

Michigan Law Review

Volume 96 | Issue 6

1998

Police and Thieves

Rosanna Cavallaro
Suffolk University Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Rosanna Cavallaro, *Police and Thieves*, 96 MICH. L. REV. 1435 (1998).
Available at: <https://repository.law.umich.edu/mlr/vol96/iss6/5>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

POLICE AND THIEVES

Rosanna Cavallaro*

VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA. By *H. Richard Uviller*. New Haven: Yale University Press. 1996. Pp. xvii, 312. \$37.50.

"Whatever it is, you should clean up this city here because this city here is like an open sewer, you know? It's full of filth and scum, and sometimes I can hardly take it."¹

What is it about New York City that has, in the last few years, spawned a series of books attacking the criminal justice system and describing a community in which victims' needs are compelling while the rights of the accused are an impediment to justice? Why does this apocalyptic vision of the system persist, despite statistics demonstrating the sharpest decline in the city's and the nation's crime rates in decades?² What explains the acute detachment from the accused that is at the core of this series of books?

In *Virtual Justice: The Flawed Prosecution of Crime in America*, Richard Uviller³ adds his voice to those of his fellow New Yorkers, including Professor George Fletcher and Judge Harold Rothwax, who have recently advocated reforms of the criminal system.⁴ Among the reforms they advocate are sharp constrictions of the exclusionary rule, the right to counsel, the privilege against self-incrimination, the peremptory challenge, and the admissibility of

* Associate Professor, Suffolk University Law School. A.B. 1983, J.D. 1986, Harvard. — Ed. Thanks to my loving family: Dave, Emma, and Sophia.

1. TAXI DRIVER (Bill Phillips Production 1976) (quoting the character Travis Bickle speaking to presidential candidate Charles Palatine).

2. Violent crime in New York City fell 34% in the period from 1990 through 1995, compared with a national drop of just 6.5%. See William Glaberson, *Safety and Numbers: A Special Report: Crime in Region Is Dropping, but Some Pockets Defy Trend*, N.Y. TIMES, Feb. 27, 1997, at A1.

The decline in New York City's murder rate has far exceeded that in the nation as a whole: the City experienced 972 homicides in 1996, fewer than half of those in 1990. See Michael Cooper, *Steep Drop in Random Killings Signals Shift in New York Crime*, N.Y. TIMES, Dec. 29, 1996, at A25.

3. H. Richard Uviller is Arthur Levitt Professor of Law at Columbia University School of Law.

4. See GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995); HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE (1995). Professor Fletcher teaches at Columbia University Law School. Harold J. Rothwax, who died in October 1997, was a judge of the New York State Supreme Court as well as a lecturer at Columbia University Law School.

expert testimony.⁵ Although ostensibly examining these same issues with the balance of a scholar rather than the voice of an advocate, Uviller's wish list is remarkably congruent with those of the more contentious Fletcher and Rothwax. And like the work of Fletcher and Rothwax, the premise of Uviller's analysis is flawed: the procedural protections he critiques simply have not effected dramatic changes in the investigation and prosecution of crime and the sentencing of defendants.

Criminal justice in New York City is, like the city itself, hardly a national prototype. In terms of volume alone, the system is peculiarly burdened.⁶ In addition, New York presents combined demographics of race⁷ and class,⁸ of access to education,⁹ housing,¹⁰ employment,¹¹ and of the availability of weapons¹² and drugs that

5. See FLETCHER, *supra* note 4, at 28-33, 229-36, 254-55 (use of expert testimony); *id.* at 250-51 (peremptory challenges); ROTHWAX, *supra* note 4, at 35-65 (exclusionary rule); *id.* at 88-106 (right to counsel); *id.* at 66-87, 186-97 (privilege against self-incrimination).

6. Of the 1,864,000 violent crimes reported nationally in 1994, 497,960 occurred in the nation's cities. Of this number, 136,522 — 28% of all urban violent crimes — were committed in New York City. Breaking this statistic down by crime, New York City was the scene of 72,540 (11%) of the nation's 659,870 robberies, 2666 (2.5%) of the nation's 106,014 forcible rapes, 1,561 (6%) of the nation's 24,526 murders, and 59,755 (5%) of the nation's 1,135,000 aggravated assaults. See U.S. Dept. of Justice, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1994, at 60, 138, 238 (1995).

New York City employs 38,000 police officers, more than any other police force in the country. See Amnesty Intl., *United States of America: Police Brutality and Excessive Force in the New York City Police Department* 3 (June 1986).

7. For example, 47.9% of all persons in New York City were non-Hispanic white, 26.3% black, 22.1% Latino (Hispanic), 6.5% Asian or Pacific Islander, and .3% American Indian, Eskimo, or Aleut. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF THE POPULATION: GENERAL POPULATION CHARACTERISTICS: UNITED STATES 468 tbl. 266 (1992).

