried a gun, and they did advocate violence and might very well have justified robbing a store to earn money to promote a cause. Would they advocate killing a poor working-class person? Probably not deliberately, but certainly revolutionary movements and anarchist movements were prepared to kill to bring about what they regarded as ultimate justice and to raise the money necessary to support their cause.

The judge appointed to try the case wasn't interested in who committed the crime. He was interested in seeing people he hated and wished had never come to America put in jail and executed. Judge Webster Thayer was a Brahmin bigot. He hated Italians. He hated Catholics. He hated Irish people. He hated Jews. He hated blacks. But the particular focus of his wrath was Italian socialists and syndicalists. He made rulings that were unfairly unfavorable to the defendants and pushed the jury hard toward conviction. Sure enough, Sacco and Vanzetti were convicted and sentenced to be electrocuted. As soon as the conviction occurred and the sentences were imposed,

there was a worldwide outcry. People representing every stream of political opinion were outraged.

Felix Frankfurter

There was such an outcry that the governor of the state appointed a distinguished committee of university presidents and others to advise him as to whether or not to commute the sentence. The problem is that he appointed as chairman of the committee the president of Harvard, A. Lawrence Lowell, one of the most anti-Italian bigots in the history of Massachusetts. He had no interest in the facts. He was only interested in justifying Massachusetts justice. Fortunately for Sacco and Vanzetti, there was a young professor at Harvard Law School named Felix Frankfurter, the only Jewish professor at Harvard Law School. Although not a radical, he was an immigrant from Vienna who had come to this country at a young age and had a brilliant record. He had no sympathy for Sacco and Vanzetti. He was anti-syndicalist and anti-socialist, but he didn't believe they were guilty, and he wrote a stirring article for the *Atlantic Monthly* trying to prove that Sacco and Vanzetti were innocent and that the trial was an injustice.

President Lowell was furious at him, because now he had two Harvard people on different sides of the cases and Frankfurter wrote a very persuasive brief in favor of Sacco and Vanzetti. Lowell could not respond to it, but he basically said that the trial had been fair and gave the governor cover to persist in the execution of Sacco and Vanzetti.

Judicial Homicide

There was forensic evidence that had been produced since the trial, ballistic evidence, and other kinds of evidence that cast real doubt on the conviction. In fact, the ballistic evidence that favored the conviction was weak. The best the prosecution could say was that the bullet that killed the victim in the robbery was consistent with coming from the gun of either Sacco or Vanzetti. The problem was that many bullets would be consistent with it and it was consistent with many, many guns. The ballistic evidence was essentially worthless. There was other evidence, but it was not particularly compelling.

In addition, the judge said that it was evidence of their own consciousness of guilt that convicted them. But it was a Brahmin judging Italian-American immigrants, and certainly the Brahmin judge would not be in a position to make these kinds of cross-cultural judgments about how someone would behave if they were falsely accused of a crime, nor would the jury that sat in this case. So the persuasiveness of consciousness of guilt in a murder case carrying capital punishment is very questionable. You don't execute someone because they were sweating or they looked nervous.

On August 22, 1927, they were finally executed. The warrant of execution, the death certificate, designates that the cause of death was "judicial homicide." Judicial homicide was the way in which executions were described in those days. Homicide simply means the killing of a human being. Not all homicides are crimes, but there were many who believed this was a judicial homicide in the broader sense of that term, that judges actually killed two innocent people.

The dispute still hasn't died years and years after their execution. A few years ago, two books came out revisiting the case. Both of them claimed they had looked at the evidence, reconsidered the forensics, and had new information. Each claimed to resolve the question with finality. The remarkable thing is that each came to opposite conclusions. To complicate matters, there have been recent suggestions that Sacco was guilty and Vanzetti was innocent, and vice versa.

The Rule of Man

How then should one think about a case in which it will never be clear whether the defendants were guilty or innocent? Does the Sacco and Vanzetti case fit among the cases where innocent people were convicted? Does it fit among the cases where guilty people were convicted and justly punished? The one category it fits into is the category of cases where the process failed, where bigotry, racism, anti-Italian feelings, and anti-immigrant feelings played more of a role than the evidence.

This was a time when Italian-Americans couldn't get jobs in law firms, when Irish-Americans couldn't get jobs in law firms. A particular threat was posed by those who saw America as a target for their change, a new place to export what their enemies called Bolshevism or syndicalism or socialism. As with McCarthyism, the enemy was real from the point of view of the Brahmins, but the means used to stifle the enemy raised daunting questions about means and ends.

Today, such a trial would not likely be conducted against two possibly innocent Italian-Americans. Today, it's more likely to be Arab-Americans or Muslim-Americans. Every generation has those defendants who are less likely to obtain a fair trial than other defendants. If a Brahmin defendant had been put on trial for killing an Italian working-class person based on exactly the same evidence as in the Sacco and Vanzetti case, he never would have been convicted.

The best proof of the bigotry of the system is another case that took place about thirty years earlier, in 1893, in Fall River, Massachusetts: the trial of Lizzie Borden. Everybody knew that Lizzie Borden murdered her father and mother, yet she was acquitted. Why? Because she was a good kid who came from a good family and she was a white Anglo-Saxon. It turns out that who you kill and who you are may be as important in predicting the outcome of a case as what the evidence against you is.

In the Lizzie Borden case, the evidence was, conservatively speaking, ten times stronger than in the Sacco and Vanzetti case. She had motive. She had means. She had tried to get weapons to murder her parents in a different way. They had all the physical evidence, and yet the jury acquitted this good girl from this good town.

How do you create a legal system that protects against the rule of man and woman, rather than the rule of law? It's difficult to do, particularly in the United States, because we have trial by jury. This democratizes justice. It allows every person to have a chance to sit on a jury. But it also reflects the biases of the time. One of the ways of protecting against that kind of bigotry is to have juries that in some ways reflect the populations from which they

come. Unfortunately, diverse juries also lead to hung juries, because when you have different jurors with different backgrounds, you'll more likely get division among the jurors. It's not an accident that at the same time we started getting diversity among juries, some states moved away from unanimous juries and toward nine-to-three votes in juries.

Is the absence of a jury system a safeguard? Some people think the European system, where professional judges decide cases, is more protective and more likely to impose the rule of law and less likely to impose the whim of human beings. But judges often come from elite backgrounds and they consciously or unconsciously reflect their own backgrounds. They can also reflect racial biases.

FOR GREATER UNDERSTANDING

Questions

1. How were Sacco and Vanzetti victims of the time in which they lived?
2. Why is it hard to protect against bias in the jury-trial system?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Avrich, Paul. *Sacco and Vanzetti*. Princeton, NJ: Princeton University Press, 1996.

Frankfurter, Felix. *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen*. New York: Little, Brown, 1962.

Topp, Michael M. *The Sacco and Vanzetti Case: A Brief History with Documents*. New York: Bedford/St. Martin's, 2004.

Lecture 7:
Claus von Bülow

The Suggested Reading for this lecture is Alan M. Dershowitz's *Reversal of Fortune: Inside the von Bülow Case.*

The appeal of Claus von Bülow took place in the early 1980s. Claus von Bülow was a socialite, a prominent, wealthy opera lover who had been a barrister in England and had married one of the world's wealthiest and most beautiful heiresses, Martha "Sunny" Sharp Crawford von Aersperg von Bülow. He was accused of trying to kill her by injecting her with insulin.

It was a case that had everything: lust (he was having an affair), secrets, wealth, and aristocracy. It allowed Americans to voyeuristically get a sense of what it must be like to live among the beautiful rich.

A Case That Could Not Be Won

Evidence of von Bülow's guilt seemed overwhelming. They had found insulin on a needle in a case that belonged to him. They had found insulin in his wife's body in abnormal amounts that could only have been injected extrinsically. The medical testimony was that she had died of an insulin overdose. It seemed conclusive that he was convicted based exclusively on the medical evidence.

Ultimately, it was proved beyond any doubt that not only was he innocent, but that Sunny von Bülow had gone into two comas as a result of her self-administration of barbiturates and pharmaceuticals.

Forensic Evidence

There had been proof that there had been insulin in Sunny von Bülow's body. This was in fact a mistake. There had been three readings of her blood insulin. One was inconclusive. One was very low, and only one was very high. The rule of medicine is that if there are three readings, one can only be accepted if it's corroborated by another. There was no corroboration that she had a high level of insulin in her blood.

What about the insulin on the needle? It was demonstrated that the insulin on the needle was not from a needle that had been injected into anyone's body. Once a needle is injected into the body, the body acts as a swab and the insulin is spread over the needle. The insulin found in the case was encrusted over the tip, which proved to the satisfaction of the experts that the needle had been dipped in insulin, rather than injected. Finally and conclusively, it was proven that the coma was not caused by insulin, but by an overdose of barbiturates coupled with an overdose of sugar by a woman who was hypoglycemic. It was also demonstrated that this was a woman who abused

pharmaceuticals. She had taken more than eighty aspirin at one time and had smoked cigarettes while in an oxygen tent.

She had had two comas, and she recovered from the first coma rather quickly. She knew her own actions had put her into her first coma, and she therefore didn't want any investigations. She had told Claus von Bülow that if she ever got sick again to not call a doctor, and when she went into her second coma, Claus von Bülow did not call a doctor right away, but finally, after seeing her in a desperate situation, he called the doctor.

In the second coma, no one could bring her back, and that was the coma that Claus von Bülow was placed on trial for. The appeal was a difficult one, because an appellate court in Rhode Island had to be persuaded that there was insufficient evidence in the case that would justify a conviction of assault with intent to murder.

The von Aersperg family, Sunny's family, was able to hire all kinds of lawyers and experts. The main lawyer for the von Aersperg family took careful notes of every interview he conducted. The Court of Appeals ruled that von Bülow's lawyers were entitled to see all the notes, and those notes were a bonanza. They showed that there was no insulin, that the maid who had testified against Claus von Bülow at the first trial had lied, and that she had falsely claimed that she had seen insulin, when she had told the lawyer during the interview that she hadn't seen any sign of insulin, that everything was scratched off the vial and you couldn't read what was on it.

In the end, the second jury quickly rendered a verdict of not guilty.

Two Trials

There were two trials, one trial before the appeal and one trial after the appeal. The first trial resulted in a unanimous verdict of conviction. The second trial resulted in a unanimous verdict of acquittal. Both juries consisted of people from Providence, Rhode Island. The difference was the appeal itself, which provided an opportunity to set the court right on what would be admitted into evidence and what the proper instruction was. It provided an opportunity to think hard about the new evidence, because it is best if an appeal is based on more than just the preceding trial.

An appeal can be combined with a new trial motion based on a new investigation. Appellate judges are more likely to reverse a conviction if they have a doubt in their own mind that the defendant is guilty. There is a lot of discretion that appellate judges have in viewing legal issues and viewing the totality of the evidence. Judges and their peer groups have to be persuaded that there is at least some realistic possibility that this defendant is innocent and that this is not an exercise in futility. Once this barrier is overcome, judges are much more likely to give weight to a legal argument.

In law school, they teach that the strength of the legal argument will determine the outcome of the appeal. But unless you can shake the certainty the judges have coming into an appeal that the defendant is always guilty, you have little chance of winning your case.

In most cases where a reversal on conviction has been won, there has not been a conviction the second time around. There are some cases in which

the reversal of the conviction does result in a second conviction, and then you have to appeal again. It's rare that a second reversal will occur.

In the von Bülow case, the court eventually reversed the conviction in a divided vote, but the jury was unanimous in its acquittal the second time around. The lesson of the von Bülow case is that appeals matter. You can, by raising issues on appeal, increase the chances of getting justice done.

Above Review

The only court that is above review is the Supreme Court of the United States. If there ever were a court higher than the Supreme Court, it would often correct its mistakes, because judges make mistakes, and juries make mistakes. No legal system can ever operate mistake free. The question is the kind of procedure you build into the system to correct the errors, and the appellate system is built in. In fact, many jurisdictions now have multiple levels of appeal.

People think the United States Supreme Court reviews lots and lots of cases, but they actually review only about seventy-five cases a year out of several thousand that are brought to their attention. A tiny number of questions get reviewed in the Supreme Court, and most of them are not brought by criminal defendants. Many are brought by governments who lost the cases below and by large corporations. In fact, many argue that the Supreme Court has become a court of last resort for the powerful rather than for the individual. But it is the highest appellate court and appellate courts are essential to keeping justice uniform and for maintaining some control over errant judges.

Trying Cases in the Press

One of the memorable aspects of the Claus von Bülow case was that it was one of the first cases in modern time in which television played a major role in shaping public opinion. This was the great media case of the 1980s and a prelude to the O.J. Simpson case. Nothing could be done by anybody in the case that didn't make it into the media. When you have a case that's so much in the media, you must not ignore that reality.

People wonder whether it is proper to try a case in the press. A simple answer is that a case should be tried wherever the prosecution tries its case. Most clients would never want their names in the press. But once the prosecution is trying a client in front of the media, the defense has to respond in front of the media.

Would it be better to adopt the English system, in which trials are not allowed to be conducted in the press, where it is against the rules to give interviews during trials? The English system would never work in America, which is a media-saturated society, and trials are a central focus of the media. To ignore that reality is to provide a client ineffective assistance of counsel. To be a good lawyer today, one must be sensitive to the media. One must use the media to the extent it is permissible ethically and morally to present a case. Trial by media may be good or bad, but it's not the role of the defense lawyer to make that judgment. It's the role of the defense lawyer to defend his client wherever the prosecution takes the case.

FOR GREATER UNDERSTANDING

Questions

1. How did the von Aerspergs' main lawyer unwittingly help to acquit von Bülow?
2. When does it become necessary for a defense lawyer to try his case in the media? Why?

Suggested Reading

Dershowitz, Alan M. *Reversal of Fortune: Inside the von Bülow Case*. New York: Random House, 1986.

Other Books of Interest

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

———. *The Best Defense*. New York: Vintage, 1983.

Hariman, Robert, ed. *Popular Trials: Rhetoric, Mass Media, and the Law*. Tuscaloosa, AL: University of Alabama Press, 1993.

Lecture 8:
Bernhard Goetz

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part XIII: "The Bernhard Goetz Case").

In the city of New York on the subway, an event occurred that riveted the country and focused attention on crime and vigilante justice. A man gets on a train. He sits down next to a group of people, and they start to hassle him. In this case, there were racial tensions. It was the height of an urban crime wave. And the man who sat down was Bernhard Goetz, and he became known as the subway vigilante.

A Disproportionate Act?

Several years earlier, Goetz had been mugged, he claims, by a group of African-American youths. After that, he got an illegal gun, a special fast-draw holster, and bullets prepared especially for combat. He went down into the subway every day and waited. One day, a group of African-American kids got on the subway. They had screwdrivers in their pants that they were probably going to use to break into vending machines. Bernhard Goetz sat down among them, probably quite deliberately and provocatively. Immediately thereafter, one of the kids turned to him and said, "How are you?" And another said, "Give me five dollars." At that point, Goetz pulled out his gun and simply lined up all the kids that had provoked him and shot them all.

None of them was killed, but one of them was permanently injured. Goetz walked out the back door of the train, walked onto the train tracks, and escaped into the darkness of the subway tunnel. This only enhanced his reputation as the subway vigilante, because nobody knew who he was.

He went up North and gave an interview and bragged about what he'd done. He said he'd stood up for the people of New York, and then he surrendered and returned to the city, expecting a hero's reception. What he got was more of a mixed reception. He was a hero to some, including some African-Americans and some African-American leaders who said, "Crime is a serious matter in New York, and it's about time someone responded." But for the most part, white and black leadership condemned the action as disproportionate and as taking the law into his own hands.

Bernhard Goetz was put on trial for a variety of crimes, from attempted murder to assault to carrying an illegal weapon. The case was put on trial by a venerable and famous New York prosecutor, Robert Morgenthau, who had been the prosecutor for many years and is regarded as a kind of legend. Initially, the grand jury refused to indict, but when pressure mounted for a trial, the grand jury was reconvened and an indictment ensued.

Bernhard Goetz had a formidable lawyer on his side, a man named Barry Slotnick, who was ideologically committed to the actions taken by Bernhard Goetz. He believed that Goetz had done the right thing, and he believed it was good for New York City to see somebody take a stand against crime.

The most seriously injured of the youths retained William M. Kunstler, a radical lawyer on the left, who saw this as simply an attempted murder, and as racism. He claimed the people of New York would never have been as sympathetic if the persons shot had been whites rather than blacks.

Actual Danger

There was a lot of luck involved in the case for Goetz. He had shot promiscuously, and several of his bullets ricocheted through the train, though fortunately, none of the bullets hit innocent bystanders. Imagine how different the case would be if some little old lady or man had been shot and killed by a stray bullet. Rumors spread that the screwdrivers had been sharpened and that Goetz could tell they were armed, although the evidence does not show that he was aware that they had screwdrivers. In a controversial ruling, the judge allowed the jury to learn what the defendant did not know at the time, which was that they had screwdrivers. This allowed the jury to see the actual danger Goetz faced rather than the apparent danger.

A Reasonable Person?

Self-defense is the oldest defense known to human beings. John Adams used it to defend the British soldiers who committed the Boston massacre. Every society in the world has self-defense and, for the most part, the defense says that a person is entitled to defend himself from aggression that threatens his life or that risks great injury to him, but only if the threat is imminent, real, and only if his actions are reasonable and proportionate to the threat. The great Oliver Wendell Holmes got it right when he said that careful calculation should not be expected in the presence of an uplifted knife. And juries clearly favor the innocent alleged victim over the so-called guilty assailant, when the innocent victim uses self-defense, even if the victim uses it disproportionately.

The interesting issue in this case, though, is whether or not Goetz's own particular brand of racism, in which he thought young black people were more dangerous than equivalently dressed or aggressive white people, can be taken into account by a jury, in deciding whether or not Goetz acted reasonably. And so the question raised was whether a reasonable person can also include a reasonable racist person, or whether a reasonable person has to be a reasonable egalitarian person.

Goetz might have been scared and justified in shooting one shot at one of the alleged assailants, but that's not what he did. He lined up his gun and aimed it directly at all of them. And when one of them was hit and began to stand up again, he shot him again and caused the serious injury.

The law of self-defense requires that you stop when the threat has abated and is no longer imminent. But juries make decisions of this kind based on what they would have done. In these cases, doubts are often resolved in favor of the innocent victim, who became the self-defender rather than the

guilty thugs. After all, none of this would have happened if not for the aggressive action of the black kids on the train. Of course, the black kids on the train didn't do anything illegal. Beggars ask for five dollars all the time. But these kids didn't ask for the five dollars as if they were beggars. They sent the subtle message that there would be consequences.

The lawyer for Goetz did a brilliant job creating the fear that Goetz would have felt in the subway. He literally re-created a darkened subway car, showed how narrow it was, how close together the people were, and how difficult it would have been for Goetz to escape. The New York law at the time said that if a person is threatened and he can easily withdraw or retreat, he has to do so.