8. The Census Bureau estimates that 16.3% of families in New York City had incomes in 1989 that were below the poverty level. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF THE POPULATION: SUMMARY OF OCCUPATION, INCOME, AND POVERTY CHARACTERISTICS: METROPOLITAN AREAS 77 tbl. 3. In 1996, approximately 1,007,000, or 11.7% of New York City residents received public assistance and 15.7% received food stamps. See David Firestone, *A Portrait of the City, Painted by the Numbers*, N.Y. TIMES, Sept. 22, 1996, at 43.

9. In 1990, 31.7% of New Yorkers over age 25 had not completed high school. Twenty-three percent had a bachelor's degree or higher education. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS: URBANIZED AREAS at 15 tbl. 1. The public school system in New York is precipitously close to collapse. In the past year, the system has experienced the most severe overcrowding in decades, with 91,000 more students registered than it can comfortably accommodate. See Pam Belluck, *Classes Open in New York City, in Closets, Hallways, Cafeterias*, N.Y. TIMES, Sept. 5, 1996, at A1.

10. In New York City in 1996, some 107 families sought emergency housing daily. There were 5693 families in temporary shelter, staying an average of 223 days. There were 336,000 families on the waiting list for public housing. See Firestone, *supra* note 8.

11. The Bureau of the Census reported a 9% unemployment rate in New York City in 1990. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS: URBANIZED AREAS at 38 tbl. 2.

12. The Mayor's Management Report for 1996 reported that police confiscated 12,631 weapons in 1996 and 14,861 in 1995. See Firestone, *supra* note 8.

appear nowhere else in the United States. This does not, however, prevent Uviller, and other observers, from extrapolating from New York's experience to conclusions about "Criminal Justice" and the "Prosecution of Crime in America." Reliance on so idiosyncratic a model cannot help but produce distortions, and this is one of the pitfalls of Uviller's book.

Those distortions can perhaps be explained and even corrected by examining them as products of a distinctly New York sensibility. Certain crimes have become as closely associated with New York City as Broadway and the Empire State Building. These crimes contribute to the sensibility I try to describe in this review, and I believe that they might go some way toward explaining the subject, tone, and point of view of Uviller's book. The 1964 murder of Catherine "Kitty" Genovese is perhaps the oldest, in our contemporary consciousness, of a long series of episodes that have come to define the New York criminal paradigm: inexplicable brutality met by outrageous indifference. It is now a fixture of urban mythology that Kitty Genovese's assailant committed three separate and ultimately fatal assaults on her, leaving and returning repeatedly, while her neighbors listened to her screams for thirty-five minutes without calling the police.¹³ More recent examples include attacks on young women in Central Park in 1989 and again last year,¹⁴ the deaths of the young daughters of Joel Steinberg and Awilda Lopez,¹⁵ and the controversial subway shootings by Bernhard Goetz.¹⁶

These cases have shaped the city's consciousness of itself. Many New Yorkers live with the impression that they are under siege and cannot walk the streets, ride the subway, or enter Central Park without falling prey to criminal offenders. There is a corresponding impression that all offenders in New York City are inhuman sociopaths, Zodiac killers, and Sons of Sam.¹⁷ Media coverage in New York and nationally compounds the fear of crime,¹⁸ not only by de-

13. See, e.g., Joseph P. Fried, *Killer of Kitty Genovese Is Denied a New Trial*, N.Y. TIMES, Nov. 14, 1995, at B4.

14. See, e.g., Michael T. Kaufman, *New Yorkers Wrestle with a Crime*, N.Y. TIMES, Apr. 28, 1989, at A1 (noting that "[a] week after a jogger was raped and left grievously injured in Central Park during a rampage by teen-agers, New Yorkers are wrestling with often complex and paradoxical feelings about the crime").

15. See Frank Bruni, *The Case of Alisa: A Child Dies, and the Questions Abound*, N.Y. TIMES, Nov. 24, 1995, at B1; Joe Sexton, *Mother of Elisa Izquierdo Pleads Guilty to Murder in a Pivotal Child-Abuse Case*, N.Y. TIMES, June 25, 1996, at B3.

16. See generally GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988).

17. See, e.g., Norimitsu Onishi, *Zodiac Case Suspect Remains an Enigma*, N.Y. TIMES, Dec. 15, 1996, at A51; Howard Blum, *The Suspect Is Quoted on Killings: "It Was a Command . . . I Had a Sign"*, N.Y. TIMES, Aug. 12, 1977, at A1.

18. See THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 69 (Steven R. Donziger ed., 1996) [hereinafter THE REAL WAR ON CRIME] (noting that the National Criminal Justice Commission [NCJC] reported that "[c]overage of

voting disproportionate attention to the extremes,¹⁹ but also by conveying the sense that few criminals are caught and fewer still are convicted or punished.²⁰ Of course, none of these impressions is accurate. The vast majority of crimes and offenders are ordinary, the same as one would find elsewhere in the country, although more numerous. Furthermore, New York City crime rates have dipped dramatically in recent years, demonstrating unambiguously that New York is a safer place now than it has been in a long time.²¹ Yet the mythology of crime in New York seems to transcend the truth. Consequently, a bunker mentality persists among longtime denizens of the city, who cling to a grim image of their own community that they could, if they would, relinquish.

With fear of crime — rather than facts about crime — dominating the debate, the legislative landscape is littered with minimum mandatory sentencing provisions,²² “three strikes” statutes,²³ modifications of the juvenile justice system to allow youthful offenders to be tried as adults and sentenced to adult correctional facilities,²⁴ reintroduction of the death penalty or broadening of its reach,²⁵ and crusades to diminish the quality of inmate life.²⁶ Record-

crime on the three major network television news shows tripled from 571 stories in 1991 to 1,632 stories in 1993 — despite the fact that crime declined slightly over that period” (citing 1993 — *The Year in Review*, MEDIA MONITOR Jan.-Feb. 1994)).

19. See generally PHILIP SCHLESINGER & HOWARD TUMBER, REPORTING CRIME: THE MEDIA POLITICS OF CRIMINAL JUSTICE 184 (1994) (quoting DORIS GRABER, CRIME NEWS AND THE PUBLIC 39 (1980) (“[An] exaggerated picture is presented of the incidence of the most violent kinds of crime, while the incidence of lesser crimes is minimized[.]”); THE REAL WAR ON CRIME, *supra* note 18, at 71 (“Newspapers also tend to present a distorted view by focusing most of their attention on sensational crimes rather than the vastly more numerous nonviolent offenses.”)).

20. The proliferation of “real life” entertainment television programs like *America's Most Wanted* and *Unsolved Mysteries*, as well as the emphasis on unsolved violent crimes in television magazine programs like *60 Minutes*, *20/20*, and *Hard Copy* fuels this misperception. See THE REAL WAR ON CRIME, *supra* note 18, at 70 (noting that one scholar has coined the term “mean world” syndrome “to describe how heavy viewers of television violence increasingly feel that their own lives are under siege.”), citing George Gerbner, *Television Violence: The Art of Asking the Wrong Question*, CURRENTS IN MODERN THOUGHT at 396, July, 1994.

21. See Glaberson, *supra* note 2.

22. See, e.g., 21 U.S.C.A. § 841 *et seq.* (minimum mandatory for cocaine and crack possession).

23. See, e.g., CAL. PENAL CODE § 667(e)(2)(A) (West 1997 Supp.) (providing an “indeterminate term of life imprisonment” for convicted offenders with two previous convictions for serious violent felonies).

24. See, e.g., MASS. GEN. LAWS ch. 119, § 6 (1990) (requiring certain offenses committed by juveniles to be tried in the adult system).

25. See, e.g., Act of Mar. 7, 1995, ch.1, § 2, 1995 N.Y. Laws 1 (reinstating death penalty in New York as of September 1, 1995); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1795 (1994 Crime Bill) (adding 23 new offenses for which the death penalty may be imposed including espionage, racketeering, and carjacking).

26. See, e.g., Neal R. Pierce, *Dos and Don'ts for Saner Prisons*, 28 NAT'L J. 1653 (Aug. 3, 1996) (quoting former Massachusetts Governor William Weld for his view that prisons should be “a tour through the circles of hell”).

breaking percentages of people — particularly men of color — are behind bars,²⁷ and prison construction projects have exploded.²⁸ The political rhetoric that propels these initiatives is bipartisan.

In the judicial branch, these same forces produced New York Judge Harold Rothwax, who toured the radio call-in show circuit to promote *Guilty: The Collapse of Criminal Justice*, a book that boasts of his conversion from a civil libertarian and defense attorney to an angry conservative disgusted by both criminal defendants and the attorneys who represent them. The book brims with righteousness and fury, unabashedly condemning all defendants²⁹ as well as their counsel.³⁰ While it enjoyed a great deal of attention in

27. See THE REAL WAR ON CRIME, *supra* note 18, at 101-03 (noting that African-American men are incarcerated at a rate six times that of white men, although they make up less than seven percent of the population, and that, in 1994, one out of every three African-American men between the ages of 20 and 29 in the entire country was under some form of criminal justice supervision (citing MARC MAUER, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992-1993 (Sept. 1994); MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (Oct. 1995))).

28. See THE EDNA MCCONNELL CLARK FOUND., AMERICANS BEHIND BARS 5 (1992) (reporting that "[i]n fiscal 1989, \$6.7 billion was spent on the construction of new prison space across the country, a 73 percent rise over the previous year," that this construction "increased state and federal capacity by 128,000 beds," and that New York State opened 27 new prisons between 1983 and 1990 (citing *Corrections Compendium*)).

29. In a defining anecdote, Judge Rothwax tells of a conversation he had with his mother early in his career as a lawyer:

When I was a fresh, young defense attorney, one of my first cases was a man who was charged with robbery. I took my job as his advocate very seriously. During that period, I was visiting my mother and I proudly told her, "I'm representing a man accused of robbery."

She frowned. "What did he do?"

"He's charged with robbing an old man coming home from a store," I told her.

She looked at me with horror, and I could see the pride in her son the lawyer quickly slipping away. "How can you represent a man like that?"