Perceptions of Guilt

Self-defense is one of the laws in which the law itself matters less than perceptions. In the Goetz case, Goetz was not entitled to shoot the people in the manner in which he shot them. But the jury comprised twelve New Yorkers and the time was the mid-1980s in New York. The subways were regarded as a place of fear. So Bernhard Goetz became a hero to some, a villain to others, and the verdict of the jury reflected the mixed nature of his role.

The jury rendered a split decision. They found him not guilty of attempted murder. But they found him guilty of going into the subway with an unlawfully possessed gun. Normally, the sentence for simply possessing an unlawful gun would be a few days in jail, at most. But the judge at this time decided that the sentence should reflect not only the unlawful nature of the gun, but the crime for which Goetz was acquitted, and so he imposed a much harsher sentence. Bernhard Goetz went off to jail, but that wasn't the end of his career.

Several years after Goetz got out of jail, he decided to run for mayor of New York on a platform based on what he'd done. But by the time he decided to run for mayor of New York, the crime rate had gone down, the city had cleaned up, and Bernhard Goetz was regarded as something of an embarrassment and someone whose racial attitudes no longer reflected the attitudes of many New Yorkers. He got few votes and went into obscurity, claiming that the city is soft on crime and that he saved New York and made it a safe place to live.

The Will of the People

The Bernhard Goetz case represents important issues that confronted America in the last part of the twentieth century. Urban crime became a serious problem in the United States, and it also became a political issue. It became clear that running against crime and putting victims' rights at the top of the agenda, which reflected more an attitude against the rights of criminal defendants, was good politics. It affected elections for district attorney and for president, governor, and mayor. Virtually everybody had to support strong actions against criminal defendants. Everybody had to embrace the death penalty. Everybody had to favor broad definitions of self-defense. America became the only country in the Western world where crime was a major issue in politics. But we elect our prosecutors. We elect our judges. So crime and justice have become political issues. Presidents run on crime.

Supreme Court nominees get nominated, at least in part based on their attitudes on law and justice.

The American Civil Liberties Union (ACLU) is called the criminal's lobby. And those candidates who try to run based on civil liberties principles are labeled pro-criminal. This all grows out of an approach that started during the Jacksonian period, the 1830s, when President Jackson tried to popularize almost every part of American life and introduced elections into places where elections had never been held. So we vote for dog catcher and we vote for prosecutors.

In Florida, they also elect public defenders. Imagine what an election must be like for public defender. Candidate A: "I graduated Harvard Law School and I was first in my class and if you vote for me I will win all my cases and the streets of Florida will be filled with criminals." Candidate B: "I graduated last in my class from Joe's Law School and I've never won a case and if you vote for me I will never free anybody. The streets will be safe." The absurdity of having elections for public defender is immense, but it's just as absurd to have elections for prosecutors. After all, the job of the prosecutor shouldn't be to please the public; it should be to do justice. Criminal trials should not be exercises in democracy. The will of the people affected every aspect of the Bernhard Goetz case: the decision not to prosecute Goetz when he was a hero, the decision to change and prosecute Bernhard Goetz, the jury verdict, the acquittal on the charge of attempted murder, and the conviction on the charge of gun possession.

As is typical in cases of this kind, the jury verdict didn't end the legal proceedings. There were civil lawsuits brought on behalf of the person most seriously injured. The original trial was brought in Manhattan, which is a mixed borough and an upper-class borough, but the lawsuit that was brought against Bernhard Goetz was brought in the Bronx, which has a largely minority jury pool. Years later, this jury quickly rendered a verdict against Goetz and held him liable for the injuries he had caused. So the Goetz case will go down in history as a period piece about vigilante justice at a time when many people thought that was the only kind of justice one could get in the New York subways.

FOR GREATER UNDERSTANDING

Questions

1. Would popular opinion of Goetz's actions have been different if the youths he shot had been white?
2. Why is perception such an important factor in self-defense cases?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Fletcher, George P. *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial*. Chicago: University of Chicago Press, 1990.

Lesly, Mark, and Charles Shuttleworth. *Subway Gunman: A Juror's Account of the Bernhard Goetz Trial*. Latham, NY: British American Publishing, Ltd., 1988.

Roehrenbeck, Carol A. People *v.* Goetz*: The Summations and the Charges to the Jury*. Buffalo, NY: William S. Hein & Co., 1989.

Lecture 9:
Mike Tyson

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part XIII: "The Trial of Mike Tyson").

Why would the trial of Mike Tyson be among the most important trials of the twentieth century? After all, he was just a boxer who was accused of raping a young woman at a beauty pageant in Indiana. He was convicted. He served his time. It ruined his career and he never returned to be the great heavyweight champion he was. The reason is that rape is one of the most important, quickly changing, and controversial crimes prosecuted today. The Mike Tyson case presents some of the benefits of the change, and there are many, and some of the disadvantages of these changes. It raises the possibility that in the current climate, people can be convicted of rape based on questionable evidence.

A Tale of Two Cases

The Mike Tyson case comprises two cases. There was the one that was presented to the jury, and that was an extremely compelling case of guilt. The jury learned about a young woman, a virgin, who had come to Indiana to participate in the Miss Black America beauty pageant and left Indiana a rape victim. And they learned about a young woman who had no desire for publicity. Her name was kept secret. She wanted no money or book or movie deals. She didn't hire a lawyer. They learned about a young woman who simply wanted to go out with a celebrity and had no interest in engaging in any sexual activity. And therefore, it was entirely the fault of Mike Tyson's use of force in the hotel room at 3 o'clock in the morning that resulted in the sexual encounter that the prosecution called rape, and which the jury agreed was rape, resulting in Mike Tyson being sentenced to a prison term in the Indiana youth facility.

But then there was the real case. It involved a young woman who had been sexually active before coming to Indiana, who had falsely accused another athlete of raping her—after she had seduced him—and had had to withdraw that claim, who had had to be tested for sexually transmitted diseases (STDs) prior to coming to Indianapolis because of her sexual activity, who had hired a money lawyer immediately upon reporting the rape, which she reported a day later with her mother standing by her side orchestrating the call. She had had a contingency fee agreement with the lawyer, who was to get a percentage of whatever she and her family collected, not only from a lawsuit, but from movie and book rights.

The cases were so dramatically different that four of the jurors said that if they had heard the actual evidence in the case, they would have acquitted

Mike Tyson. Another juror now believes that the woman in the case committed the crime of perjury by testifying falsely at the trial itself.

Behind Closed Doors

Mike Tyson was the former heavyweight champion of the world and was still at the top of his career. He came as one of the guests to the Miss Black America beauty pageant in Indianapolis, and all the young women were gathering around him. Desiree Washington, the victim in this case, jumped on his lap and flirted with him. Both agreed that he would take her out. According to his testimony, he said, "You want to go out?" And she said, "Sure, let's go to a movie." And he said, "No, I'm not interested in going to a movie. You know what I'm interested in," and then he used an explicit word that starts with f indicating what he wanted to do with her. Several days later, Mike Tyson called Desiree Washington to follow through on their initial agreement to go out. It was after midnight and she was getting ready to go to bed, but she agreed to come down and meet with him.

Washington was menstruating, so she wore a pad and borrowed an expensive dress to wear for her date. They went into Mike Tyson's limousine and pulled up to his hotel. She testified under oath that he leaned over to kiss her and that she rejected him. Halfway through the trial, this testimony was revealed in the press, and several women came forward who had been standing near the limo at the time. They called Tyson's lawyer and said that Washington was all over him, that they were kissing and hugging, and that they were holding hands when they walked into the hotel. But the jury never heard the testimony of those women, because the judge ruled the evidence had been presented too late. As the result of that extreme technicality, the jury was denied crucial evidence.

Tyson and Washington went up to the hotel room and, according to her testimony, she went to the bathroom. She removed her panty liner and her pad, and she left the panty liner in the bathroom and came out wearing only her panties and the dress. At this point, the story diverges.

She claims Mike Tyson forced her to have sex with him. He claims she consented to the sexual advance. But interestingly enough, she acknowledges that in the course of the sexual activity, he asked her if she would like to get on top. She said sure, and she explained that it would be easier for her to escape if she was on top. But she never made an effort to escape. They completed the sexual encounter and he took her home.

She then learned that her parents were coming the next day and that all of her friends knew she had had a sexual encounter with Mike Tyson. A few years earlier, she had had voluntary sex with her high school quarterback. When her father found out about it, he threatened to beat her up. At that point, she falsely accused the quarterback of having raped her. Her father then said, "If he raped you, let's go down to the police station and file charges against him." She then withdrew her accusation, and her father in fact beat her up.

Troubling Information

It is possible that Washington concocted the story of being raped by Mike Tyson to avoid a confrontation with her father. She went down with her mother

to the hospital, where she reported she had participated early on in the necking. She told a number of inconsistent stories, but the jury never heard those stories. All the jury heard was a simple pattern of clear rape. The jury also never heard she had a serious financial stake in the case, because the prosecutor refused to allow her private lawyer to attend the trial. Had the private lawyer attended the trial, he would have been there when she testified that she had no contingency fee agreement and had no interest in movie rights. The lawyer would have been obligated to stand up and say that they had a contingency agreement and had discussed movie rights, and that she was interested in suing and collecting a lot of money.

After the trial and the conviction, the lawyer went to the bar in Rhode Island and said, "What am I supposed to do? My client has lied under oath in a criminal trial. I have information that contradicts that, but I learned that information in a confidential manner." The bar in Rhode Island said, "You must come forward. You must tell the court your client lied under oath." So the lawyer brought this to the attention of the Indiana authorities, but the Indiana authorities ignored it and affirmed the conviction.

The judge in the case was a former rape prosecutor who refused to concede there was such a thing as date rape and didn't recognize the difference between violent rape and rape that resulted from a misunderstanding. In Indiana, the prosecutor gets to pick the judge in the case. Of all the judges in Indiana, the prosecutor picked a woman who had been a rape prosecutor and whose sympathies were completely and one-sidedly against anybody accused of rape and in favor of anybody who claimed rape. It was that judge who kept out the testimony of the women who had seen the necking and the kissing before the rape occurred. It was that judge who kept out the evidence of the lawyer who said that he could testify that his own client had testified falsely. It was that judge who kept out evidence that the woman had previously falsely accused another athlete of rape. And then the judge ruled that the appeal itself would be frivolous and sent Mike Tyson immediately to jail, where he remained for the next several years. But one would still think the appeal would have had a good chance of succeeding. But the appellate decision split, two in favor of affirming and two in favor of reversing the decision. When there's a split, the lower court ruling is upheld.

How did the case come to have a tie? Alan Dershowitz, one of Mike Tyson's appeals lawyers, had a brief conversation—before learning who she was—with the wife of the chief justice of Indiana at a class reunion for Yale Law School. Nothing was said that could have affected the case, but two weeks later, the chief justice of Indiana issued an order saying, "I hereby recuse myself from the Mike Tyson case."

The chief justice had been running for reelection several years earlier and was accused of sexually harassing male law clerks in the office. Nonetheless, he won the election and quickly married. Many thought it was not a real marriage, but one to protect him from future accusations. The last thing this judge wanted was to cast the deciding vote that allowed an accused rapist to go free out of fear it would resurrect the story about his own predatory actions. So he used the pretense of his wife's encounter with Alan Dershowitz to recuse himself from the case. To complicate matters, he had written a previous decision

that said that you can't exclude witnesses from testifying because they have come forward late. His prior decision would have inclined him to rule in Tyson's favor.

A Difficult Crime to Prosecute

Plainly, the rules of rape have changed in a positive direction. Rape shield laws are very important. They protect a woman from having her prior sexual life spread all over. They prevent defense attorneys from engaging in extortion and keeping people who have been raped from testifying. But should it be covered by rape shield laws if a woman has falsely accused someone of rape in the past? Someone who has falsely accused someone of rape may do so again.

In the old days, a person could not get a rape prosecution to succeed by simply testifying that she had been raped. It was the only crime for which you needed corroboration, and that has changed. And for the better. There's no reason why a woman's testimony should not be believed so long as all the evidence comes in on all sides, and as long the jury can fairly assess the credibility of the complaining witnesses, the credibility of the defendant, and the total credibility of the case.

Rape is one of the most difficult crimes to prosecute accurately and fairly, along with child molestation. There are more cases of actual rapes and molestations that occur and that aren't prosecuted than any other crime, and most would agree there are more instances of rapists being acquitted than of any other crime. But rape has a considerable number of false convictions. Juries will likely err on the side of finding guilt in close cases. Second of all, many of these cases are close cases. And the law is unclear on what level of consent is required.

Only Mike Tyson and Desiree Washington will ever know what went on in that hotel room, but the jury in that case was denied important information that could have helped them come to an honest, fuller, and better decision about what happened. When there's a doubt, should it be resolved in favor of the defendant or the prosecution? Is it better for ten guilty rapists to go free than for one possibly innocent nonrapist to be wrongfully prosecuted and convicted? The trial of Mike Tyson stands for where we are going in this extremely complicated area of rape. The trial of Mike Tyson will go down as a turning point and an important reflection of the changing nature of attitudes toward rape in America.

FOR GREATER UNDERSTANDING

Questions

1. How would public perception of the Mike Tyson case have been different if all the facts in the case were made known?
2. What questions does the Mike Tyson trial raise about whether doubt should be resolved in favor of the defendant or the prosecution in close cases?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Cuklanz, Lisa M. *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change*. Philadelphia: University of Pennsylvania Press, 1999.

Roberts, Randy, and J. Gregory Garrison. *Heavy Justice: The Trial of Mike Tyson*. Tuscaloosa, AL: University of Alabama Press, 2000.

Lecture 10:
Roe v. *Wade*

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part XII: "*Roe* v. *Wade*").

One of the most significant cases of the entire twentieth century, certainly from a political perspective, is the Supreme Court's decision in *Roe* v. *Wade,* the decision that gave women the right to choose whether to have an abortion or to give birth to a child.

Roe v. *Wade* became the focal point for many political battles, and it also became a significant litmus test for appointment to the United States Supreme Court.

A Constitutional Right

A woman's right to choose abortion was becoming acceptable in most parts of the world even before the United States Supreme Court rendered its decision in 1973. Most European countries had legalized abortion, and many other countries, even some Catholic countries, had permitted abortion to go forward.

In 1973, the Supreme Court of the United States constitutionalized the issue and ruled that a woman, at least during the first trimester, has a constitutional right, an unequivocal right, to abort her own baby for any reason whatsoever.

The woman in the case of *Roe* v. *Wade* was named Roe to protect her privacy. Her name was Norma McCorvey. In the case, she claimed that her pregnancy had been caused by an interracial gang rape.

It's not clear whether the lawyers believed the story of rape, because they don't actually allege it in the court papers, but in all the media coverage and discussion of the case, the underlying assumption was that she was the victim of rape.

The whole story was a lie. She had simply gotten pregnant and decided to lie about it. She later changed her mind completely and became a strong opponent of any abortion, claiming that she was forced to lie about it by pro-abortion and pro-choice activists.

Was it right for the Supreme Court to constitutionalize a woman's right to choose an abortion? There is nothing in the Constitution about abortion. There's also nothing in the Bible about abortion. Neither the Constitution nor the Bible speak to the issue of abortion.

Yet the Supreme Court was asked to decide whether a woman's right to choose an abortion is a fundamental constitutional right, and they concluded that it was. They did it by finding a right of marital privacy, of procreational privacy. The first case involved a married couple in New Haven, Connecticut,

that wanted access to birth control information. The Supreme Court held, in a decision called *Griswold* v. *Connecticut*, that there was a privacy right that married couples had to have birth control information given to them without fear of criminal prosecution.

The Constitution doesn't mention the right of privacy. But the Fourth Amendment states the right of people to be secure in their persons, homes, and affects (secure was another word for private).

The Ninth and Tenth Amendments basically state that this is a government of limited powers and the rights not given to the government expressly by the Constitution are reserved to the people. Therefore, the question is not whether there is a right of privacy in the Constitution, but where the government gets the power to intrude into the private decisions of citizens. If you ask the question that way, a negative constitutional right develops.

A Giant Leap

In *Roe* v. *Wade,* the Supreme Court makes the leap from birth control to abortion. Birth control obviously involves privacy. There is no third party, no fetus. It's an attempt to practice sex in a way that prevents pregnancy. That is very different from saying that a woman has the right to terminate a pregnancy once it occurs. For many people, once conception occurs, it becomes an issue of the woman's right of privacy juxtaposed against the fetus's right to develop into a human being.

If a woman were pregnant and desperately wanted to have the child and a man attacked her and beat her stomach purposely to kill the fetus, it would be an extremely serious crime, even if the mother wasn't herself hurt. So the fetus in the body of a woman who wants to bear it has a protected legal status. Does it follow from that that the fetus is a live human being and that the woman herself can't abort that fetus?

A rational distinction can be made that goes along the following lines. If the woman decides the fetus is to be born, it's a life and deserving of protection. If the woman decides the fetus is not to be born, it then is an appendage and can be removed as easily as a person removes an appendix.

It's precisely these kinds of distinctions that are generally made by the legislature and not by the Supreme Court. Many scholars believe in a woman's right to choose, but do not believe that *Roe* v. *Wade* was properly decided, because the issue of abortion should not be made a constitutional issue. It should be left to the states and the legislatures.

Politics

Supreme Court justices are not supposed to consider politics, but inevitably, they do. *Roe* v. *Wade,* by constitutionalizing a woman's right to choose abortion, took it out of the political process, and that had some very negative effects. It energized the right-to-life movement and it created a major political force in America that didn't exist previously.

At the same time that that happened, the right-to-choose movement fell asleep at the wheel. They had won. They had justices on their side. They didn't need to create grass roots support for their movement. Politically, the opponents of abortion were energized and created a mass political

movement, and the supporters of abortion lost the opportunity to create a mass movement.

Nonetheless, a majority of Americans today favor a woman's right to choose, at least in the first trimester. But now that it's become constitutionalized, it's no longer an issue that is prominent in political elections. Take a family that is conservative in financial outlook, but who are not religious or social conservatives. Prior to *Roe* v. *Wade,* their pocketbook would incline them to vote Republican, but their desire to make sure their daughter or niece had access to abortion would incline them to vote for either Democrats or for Rockefeller Republicans (moderate Republicans). The day *Roe* v. *Wade* was decided marked the end of Rockefeller Republicanism, because the issue was no longer of concern to voters. Therefore, that couple that wanted to vote their pocketbook found it much easier to vote for the Republican Party, and they could vote anti-choice Republicans, because they couldn't take away the right to abortion. It strengthened the right wing of the Republican Party. There was no longer a branch of the Republican Party that was pro-choice. The Republican Party was easily captured by the religious right, and a culture war ensued in the United States. This proved to be a disaster for the Democratic Party and for liberals in general, because what they had done was turn over to the courts an issue on which they would have won elections.

Another reason why it has been a negative in American political and legal history is that it has become *the* litmus test for Supreme Court appointments. Legislatures can't do anything about it. The only way to change that is to overrule *Roe* v. *Wade*. Overturning *Roe* v. *Wade* has become the primary focus of the religious right and the cultural conservatives in this country. Therefore, it has become a litmus test for appointment to the Supreme Court. Today, you can't get Democratic votes for confirmation unless you support *Roe* v. *Wade*, and it's hard to get Republican votes unless you oppose *Roe* v. *Wade*.