I explained patiently. "Well, Mom, he tells me he's not guilty."

My mother gazed at me pityingly, as though I was the most naive creature on earth, and said with a sigh, "Son, if he can rob, he can lie."

I often think of my mother's words on that day. They serve as my reminder, a tickler to my conscience. Even the most sacred idea is open to scrutiny. And even as we search for truth, we all too often give credence to a lie.

ROTHWAX, *supra* note 4, at 34.

30. Judge Rothwax argues, "There are many places we can look for a cure to the out-of-control adversary system. But perhaps the best place to start is with a serious reevaluation of the role of the defense attorney." *Id.* at 139. His premise is that "[s]adly, the culture that the defense lawyer inhabits today is one that says it's okay to push the envelope, to brush against the ethical barrier and occasionally slip over." *Id.* at 130. In one of his less vitriolic passages, Judge Rothwax observes that:

Given the probability that the defendant is guilty, the defense attorney knows that the defendant will win *only* if counsel is successful in *preventing* the truth from being disclosed — or, failing that, misleading the jury once it is disclosed. So, when the defendant is guilty, the defense attorney's role is to prevent, distort, and mislead.

Id. at 141 (emphasis in original); see also *id.* at 135 (claiming that defendants, most of whom are guilty, are "yearning neither for an accurate reconstruction of the facts nor for an error-free trial").

the popular press,³¹ it was dismissed by legal scholars and jurists as "lopsided,"³² and a "jeremiad."³³

With *Virtual Justice*, Uviller takes Judge Rothwax's populist theme into the academic setting, couching in disarmingly bland prose the same radical thesis: that many of the rules of criminal procedure that have evolved through the last thirty years of constitutional adjudication hamper law enforcement excessively and should be curtailed or repealed. Despite the fact that Uviller has buffed up Judge Rothwax's arguments with some sane discussion and occasional nods to the counterargument, he ends up right where Rothwax started. *The Collapse of Criminal Justice* and *The Flawed Prosecution of Crime in America* pander to the same fears and exploit the same distorted perceptions. The surprise is that Uviller's sugar coated version of Rothwax's tirade is much harder to swallow.

I. NYPD BLUES: A PLEA FOR MORE POLICE DISCRETION

Uviller's major point is that the Supreme Court's readings of the Fourth, Fifth, and Sixth Amendments are not justified. According to Uviller, "the continuous struggle between effective illegality and the blunter but prouder tactics of lawful law enforcement" (p. 109) has been wrongly resolved:

Though the Constitution was certainly drafted with the common-law model in mind, the fundamental catalogue of rights and obligations that found their way into the text do not require the full adversary mode that we have engrafted onto it. The citizen can be secure against unreasonable searches and seizures with far greater scope for court-sanctioned investigations. Our ingrained notions of the limits of interrogation and the consequences of silence are not dictated by the words of the Fifth Amendment that none shall be compelled to be a witness against himself. And certainly the right to the assistance of counsel in one's defense does not necessitate the adversary circus or the lawyerly shield against the fair acquisition of evidence against the accused defendant. [pp. 309-10]

To prove his point, Uviller examines the criminal process in the conventional arrest-to-trial sequence, using a "modest collection of tales" that are fictional but, he says, not "altogether fictitious" (p. xv) to depict "common and perplexing events in the collection of evidence and the trial of criminal cases" (p. xv). He then applies his long experience as a scholar and, more surreptitiously, as a prosecu-

31. See, e.g., Bernard Gavzer, *Is Justice Possible?*, BOSTON GLOBE, July 26, 1996, Parade at 1, 4-6.

32. See, e.g., *id.* at 6 (quoting Professor Yale Kamisar of the University of Michigan).

33. See, e.g., Sol Wachtler, *Crime and Punishment*, NEW YORKER, July 15, 1996, at 72, 74 (reviewing *Guilty* and other books on criminal justice, with passing reference to *Virtual Justice*).

tor, to tease out of the narratives an assortment of problems that, he contends, produce a system of "virtual," rather than true, justice.³⁴

As a result of this choice of narrative structure, the book's tone shifts awkwardly from the Mickey Spillane diction of the "tales" to Uviller's own more ponderous analytic prose.³⁵ Many of the fictional passages suggest a fascination with the gadgets and jargon of police work — such as crownlights (p. 29) and bullhorns (p. 243), "perps" (p. 58), "mopes," and "The Job"³⁶ — that is especially discordant with the tone of mastery that dominates the remainder of the book. While Uviller plainly strives for diversity among his fictional characters, with male and female police officers, prosecutors, and judges, he often slips into hackneyed stereotypes of gender and

34. While acknowledging the "congruence" between the "virtual justice" produced by the system and the "true justice" for which the system strives, Uviller notes:

But I also know that there are elements in the process — systemic flaws — that tend to bend virtual justice without distorting its apparent correspondence to true justice. In places, law fails the needs of the investigators, of the lawyers, of the fact finders; at critical junctures action is improvised and adversary confrontations cast the players in roles that do not enhance the reliability of the synthesis. It is these aspects of the process on which I will focus. Here, perhaps, we may see whether the virtual justice generated by the adversary system has an acceptably close correspondence to the true justice that our collective libido demands.