So it's led to people coming up for Supreme Court nomination who refuse to expose their positions on *Roe* v. *Wade*. Today, it's impossible for a nominee, certainly a nominee of the Republican Party, to express either support for or opposition to *Roe* v. *Wade*.

The Future of Abortion

It is likely that *Roe* v. *Wade* will not be overruled, because it will be bad for the Supreme Court to overrule *Roe* v. *Wade*. It will be bad for the Republican Party to overrule it, because it would give the Democrats a great issue in all upcoming elections. But it will be chipped away at. Every opportunity to expand *Roe* v. *Wade* will be rejected and every opportunity to cut back slightly on *Roe* v. *Wade* will be seized upon.

Science will narrow the debate over *Roe* v. *Wade*. The morning-after pill will be used widely and will end the issue of very early abortion. That will become no longer an issue of abortion; it will become an issue of birth control. And the majority of Americans will see the morning-after pill not as an abortion, but as a mechanism of birth control.

At the late end, the right-to-life people will prevail, as we're able to move back the time in a woman's pregnancy when the fetus is viable and when the

person can actually produce a live baby capable of surviving. The American public does not support late-term abortions, particularly late-term abortions in which the fetus can be removed from the woman without risk to the mother or child. What will be left will be the target time of second trimester. Sonograms will show that the fetus is very much alive and can grasp and maybe feel pain. But I believe the Supreme Court will continue to permit second trimester abortions. More and more politicians will move toward the center on this issue, saying the number of abortions has to be reduced without reducing the woman's right to choose. When it comes to the health of the mother, abortion will be permitted. So *Roe* v. *Wade* stands for one of those cases that was important in its time, continues to have some importance as a political standard and symbol, but will probably have decreasing importance on the actual issue of abortion, an issue that will continue to divide, challenge, and frustrate many people.

FOR GREATER UNDERSTANDING

Questions

1. Should Norma McCorvey's current opinion on the issue of abortion influence the way that people think of *Roe* v. *Wade*?
2. In terms of rights of privacy, why is the leap from birth control to abortion such a dramatic one?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Hull, N.E.H., and Peter Charles Hoffer. Roe *v.* Wade*: The Abortion Rights Controversy in American History*. Lawrence, KS: University Press of Kansas, 2001.

Lecture 11:
Lawrence v. *Texas*

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part XIV: "The Texas Sodomy Trial and Appeal").

As recently as the end of the twentieth century, it was still against the law, essentially, to be gay (that is, it was a crime to have sex with a person of your own gender).

Liberty Interest

The Supreme Court decision *Bowers* v. *Hardwick* allowed the state of Georgia to make it a crime for two gay men to engage in consensual homosexual conduct in the privacy of their own bedroom. There was a time in America when gays were lynched. Thomas Jefferson, when he wrote a new code for the state of Virginia, made sodomy a capital crime. Many liberals had strong views against homosexuality as recently as the middle of the twentieth century, and the United States Supreme Court legitimated that in one of the worst decisions ever rendered by a high court of justice. Warren Burger, the chief justice of the United States, in his opinion, suggested that gay sex was in some ways worse than rape, and that being gay was an abomination and something that the Bible disapproved of. But then, early in the twenty-first century, the Supreme Court resoundingly struck down all remnants of antigay legislation and made it absolutely clear that the right to practice homosexual sex in the privacy of one's home is a liberty interest protected by the United States Constitution.

The case that gave rise to this Magna Carta for gay and lesbian Americans, *Lawrence* v. *Texas,* was a simple case that originated in Texas. The police received a report of a weapons disturbance. Everybody knew there were no weapons, but it gave the police an excuse to break into the home of a known homosexual. The police found two adult men engaged in sex in the privacy of their own bedroom. John Lawrence was arrested and charged with the Texas misdemeanor of sodomy and brought to trial. It's interesting that the state law of sodomy makes a distinction between the kind of conduct men can engage in with each other and the kind that a man can engage in with a woman. In Texas, a man and a woman may lawfully engage in sodomy. But two people of the same sex who do the same thing are criminals.

Several other states do not make that distinction. They've criminalized all sodomy, including oral-genital contact between a husband and a wife. Plainly, that kind of statute would never survive constitutional attack. If a couple has the right to practice birth control in their home, surely the state can't tell them how to engage in heterosexual sex. The case came before the Supreme Court on the issue not of discrimination between homosexuals and hetero-

sexuals, but on a more profound basic issue, namely, whether or not there is a right, or a liberty interest, in engaging in homosexual sex.

In the Supreme Court decision, Justice Anthony Kennedy wrote what many have called the Magna Carta for gay and lesbian Americans. He wrote that there are two basic reasons that the state could not prohibit what went on in the home of Mr. Lawrence. Number one, it was his home, and the police have limited rights to intrude (though that doesn't mean they have no rights). They can come in and examine or investigate whether or not a person was using drugs in the privacy of one's own home. The Court distinguishes between drugs and a sex act by moving to the next phrase in the opinion, "the more transcendent dimensions."

Justice Kennedy suggests that sex is different, intimate, that it is transcendent. It relates to love, though it doesn't always, and it's different than the use of drugs or other forms of prohibited conduct.

A Broad Ruling

The Court set out a general rule that has enormous implications for the future. The rule counsels against any attempts by the state or a court to define the meaning of a relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.

That is a broad ruling. It basically says that homosexuality as a lifestyle is a protected liberty under the privacy, due-process rights of the United States Constitution. I don't think that any reasonable person could argue that the state should intrude on the private lives of adult homosexuals. But the question is whether that right is a constitutional right or a right that should be enforced by legislation.

One can make a plausible argument that abortion injures. One cannot make a plausible argument that sexual conduct between consenting adults injures. You can argue that the institution of marriage is dependent on two people of opposite sex uniting for procreative purposes, but the Lawrence case doesn't deal with gay marriage, though it is hard to distinguish between the right of gays to engage in important relationships and the choice to marry and legitimate their sexual relationship through the state. The Court would have a difficult time explaining why this ruling doesn't include marriage or at least civil union, because the broad scope of its reasoning would seem to encompass conduct of this kind that legitimates the private conduct itself.

The Court says the case involves two adults who with full and mutual consent engage in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the due-process clause gives them the full right to engage in their conduct without the intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty that the government may not enter.

The vast majority of Americans favor the Supreme Court decision in *Lawrence* v. *Texas.* They support the right of homosexuals to engage in homosexual conduct in the privacy of their own bedrooms, but they do not support gay marriage in most states.

Justice Scalia wrote a scathing dissent, characterizing the majority decision as "a result-oriented expedient." He said that the pillars of society would crumble and the laws against masturbation, fornication, and adultery would be struck down. And he lists a few other things: "bestiality, obscenity." The interesting point is the slippery slope. If homosexual conduct is protected, how about drug use? The Supreme Court has cases asking whether or not medical use of marijuana is permitted, and the Court has generally said no. The state can prohibit the medical use of marijuana and other kinds of activities, but it can't prohibit homosexual conduct in the home. What is the limiting principle?

If one takes the view that the Constitution only gives the states and government limited powers, then there is a broad possible interpretation of this decision. Nearly anything goes in the home unless the state can demonstrate a significant harm.

Texas permits sodomy between a man and a woman, but not when it's done by men with men and women with women. So the Supreme Court could have decided the case on equal protection grounds, saying it's the same act. The problem is that then the states would move toward a more general prohibition of all sodomy. They would simply enforce it only against homosexuals and not against married couples, or they would say it's prohibited, but the rights of marriage trump other powers of the government.

Looking to the Future

The Supreme Court of Massachusetts rendered a decision permitting gay rights several months before the election in the year 2004, and many people felt that that Supreme Court decision was a tremendous help to the Republicans in that national election. A number of states, particularly pivotal states, put referenda on their ballots prohibiting gay marriage, and all of those referenda prevailed. The vast majority of Americans think of marriage as a sacrament, as biblical, as between only a man and a woman. Marriage is a religious exercise, and you surely wouldn't want the state to get into the business of baptizing and circumcising. The state should be involved in those aspects of unions that have implications for civil society (namely, insurance, adoption), but the word marriage should be reserved for religious institutions. The key to making it equal is that nobody gets to marry by the state. The state only gives civil union, and religion adds the sanctity of marriage.

Lawrence v. *Texas* is a case for the future in much the way that *Roe* v. *Wade* looks to the past. It changes the nature of constitutional law when it relates to liberty interests, but it only legitimates the rights of adult gays to engage in sexual conduct in the privacy of their home. But the logic of the opinion validates the homosexual lifestyle and basically says that the Constitution requires the state to show a compelling interest before discriminating against people based on sexual orientation or sexual choice.

Will the Supreme Court follow the logic of its opinion to its inevitable result? The Supreme Court that rendered the decision is no longer the same. There have been several new additions, and when justices change, opinions change. Will we ever move back to a point where homosexual conduct is prohibited by law and criminalized? Absolutely not. But will it legitimize gay marriage or strike down the Army's gay-marriage policy? Probably not. For the moment,

it will be limited to homosexual conduct in the privacy of the home, but let's not diminish the importance of that. The fact that a gay person had to engage in criminal conduct to satisfy his or her emotional and sexual needs sent a terrible message of double standard, a terrible message of discrimination. It made people have to choose between obeying the law and obeying the needs of their psyche and the needs of their emotional callings.

FOR GREATER UNDERSTANDING

Questions

1. Why are many Americans supportive of the right to homosexual conduct in private but at the same time opposed to gay marriage?
2. What are the possible "slippery slope" implications of *Lawrence* v. *Texas*?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Pinello, Daniel R. *Gay Rights and American Law*. New York: Cambridge University Press, 2003.

Rimmerman, Craig A., Kenneth D. Wald, and Clyde Wilcox. *The Politics of Gay Rights*. Chicago: University of Chicago Press, 2000.

Lecture 12:
Bill Clinton

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part XIII: "The Clinton Impeachment Trial").

The most important political case of the twentieth century was almost certainly the impeachment of President Bill Clinton. Impeachment is a very, very rare remedy invoked in our history, and it has never succeeded, although the resignation of Richard Nixon is as close as we have come. The other two impeachments of presidents resulted in successful impeachments, but failed trials. And the impeachment of Bill Clinton was probably the most unusual and one not contemplated by the framers of the Constitution.

Perjury

It's hard to imagine the Founders contemplating the extraordinary power to impeach a duly elected president for lying about sex under oath in an unsuccessful effort to keep secret an improper sexual relationship. Nonetheless, the impeachment of President Clinton threatened a constitutional crisis, primarily because the impeachment mechanism was supposed to be reserved for the most extraordinary derelictions of office, high crimes and misdemeanors, crimes of state, treason, and failing to perform one's duty. Yet in this case, the power was so trivialized that the United States became the mockery of the rest of the world.

An Inexplicable Decision

A lie can easily be elevated into a serious crime when it's done under oath. The remarkable thing about the Clinton impeachment is that it didn't have to happen. It was largely the fault of Clinton's lawyer. Clinton was not impeached for having a sexual encounter in the Oval Office. He was impeached for testifying at a deposition and allegedly committing perjury. But why did Clinton testify at a deposition about his sex life?

Bill Clinton was being sued because of what he was alleged to have done while he was the governor of Arkansas (namely, engage in sexual harassment with somebody who worked for the state of Arkansas). As part of the lawsuit, he was being asked to be deposed. The interesting thing about the case is that he was being sued for a relatively small amount of money: $750,000. Considering the legal fees that were required, a case like this would be settled for a fraction of that amount. But Paula Jones didn't settle, and the reason is that the people who were representing her in the case saw it not as a simple sexual harassment case, but as a way of bringing down the president. Bill Clinton thought he had no choice but to respond to the deposition.

A Bad Decision

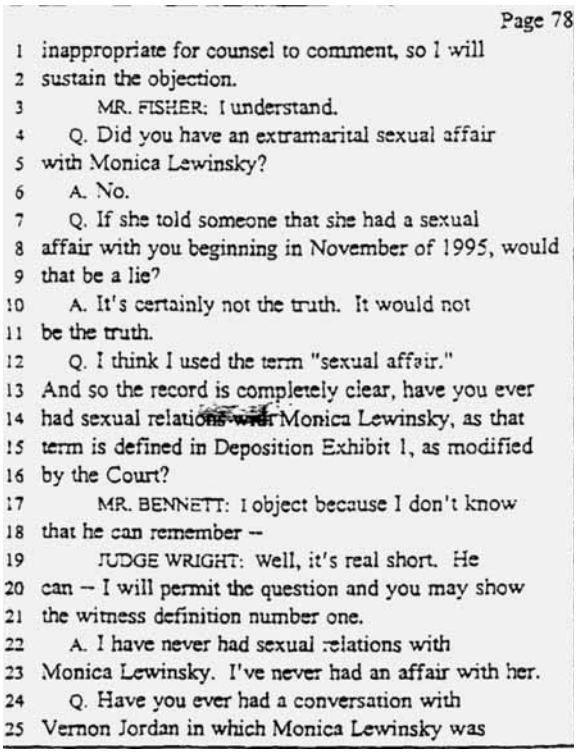
In a civil case, you never have to be deposed. If you refuse, you will lose the lawsuit. But if you cannot testify truthfully, it's always better to lose a lawsuit. There's no great stigma attached to that, but it is a crime to testify falsely under oath.

What Clinton's lawyer refused to tell him was that there was another option. Whenever you're sued, particularly when you're sued for a certain amount of money, you can end the litigation by simply taking that amount of money in a certified check and depositing it with the clerk of the court. That's not settling the case, that's simply submitting.

Bill Clinton was never told he had that option, because his lawyer, Robert Bennett, said it would have been a foolish option to pursue and that Clinton would have opened himself up to other lawsuits. That's not necessarily the case, because the statute of limitations on these lawsuits was quickly winding down, and if there were people willing to sue him, they would have sued him already.

Hilary Rodham Clinton once said that there was a vast right-wing conspiracy out to get President Clinton and her. She may have been right, but when there is a conspiracy out to get you, the last thing you do is give the conspirators the opportunity to get you by falling into their trap, and that is precisely what President Clinton did, in two ways.

First, Clinton engaged in the sexual encounter in the Oval Office at a time when he knew he was under investigation by the political right, and at a time when he knew he was being sued for sexual harassment and there would be depositions. The idea of allowing the president to submit to a deposition about his sex life is simply inexplicable. Robert Bennet should have told the president that under no circumstances was he going to testify. It would have been a bad story for a day, but the nation would have been spared a terrible trauma.



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inappropriate for counsel to comment, so I will sustain the objection.

MR. FISHER: I understand.

Q. Did you have an extramarital sexual affair with Monica Lewinsky?

A. No.

Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?

A. It's certainly not the truth. It would not be the truth.

Q. I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?

MR. BENNETT: I object because I don't know that he can remember --

JUDGE WRIGHT: Well, it's real short. He can -- I will permit the question and you may show the witness definition number one.

A. I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.

Q. Have you ever had a conversation with Vernon Jordan in which Monica Lewinsky was

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Page 78 from the videotaped deposition of President Clinton on January 17, 1998. President Clinton's responses are indicated as "A" in this document.

Once President Clinton testified, his lawyer compounded the problem by writing a letter to the judge saying he did not stand by his client's testimony and essentially undercutting his client's testimony, covering his rear end at the expense of his client's. And that put the president in a very difficult situation. It made him vulnerable, and a vote was taken to impeach the president of the United States.

Only twice in U.S. history has a vote been taken to impeach the president, and many people confuse impeachment with removal. Impeachment is an indictment that happens in the House of Representatives. A simple majority is all that is required for impeachment, and it's pretty easy to get one, because if the opposing party is in control and if they stick together, normally there will be enough votes for an impeachment. But an impeachment is only an indictment. There has to be a trial.

The Constitution calls for a criminal trial, in effect, on the floor of the United States Senate. There are one hundred jurors. There is a judge, the chief justice of the United States (at the time, William Rehnquist). To remove a president, you need two-thirds of the vote, and more than a third of the Senate comprised Democrats. The end result was a tie vote, 50-50, and the president was allowed to complete his term.

A Terrible Precedent

Nonetheless, the process of impeaching a president and then having a trial for removal set a terrible precedent for the future. It sent a message that impeachment can be implemented on partisan grounds, without regard to the intent of the Constitution. And there is no judicial review. Because of our separation of powers, even if the removal were improper, there'd be no mechanism for challenging the constitutionality of that removal.

The job of the defense was not to provoke any opposition, and just to let the matter go as smoothly as possible, because they had enough votes to ensure that there would be no removal. There was another goal as well, to try to get some Republican senators to vote against removal, so that the vote against removal would be perceived as bipartisan and the vote for removal would be perceived as partisan. In fact, several Republicans voted against removal. They made a point of condemning the president's actions, but tried to distinguish between improper conduct and a removable offense.

The United States is a country of common law, which means precedent is important. Is the private conduct of the president a proper subject for impeachment and removal? The House of Representatives said yes. The Senate tied, but because of the vote required, said no. The chief justice made no substantive rulings during the case. And so there is a relatively ambiguous historical record.

The Special Prosecutor

The one matter that is hard to ignore in the entire impeachment is the fact that it wasn't done only by the House and the Senate. In this case, a special prosecutor was appointed. In the beginning, an objective neutral prosecutor named Robert Fisk was appointed by the Justice Department to oversee the investigation of Clinton. But then some of the Republicans got concerned

that he wouldn't be sufficiently tough, and they decided instead to appoint Ken Starr, someone seen as an ideological right winger.

Ken Starr took over the investigation, which began as an investigation of financial corruption, of White Water, of Travelgate, of a number of other alleged financial irregularities, but as soon as the incident with Monica Lewinsky surfaced, Starr began to focus his investigation on that sordid affair. He managed to make Monica Lewinsky into a witness for the prosecution over her clear objection. He threatened to bring her mother into the case, threatened to indict her, threatened to make her life miserable, and eventually she cooperated with the investigation and became the focus of the *Starr Report.*

The *Starr Report* went into excruciating detail about the private sex life of the president of the United States. Some people regard the *Starr Report* as pornographic. Bill Clinton is the only president whose sex life has ever been subject to that kind of scrutiny, and the reason lies squarely with his lawyer, who should have taken the position early on that the sex life of the president is beyond the scope of investigation.

A Broken Process

The mechanism of impeachment is broken and has to be fixed. Clarifications are needed as to the grounds for impeachment and removal. The whole concept of the special prosecutor has been called into question. There are no longer independent prosecutors. Special prosecutors are now appointed by the Justice Department. But can the Justice Department be fair in investigating its own people? The independent counsel raised the same question. Can an outside counsel be fair if his only job is to investigate one person?

It's impossible to contemplate a democracy with checks and balances that doesn't include some mechanism for removing a president who clearly deviates from his sworn role and his obligation as commander in chief and president of the United States. But when we trivialize the impeachment process and allow it to be used for partisan purposes, we know that the system is in deep trouble.