P. xiv.

Uviller's conception of justice as a response to libidinous demands perhaps explains the irrationality of many of his criticisms as well as his proposed solutions.

35. I am not the first to observe that Uviller strives for authenticity by emulating the hard boiled prose of writers like Mickey Spillane. See Book Note, *The Eyes of the Law*, 103 HARV. L. REV. 1390, 1392 (1990) (describing *Tempered Zeal*, Uviller's earlier book, as "[s]ounding more like Mickey Spillane than Clifford Geertz"). The comparison stems from Uviller's rather self-conscious use of "street" language like this:

Detective Bailey reaches over, slips the photo out of the book, and reads the information on the back. So far so good, she thinks. At least it doesn't rule him out. Not like the victim we had in here last week who described a perp as six-four, maybe five, then ID'd a shot of a mope five-eight. Or the vic last month who made a positive on a heavy hitter who was doing four-to-eight at the time the crime went down.

P. 41. In addition, like Spillane's, Uviller's fictional passages often rely upon cliché, like "the unfinished donut," p. 15, and extremely mannered diction, like "Lauren hijacked Mike's cup, took a sip of bad coffee, cold now," p. 101.

These narratives contrast abruptly with Uviller's own authoritative, and at times even patronizing, voice:

In the pages ahead, I shall conduct a short tour of this bedeviled edifice. . . . Perhaps an odd, habitual turn of the legal mind will be amusing, perhaps an unsuspected doctrinal wrinkle will raise a casual eyebrow. Harmless sport. Disappointing, perhaps, to some who seek more aggressive commentary. But it is my prime purpose merely to engage, to reveal, and to share some of the wonder I feel as I wander through these familiar premises.

Pp. xiv-xv.

36. P. 42. This fascination perhaps has its roots in Uviller's sabbatical experiences "riding" with a division of the NYPD, and documented in a previous book. See H. RICHARD UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* (1980). *Virtual Justice* does not refer to this experience.

ethnicity.³⁷ All of this makes it somewhat difficult to take the serious stuff seriously.

Although it appears from the opening chapter, "Overview of the Criminal Justice System," that *Virtual Justice* is written for an audience of readers who have not received a legal education, much of the detail would seem to hold little interest for anyone but lawyers.³⁸ Conversely, however, the book is too simplistic for most lawyers.³⁹ Consequently, it occupies an intermediate zone in which it is both too sophisticated for some and too superficial for others.

In addition, many of the problems to which Uviller applies his two narrative voices are so esoteric that they merit neither the overly stylized "tales"⁴⁰ he develops in order to frame them nor the lengthy exegeses he then supplies. For example, Uviller's first issue — the difficulty police face when seeking a warrant to search a murder scene if the premises on which the body is found are not those of the victim — can hardly be said to have a significant impact on the "prosecution of crime in America," as his title promises. He describes the issue as a "genuine legal hole" (p. 24) formed by the particularity requirement of the Fourth Amendment's warrants clause⁴¹ and the impossibility, in his view, of knowing in advance of

37. In one "tale," he writes that "Katherine was swept off her feet by Manuel's legendary Latin ardor." P. 200. In another, he presents a gay character, Bruce, whose "earliest memory was the time his father had discovered a doll that Bruce had found in the attic and liked secretly to dress up and play with in his room." Pp. 271-72. Uviller appears to attribute Bruce's sexual orientation to this episode, in which his father "murder[s]" the "baby," "viciously slamming its sweet bewigged head against the wall until it br[ea]ks." P. 272. Later in the narrative, Bruce's longing for his father's approval drives him to join the Marines. P. 272.

38. For example, in chapter 11, Uviller strives at length to explain the nuances of rules relating to admissibility of character and conduct evidence, and the risk that exceptions language might swallow the rule against propensity evidence.

39. See, e.g., p. 261 ("In recent years, urged by the women's movement, psychologists have studied cases of women who eventually strike back after being viciously abused by their partners over an extended period. From these clinical studies, they have crafted what is now called the 'battered-spouse syndrome.'"). In addition, as this example illustrates, Uviller often presents well-settled concepts as recent developments.

40. Uviller emphatically denies that these tales are "artificial — the sort of hypothetical puzzles that generations of law students have grappled with in classrooms, never to encounter again." P. xv. Despite this disclaimer, I think he would be hard-pressed to demonstrate that many of the tales are, as he insists, "true to life." P. xv. The Arab-American police officer working undercover to infiltrate the "Islamic Friendship Federation," who, the district attorney fears, "may be going over," p. 161, is one such unlikely tale.