The Clinton impeachment came off badly for everybody. Republicans didn't benefit. Many of those who sought impeachment were removed from office. The presidency didn't benefit. The country didn't benefit. The focus of the country on Bill Clinton's alleged improprieties, both in the Oval Office and in front of the Grand Jury and at a deposition, distorted the functions of the Constitution and hopefully will never be repeated.

FOR GREATER UNDERSTANDING

Questions

1. What terrible mistake led to Clinton's impeachment?
2. Why can the Clinton impeachment be considered such a bad precedent?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

McLoughlin, Merrill, ed. *The Impeachment and Trial of President Clinton: The Official Transcripts from the House Judiciary Committee Hearings to the Senate Trial*. New York: Time Books, 1999.

Morris, Irwin L. *Votes, Money, and the Clinton Impeachment*. Boulder, CO: Westview Press, 2002.

Lecture 13:
Bush v. *Gore*

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part XIV: "*Bush* v. *Gore*").

The legal history of the twenty-first century began with the Supreme Court's most disastrous decision in its more than two-hundred year history, namely, *Bush* v. *Gore,* the decision that ended the 2000 presidential election and will go down in legal history as a self-inflicted wound from which the Supreme Court is unlikely to ever fully recover its credibility.

The Other Foot

The test that's used to judge a Supreme Court decision basically is whether it was based on the law or on considerations outside of the law. The best way of testing that question is to ask the "shoe on the other foot" question. If the decision had involved a Democrat who had been ahead in the original count and it was a Republican candidate who called for a recount, if the case had been *Gore* v. *Bush* rather than vice versa, would it have come out the same way? Would the five justices have voted to stop the count? Would the four justices who were against stopping the count have voted to stop the count? If so, then we're talking about a judicial institution that is totally partisan, and there's nothing worse you can say about a court. Yet it seems perfectly clear that if the shoe had been on the other foot, at least some of the justices would have voted differently. Bush might have won anyway, but nobody knew that at the time, so in their mind it was giving the election to Bush.

It's clear that several would have voted the exact opposite way, particularly Justices Antonin Scalia, Clarence Thomas, William Rehnquist, and probably Sandra Day O'Connor. The reason is that the decision was based on an equal protection ground, namely, that it denied equal protection for disputed ballots to be looked at differently in different counties. In some counties, the chads were viewed one way. In other counties, they were viewed in other ways. The answer for that would be to impose uniformity. Instead, they simply stopped the election and said it was too late for any further recount, and so Bush was declared the winner.

The problem with the equal protection analysis is that several of the justices had narrow views of equal protection before they invoked it in this case. Justice Rehnquist in particular had said in previous decisions that equal protection grew out of the Civil War and was designed to protect black slaves who had been freed by the Civil War. The Thirteenth, Fourteenth, and Fifteenth Amendments were about race and certainly not about how to count chads, and the equal protection clause should not be broadly interpreted to

cover all manners of inequality. Most inequalities are not unconstitutional, according to Justice Rehnquist, until *Bush* v. *Gore.* But when *Bush* v. *Gore* came along, he joined an opinion that stopped the election on grounds that equal protection had been violated. Similarly, Justices Scalia and Thomas had had narrow constructions of equal protection and said that it meant in the year 2000 exactly what it would have meant in the year that it was put in the Constitution, that at that time it had nothing to do with how you count ballots in elections.

Partisan Considerations

And so these justices stretched, tugged, and pulled the law to make it come out the way they wanted it to come out. Were they motivated by purely partisan considerations? Sandra Day O'Connor was a prominent Republican operative in Arizona. She invited Republicans who were willing to contribute $25,000 to the Republican Party to come to Washington for a special briefing about how the Supreme Court works, and she had to cancel that when the *Washington Post* got wind of it. She was willing to write a letter on Supreme Court stationery supporting the Republican Party's effort to declare that the United States is a Christian country to be used by Republicans as a way of gathering support in areas of Arizona where they previously had been losing support. So clearly, at least, Justice O'Connor had strong partisan interests in the election.

Other justices as well had stakes in the election. Several were competing to become chief justice, and it was thought at the time that the new chief justice would come from within the court. Some of the Republican justices knew they would never be nominated for chief justice by a Democrat, so they had a partisan interest in the outcome of the election.

What can be made of so important a Supreme Court decision being determined not by voters, but by people who have been appointed for life to the Supreme Court and wear robes of a justice? The very fact that the majority granted a stay even before they heard oral arguments in the case was quite shocking to many legal observers. After all, these same five justices had routinely refused to grant stays in capital cases.

It seems likely that virtually all of the five justices who voted in favor of Bush would have voted against Gore had the case been the exact opposite. But would the four who voted the other way have voted differently? Some of them might very well have voted according to their own partisan predilections, though Justice Stevens and Justice Suter are Republicans. But it's not clear, and two wrongs don't make a right.

It's also speculated that the reason they voted to stop the count in the election was because the Florida Supreme Court had been equally political, and they had to level the playing field by being political as well, that if the case had to be decided by a court, it would be better to decide a national election by the United States Supreme Court than by a local court in Florida. The problem with that thinking is that that's not how the Constitution sets out the process of electing a president. The process is set out state by state. Every state gets to cast a certain number of electoral votes, and state law determines whether or not the vote goes one way or another. Florida law was clear even before this

election. Florida law stipulates that every effort must be made to discern the intention of the voters, and the obligation of the court is to discern the intention of the voters. Following *Bush* v. *Gore,* there have been many attempts to reconstruct the election. Gore probably would have won if there had been a state-wide recount, but that's not something Gore himself had asked for.

If you asked the question more basically, less legally and more politically, of how many people in Florida intended to vote for Bush and how many people intended to vote for Gore, virtually every pundit has concluded that the intention of the voters of Florida in an overwhelming majority was to vote for Gore rather than Bush. But that's not the real issue.

Enduring Decisions

The key point is the enduring decisions of the Supreme Court. In a remarkable sentence in the decision, the Supreme Court essentially said this case should not be used for precedent. Supreme Court decisions and opinions are supposed to be based on precedent, on prior decisions, and they're supposed to become the basis for future decisions. And yet this Supreme Court decision clearly deviates from all past decisions. What this says to a lot of people is that results matter more than process. This was a case of extreme judicial activism, of a court intervening in an ongoing election and stopping an ongoing recount.

This is a court that believes in states' rights, not federal power, yet this Supreme Court decision allowed federal power to overrule states' rights. The State of Florida had a process in place for deciding how to count votes. That process made its own Supreme Court the court of last resort in this matter, and in a number of prior decisions, that state's Supreme Court had ruled that discerning the intent of the voter was the key criteria and errors should always be made favorable to including votes rather than excluding votes. Yet the Supreme Court of the United States intruded and overruled a state decision that was perfectly plausible on its face and consistent with years of precedent.

What does this mean for critics of the Supreme Court? When the decision came down, a number of professors announced quite categorically that one should not question the motives or integrity of the justices, and it has been a mantra of academic scholarship that one shouldn't look behind the opinions. But if a senator said he was voting for a certain bill and it turned out he had been lobbied and campaign contributions had been given to his campaign, that would be investigated. We're entitled to look at senators' and presidents' actual motivations. Why shouldn't we be encouraged to do that with Supreme Court justices? We know that justices often determine cases on the basis of their own ideology, background, partisanship, religious background, and views of law, life, and politics.

Is it important for people to hold the Supreme Court in high regard, to consider the justices as above reproach, or should the justices be questioned and criticized the way other political figures are questioned and criticized? It's easy for brilliant judges to find plausible justifications for what they have already decided is the right decision. That's called result-oriented jurisprudence. If a justice says a case should come out in favor of Bush or Gore, or a particular corporation or individual, that is corrupt. Supreme Court justices

take an oath that they will render justice without regard to individuals, that they will render justice on the basis of the law, on the basis of an objective view of the facts, and if they deviate from that oath, the public has the right to call them to account for it.

The public reaction to *Bush* v. *Gore* was considerable. It really looked like the Supreme Court could not endure as an institution with credibility. For the first months after *Bush* v. *Gore,* critical opinion, academic opinion, and media opinion was almost uniformly derisive of the Supreme Court and of the majority opinion. And then an event occurred in American history that changed all of that, namely, the attack on the United States of September 11, 2001. *Bush* v. *Gore* was taken off the table. Nobody wanted to hear about the possible illegitimacy of the Supreme Court or questions about how our president got into office. America wanted to unite around the president at a time of crisis. And the first way of uniting around the president was to not question his election or the credibility of the institution that had contributed to putting him in office. Even in the face of grave questions about the presidency of George Bush, when public opinion numbers dipped very low, the criticism of *Bush* v. *Gore* did not resurface.

In the end, the Supreme Court survived *Bush* v. *Gore*. It's a case that's taught in constitutional law classes and that's argued about among scholars of the Supreme Court. Although it was one of the most important cases in modern history in the sense of expanding the role of the Supreme Court and giving it a major place in the selection of presidents and in the operation of the electoral college, the case itself is not a case that will endure long into the twenty-first century—provided the Supreme Court never does it again. But if it ever were to inflict this wound again on itself, by coming into an election and deciding it on partisan grounds, that might forever destroy the credibility of a very important institution.

FOR GREATER UNDERSTANDING

Questions

1. What is the best way to judge a Supreme Court decision?
2. What event drew attention away from the Supreme Court decision in *Bush* v. *Gore*?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

Ackerman, Bruce. Bush *v.* Gore*: The Question of Legitimacy*. New Haven, CT: Yale University Press, 2002.

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Lecture 14:
Human Rights in the Face of Terrorism

The Suggested Reading for this lecture is Alan M. Dershowitz's *America on Trial: Inside the Legal Battles That Transformed Our Nation* (Part XIV: "The Case of the Terrorist Detainees—in Guantanamo, on the U.S. Mainland, and in Unknown Places Around the World").