41. U.S. CONST. amend. IV ("[N]o warrant shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

Uviller attributes this "legal hole" to the decision of the Supreme Court in *Mincey v. Arizona*, 437 U.S. 385 (1978), in which it declined to recognize an exception to the warrant requirement for crime scene searches. Although Uviller explicates the decision in *Mincey*, he does so without noting that the 1978 decision was unanimous on this point, and that it refuted Uviller's position regarding crime-scene searches and, more generally, the needs of law enforcement, by restating the following fundamental principle:

Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would

a search "what particular item of evidence might be found on the scene" (p. 24). Despite qualifications — he notes that "[i]t is . . . difficult to say how often warrants are sought for crime scene searches and with what results"⁴² and that "[o]nly those whose security was invaded and against whom the evidence is offered have standing to exclude it" (p. 24) — Uviller nevertheless selects that single issue to epitomize his first chapter heading, "Virtual Legality in the Field" (p. 13).

This somewhat arcane problem becomes the vehicle for Uviller to advocate a radical expansion of police power. He proposes statutory authorization for judges to issue warrants to search "the scene of a recent crime of a certain level of gravity — perhaps named crimes like homicide, rape, arson, kidnapping" and to allow for the seizure of evidence "notwithstanding the inability of the police to particularly describe in advance the evidence they are looking for or to give any specific reason to think they will find it" (pp. 24-25). This proposal sounds very much like a general warrant,⁴³ a practice that Uviller concedes was "a primary abuse by the colonial police — one of the precipitating causes of the revolution, some say."⁴⁴ Yet, as throughout *Virtual Justice*, Uviller urges this result-oriented

always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey, 437 U.S. at 393 (citation omitted). Certainly, one might critique the position implicit in *Mincey* that no search or seizure may take place except pursuant to a warrant as lacking historical or textual support, see, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 4 (1997) (characterizing the *Mincey* rule as a "per se" approach to the Fourth Amendment that is plainly contradicted by a variety of historical sources), but Uviller does not bother to do so. Instead, he simply announces that the rule should be abrogated because it impairs law enforcement.

42. Pp. 26-27. There is nothing in *Virtual Justice* to suggest that Uviller attempted to gather such information. Moreover, Uviller offers no estimate of the frequency of the "legal hole" created when the premises to be searched are those as to whom the particularity requirement cannot be satisfied.

43. See *Wilkes v. Wood*, 98 Eng. Rep. 489 (P.C. 1763) (British decision declaring general warrants unconstitutional); 2 *LEGAL PAPERS OF JOHN ADAMS* 134-44, 142 (L. Kihvin Wroth & Hiller B. Zobel eds., 1965) (explaining why writs of assistance, a kind of general warrant, were illegal, including that "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege."); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 224-26 (1993) (explaining one basis of the opposition of James Otis, Jr., to general warrants — that they could be issued to a customs officer who could search all private citizens' homes or businesses without judicial oversight or accountability for the life of the warrant).

44. P. 23. Again, reasonable minds might differ on whether it was the specter of a general warrant that produced the language of the Fourth Amendment, see generally Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 822-24 (1994) (citing examples of debate on the historical evidence of the Fourth Amendment's meaning), or whether, instead, the Warrant Clause was adopted not to "reassure[] a search target" but to "bar[] a target from suing after the fact," AMAR, *supra* note 41, at 15. But Uviller ought to give some critical context for the proposals that he offers on so fundamental a point as this.

curtailment of a core civil liberty to free law enforcement from what he views as cumbersome and unnecessary technicalities, while offering very little legal or empirical support for the change.⁴⁵

Uviller suggests that his statute ought to be defensible as a variation on an inspection warrant,⁴⁶ even while confessing the critical distinction: the inspection warrant has an administrative purpose while his crime scene warrant is all about finding evidence of a crime to be used to prosecute an individual.⁴⁷ His reasoning becomes increasingly sloppy once the issue is joined; as the chapter draws to a close, he pleads, "Still, it does seem reasonable, doesn't it? And reasonability, remember, is at the heart of the Fourth Amendment"⁴⁸

As the book progresses, Uviller becomes more bold and expands his suggestion from the relatively infrequent context of crime scene searches to the far broader assertion that law enforcement agencies ought to be authorized to conduct door-to-door searches for firearms under this same rubric of administrative inspections. Noting only that the statute authorizing such a power "would have to be meticulously fair and even-handed" (p. 105), he pays mere lip service to the concerns that such a radical expansion of police power provokes. Acknowledging that "[a]ggressive police patrol carries an unmistakable whiff of fascism," he then brushes this concern aside with conclusory ease: "Believing as I do, it's hard to deny that the program is compatible with basic values of our society" (p. 108). Instead, Uviller unconvincingly repeats his refrain that "the key concept in the Fourth Amendment is *reasonableness* . . . a flexible idea [that] should take account of the urgency of social necessity as well as the unavailability of lesser intrusions to accomplish the purpose."⁴⁹

This sequence is repeated in succeeding chapters, as Uviller catalogs a series of problems he sees in the criminal system, without

45. Uviller makes no effort, for example, to root the "crime scene" approach to searches in any source of authority, either textual or precedential. His "solution," it seems, is not so much to be applauded for its creativity as closely scrutinized for its anomaly.

46. See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

47. Uviller ignores this distinction in his suggestion that *Camara* supports his proposal. Compare p. 26 ("My argument, I must confess, is not quite as neat as it appears. These inspection searches — along with their warrantless siblings, the 'inventory searches' . . . — are frequently justified by their *administrative* aspect, a benign purpose compared with *law enforcement* objectives.") with *Camara*, 387 U.S. at 530 ("Since the inspector does not ask that the property owner open his doors to a search for 'evidence of criminal action' which may be used to secure the owner's criminal conviction, historic interests of 'self-protection' jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense 'right to be secure from intrusion into personal privacy.'" (footnote omitted)).

48. P. 26. The remainder of the sentence quotes the Amendment in full.

49. P. 105. Uviller offers no proof that a lesser intrusion — like a warrant based on probable cause — is unavailable.

attempting to substantiate them. He does not show that these problems occur with a frequency that matters, but instead characterizes them as grave enough not only to warrant his and our attention, but also to justify significant changes in criminal procedure. He laments the “inescapable conundrum” (p. 50) that an equivocal photo identification from a book of mug shots — “I can’t be sure. The guy who robbed me looked meaner, angrier, you know what I mean? But it could be him” (p. 41) — coupled with a second witness’s equivocal statement that the suspect “could be one of the [people in a photo array] but I really can’t say for sure” (p. 42), does not amount to probable cause to arrest an individual and compel him to appear in a lineup. The “problem” in this scenario, as Uviller sees it, is that the police do not get to arrest the person that they have determined — or, more accurately, predetermined, given that there is insufficient evidence for arrest — must have committed the crime.

Once again, the remedy is far more dangerous than the illness: Uviller recommends adoption of a “Non-testimonial Identification” amendment to the Federal Rules of Criminal Procedure, a solution he attributes to “[s]ome unsung hero” of “more than twenty years ago” (p. 51), whereby “probable cause” would be watered down to “reasonable grounds” when police seek authorization to order an individual to appear in a lineup or to provide other nontestimonial evidence such as fingerprints, blood, and urine (p. 51). Uviller does not even consider the potential impact of this enhanced police power on citizens, let alone offer any analysis of competing rights and interests.⁵⁰ Instead, he masks the significance of the change he proposes by describing it as “[n]eat, simple, and — as far as I can see — perfectly constitutional” (p. 51).

The danger of *Virtual Justice* is in such glibness. Unlike Rothwax, who boldly announces his contempt for the criminal defendant and considers it a virtue that his reform proposals will have painful costs for that constituency,⁵¹ Uviller dissembles, presenting controversial proposals as obvious boons and exploiting the tone of the scholar to disguise his bias as wisdom.

Like his colleagues Judge Rothwax and Professor Fletcher, Uviller is also highly critical of the exclusionary rule as a remedy for Fourth and Fifth Amendment violations.⁵² In the Fourth Amend-

50. I use the term “interests” rather than “rights” to avoid the circularity of defining the contours of the Fourth Amendment “right” by reference to the standard of probable cause. More important, I think it is crucial to reject the subtle distortion implicit in the use of the term “rights” to describe the power exercised by law enforcement and other governmental authorities.

51. See ROTHWAX, *supra* note 4, *passim*.

52. Pp. 69-70. Uviller, like Rothwax, advocates a rule of judicial discretion rather than the automatic remedy of the exclusionary rule. Pretending to ambivalence at first, he con-

ment context, he characterizes it as a "baroque minuet" (p. 80), "that ugly old monster" (p. 86), and a rule that causes us to "suffer the anomaly of lost prosecutions of guilty criminals in order to protect people against unreasonable invasions of security" (p. 85). Yet again he offers almost nothing to support his contention. Certainly, much is available in legal literature as to the empirical evidence of the exclusionary rule's cost, even if that evidence's significance is debated.⁵³ Instead, he announces in conclusory fashion that the exclusionary rule is "the prime distortion factor in criminal verdicts, the gunk that clogs the court docket" (p. 86). Would his recommendations about the rule differ, one wonders, if he were aware that in one four-year period, the Second Circuit did not affirm a single suppression order?⁵⁴

II. WHAT'S GOING ON: POLICE PRACTICES IN NEW YORK CITY IN THE 1990s

Uviller's uncritical depiction of law enforcement is particularly surprising for a number of reasons. Prior to *Virtual Justice*, Uviller wrote *Tempered Zeal*,⁵⁵ an account of his experiences during a sabbatical with the New York City Police Department. *Tempered Zeal* not only acknowledged, but also expressed concern about, the frequency of police perjury with respect to Fourth Amendment issues such as warrants and searches. He described the "most common form of police perjury" as "the *instrumental adjustment*," which he defined as "[a] slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result."⁵⁶ As Uviller explained:

[C]ops may insert a little invention to fortify the probable cause upon which a fruitful search was predicated. Add a small but deft stroke to

cludes that "on balance, I trust judges. I do not believe that the exercise of judicial discretion is a roll of the dice. And I think that the solution to the perplexing dilemma is probably in resort to good sense and an educated decision on whether exclusion is appropriate in all the complex circumstances of the particular case." P. 70.