One of the most difficult questions a democracy can ever face is how to try the most villainous people, those who are guilty of crimes against humanity. This is a problem the United States has faced in the past and will face in the future.

Trying War Crimes

This dilemma arose when the United States and Russia defeated the Nazi regime and captured many, but not all, of its leaders. These were people who had killed tens of millions of civilians in an aggressive, unjustified war. Their guilt was manifest and apparent, prompting important leaders in the United States to suggest foregoing trials and simply executing them. That's the traditional military way of ending a war.

But President Roosevelt saw it differently. With the advice of Supreme Court Justice Robert H. Jackson, a decision was finally made to convene a war crimes tribunal. The decision was made to have four powers convene an international court at Nuremburg. The justices were to come from the four victorious countries: England, the United States, the Soviet Union, and France.

Can a trial like this ever be a real trial? Or is it always going to be victor's justice? After all the critics complained, nobody was put on trial for the bombing of Dresden, the fire bombing that caused so many deaths, or the bombs that were dropped on so many civilian targets at Hiroshima and Nagasaki. At the end of the Civil War, the United States put only one person on trial, and that was the head of the prisoner of war camp in which many Northern soldiers died horrible deaths. But no Northern commanders were put on trial for what many regarded as equally bad camps for people who were captured in the South or for Sherman's march through Atlanta.

But can victor's justice be real justice? Can the rules that emerge from a trial like Nuremberg become the foundation for enforceable legal rules against aggressive war and crimes against humanity? That certainly was the goal of Justice Jackson, who took leave from the Supreme Court and served as chief American prosecutor at Nuremberg. He was succeeded by General Telford Taylor, who became the chief prosecutor after Justice Jackson returned to the Supreme Court.

Taylor presided over the trials of the doctors, lawyers, and others who had been complicit in the Nazi atrocities. Under what law should these Nazi leaders be tried? After all, they had mostly complied with German law. Everything had to be documented and legitimated, so they couldn't be tried under

German law. Could they be tried under international law? No real international court of justice was recognized and legitimated, and international law was primarily based on treaties. They decided to look at a consensus of what all civilized societies regarded as core values, and an indictment was drawn up, alleging violations.

The Legacy of Nuremberg

Everybody knew what the conclusion of the trial was going to be, though there were some surprises. In fact, there is a scandal that happened following the Nuremberg trials. The United States appointed John McCloy to be the high commissioner of Germany. He was a German sympathizer and he was sympathetic to the Nazi leaders. Almost immediately, he commuted most of their sentences and restored them to positions of high authority in Germany.

De-Nazification failed miserably. All the companies that had been involved in the mass killings got their property back, and normalcy in Germany was restored in a relatively short time by the Marshall Plan and by John McCloy's re-Nazification of Germany. Although the immediate impact of the Nuremberg trial, the hanging of a few dozen arch criminals, had a symbolic effect, the second message that was sent was one of great concern to the civilized world: If you weren't at the very top of the chain of command, but if you were one of those who was instrumental in carrying out the Nazi program, not only would you be pardoned, but you would be restored to your role of authority and you would suffer virtually no consequences.

It's not surprising that the bottom-line message of Nuremberg was what one cynic said: "We take single murders very seriously, but mass murders are taken somewhat less seriously by the world." The second half of the twentieth century, from the end of the Second World War on, was one of the bloodiest periods of time in the history of the world. We have had genocides in Cambodia, Rwanda, Darfur, and even in Europe itself in the former Yugoslavia. Though a small number of people have been placed on trial for these genocides, certainly the message has not been successfully conveyed that all genocides will be punished and that all of the people who participate will bear heavy consequences.

Countries around the world have established a new court, a permanent court, called the International Criminal Court. It was established not as an organ of the United Nations, but rather as a separate organ decided at the Treaty of Rome. Its goal is to prevent genocide and to have jurisdiction to intervene while genocides are ongoing. This court would have jurisdiction to impose punishments of up to life imprisonment for perpetrators of genocide. The United States has refused to sign on to that court, and though the court does exist and has jurisdiction, and though most of the countries in the world are signatories to it, it remains to be seen whether that court can play an effective role in trying to prevent and punish the kinds of genocides that have plagued the last half of the twentieth century.

The legacy of Nuremberg has continued in various regional courts and specific courts. For example, there was a special court appointed in Rwanda to look at the Rwandan genocide, and that court has punished numerous perpetrators, including several media people. The former Yugoslavia has had a trial

set up at the Hague, and punishment is being meted out, and people are being given jail terms.

The Challenge of Terrorism

The United States now faces the challenge of what to do in Iraq. Can the United States government and the new Iraqi regime fairly try those who perpetrated years of injustice and torture and killings on the Iraqi people? Is it possible to have justice without it being politicized? The problem is that when every country claims universal jurisdiction against every other country, it brings about mini victor's justice trials, and that tends to trivialize real abuses. That's why the International Criminal Court, which is not under the auspices of the United Nations, is a court that holds great promise for the future of bringing justice to the world.

The events of 9/11 and Al Qaeda present great challenges to the world legal system and to the United States legal system. You can't respond to a government, because terrorism is committed by individuals. Of course, some terrorism is state sponsored. The terrorism sponsored by Al Qaeda was appropriately seen as growing out of support by the Taliban regime that controlled Afghanistan, and so the United States did attack Afghanistan and the Taliban regime.

When there are threats of terrorism with mass casualties, inevitably, countries begin to compromise their rules of law. The United States responded to 9/11 in many different ways: the attack on Afghanistan, perhaps the attack on Iraq (though critics have pointed out the lack of a relationship between Al Qaeda and the regime of Saddam Hussein), and most particularly, confinement of large numbers of Arabs and Muslims, who have been held for long periods of time without trial and without a lawful basis in existing legislation.

The United States used a number of tactics. One was the material witness statute. They arrested people not because they had committed any crimes, but because they may be witnesses to crimes committed by others. Plainly, the United States needed a way of simply freezing the situation and detaining these people until they could be checked out. But there was no basis for the use of those kinds of statutes. They were intended to be used when somebody had seen a crime but didn't live in the country and was about to travel away, so you could hold someone as a material witness for a few weeks until the trial occurred. That was not the way they were used against suspected Arab and Muslim terrorists.

Another law that was used was the Immigration Law, which said that everybody living in the United States who was not a citizen had to have certain papers, keep their papers up to date, and remain in the country only for the limited period of time that their visa permitted. Under these statutes, normally, people are simply picked up, held for short periods of time, and then deported, but after 9/11, people were held for long periods of time for purposes of investigation.

And then there were the roundups of captured people abroad. These were not American citizens or residents, so they were simply taken and put in Guantanamo, which is a military base the United States leases from Cuba, or they were simply kept in ships and interrogated.

What Price Freedom?

Could the United States government torture suspected terrorists, like Sheik Khalid Mohammed? There's no question he was exposed to what is called "water boarding." He was placed on a board and then his head was lowered into water for long periods of time, until he was almost rendered unconscious, and then he would be popped back out of the water and asked questions. Nevertheless, the United States government does not consider this torture, because it does not inflict physical pain. At the same time, his nine-year-old son was taken into custody and nobody knows what Mohammed was told about his son or even what happened to his son. But these were lawless actions that took place outside of the United States, sometimes not even by U.S. government officials.

In 2004, the United States Supreme Court decided it had to review some of these cases, and it rendered a series of decisions that are still works in progress. The Supreme Court essentially ruled that the law applies, but that the law has to be flexible and recognize the reality of terrorism. Justice Scalia said the Constitution is a dead document, not a living document. It does not expand and contract. So Justice Scalia insisted that the Confrontation Clause of the Constitution, which entitles every person who is subjected to criminal trial in America to confront his accuser, can't be watered down in the name of terrorism. Whereas Justice O'Connor, Justice Breyer, and some of the others suggested arriving at a compromise solution. So what we're left with is a basic outline of what the law will look like in the twenty-first century as terrorism gets worse and worse. Is there a legal system ready for these attacks? The answer is no.

There are no laws on the books providing for federal quarantine in the event of an infectious disease being spread by a weaponized germ carrier. The United States is completely unprepared for attacks using unconventional weapons, chemicals, or dirty bombs.

How would the United States respond to such an attack? The executive would gain more and more power. Would the courts intervene? The courts have generally not played a major role in preventing the executive from acting. After the attack on Pearl Harbor, the executive responded by imprisoning 110,000 Japanese Americans in concentration camps, and the Supreme Court did not intervene.

After 9/11, the United States didn't confine hundreds of thousands or tens of thousands of Muslim Americans, but too many were confined for too long, and the courts waited too long before they intervened. The courts have now sent an important message: there will be intervention, but it will be limited intervention. The need to fight terrorism must be balanced against sacrifices to civil liberties. In the real world, some liberty inevitably has to be sacrificed in the name of security. It's always a matter of degree. The question is how much people are prepared to give up.

People have already given up anonymity. Nobody objects when they're asked to show a driver's license when boarding an airplane or going into a government building. Some rights inevitably have to be compromised. The United States's constitutional system is the most enduring system in history.

One of the reasons is that it uses general and broad language: “equal protection,” “cruel and unusual punishment,” “no unreasonable searches.” That flexibility has allowed the Constitution to endure many changes. Will it be able to endure and survive terrorism? That is the great question of the twenty-first century.

FOR GREATER UNDERSTANDING

Questions

1. Can victor's justice ever be real justice?
2. What tactics were used by the United States to confine Arabs and Muslims following 9/11?

Suggested Reading

Dershowitz, Alan M. *America on Trial: Inside the Legal Battles That Transformed Our Nation*. New York: Warner Books, 2004.

Other Books of Interest

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