53. See, e.g., Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) (evaluating several empirical studies calculating the impact of *Miranda* in eleven American cities as well as Britain and Canada); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (responding to Cassell); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996) (responding to Schulhofer).

54. See Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 59, 64-65 (1996). As it happens, Uviller's recommendation — more frequent use of radio hookups between officers in the field and judges and magistrates with the authority to approve a warrant application — is hardly the "godsend" or the "beautiful deliverance," p. 85, that he congratulates himself for proposing. Predicated as it is on another unproven conclusion — that "[t]he prime reason police do not go to court before they enter secure spaces is logistical. It's a hassle," p. 84 — Uviller's hyperbole only underscores the superficiality of the solution.

55. See UVILLER, *supra* note 36.

56. *Id.* at 115-16 (emphasis in original).

the facts — say, a visible bulge at the waistband of a person carrying a pistol. Just enough to put some flesh on the hunch that actually induced the officer to give the man a toss; it might make all the difference. Or a police officer, understandably eager to have the jury hear the bad guy's full and free confession, might advance slightly the moment at which the *Miranda* warnings were recited to satisfy the courts' insistence that they precede the very first question in a course of interrogation. That sort of thing. Although no one admitted it to me in so many words, I think most police officers regard such alterations of events as the natural and inevitable outgrowth of artificial and unrealistic *post facto* judgments that release criminals.⁵⁷

Given these observations, it is surprising that Uviller never puts two and two together: reducing probable cause to reasonable cause, coupled with the frequent "invention" that "fortif[ies]" probable cause, means a dramatic double reduction in the standard of proof for investigatory arrests — once in the word and once in the deed. What Uviller describes as a "hunch" beefed up by an "instrumental adjustment" is, under his proposal, watered down still further. At what level do we then find ourselves: bias?⁵⁸

In the eight years since *Tempered Zeal*, the issue of perjury among police, particularly New York City's officers, has received extraordinary scrutiny, and the evidence available to Uviller and others clearly demonstrates that the problem he not only acknowledged, but purported to justify, has only been exacerbated. The 1994 report of the Mollen Commission, charged with investigating allegations of police misconduct in New York City, presented a disturbing picture of police perjury that was so pervasive that the term "testilying" was coined to describe it.⁵⁹ The Commission reported

57. *Id.* at 116. Uviller dares to defend police perjury by distinguishing between "[p]erjury that creates artificial evidence" and thereby "distorts the data being considered by the jury," on the one hand, and "lies that result in a more complete picture of the events on trial." He actually applauds this latter category of perjury as "contribut[ing] to the accuracy of the verdict." *Id.* at 117.

58. Most disturbing is the prospect of illegitimate factors, like race and class, assuming an even greater role in the exercise of discretion by law enforcement officials than they do under present constitutional standards. Racism already forms an all-too-common basis for the "hunches" that Uviller celebrated in *Tempered Zeal*. See, e.g., Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1661 n.5 (book review) (citing cases in which courts have approved use of race as a factor in exercise of police discretion); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Tracey Maclin, "Black and Blue Encounters" — *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991).

There are certainly sufficient examples in the popular press of this kind of law enforcement, from Mark Fuhrman's braggadocio in the O.J. Simpson case to the manipulations of racism by Susan Smith and Charles Stuart. The recent controversy surrounding U.S. District Judge Baer's suppression of evidence in a drug case in the southern district of New York stemmed in part from his express acknowledgment of what more often lurks beneath the surface of many, if not all, criminal proceedings: that people of color have qualitatively different expectations of and experiences with law enforcement. See *infra* notes 75-76.

59. See REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 36 (1994)

on such practices as "turnover arrests,"⁶⁰ "collars for dollars,"⁶¹ and other forms of systematic perjury.⁶² The prosecutors who work with these officers demonstrated a level of knowledge that amounts to complicity: as one anonymous Manhattan A.D.A. noted, "No one looks down on it. . . . Taking money is considered dirty, but perjury for the sake of an arrest is accepted. It's become more casual. And the civil libertarians have no effective response to it. It's almost an intractable problem."⁶³

During this same period in which Uviller bewailed the increased burden that current rules of criminal procedure have imposed on law enforcement, the New York City Police Department was ripped apart by a succession of scandals in precincts in the Bronx,⁶⁴ Manhattan,⁶⁵ Brooklyn,⁶⁶ and Queens,⁶⁷ involving an estimated 300 officers⁶⁸ who used their status as police systematically to rob, beat,

(Milton Mollen, Chair) [hereinafter Mollen Commission Report] ("Several officers also told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: 'testilying'"); see also Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1 [hereinafter Sexton, *Police Often Lie*] (noting that "the commission 'was told of officers up to the rank of captain being actively complicit in and even encouraging warrantless searches and subsequent perjury'"); Joe Sexton, *Types of Perjury Common Among Police Officers Are Detailed*, N.Y. TIMES, Apr. 23, 1994, at A27 [hereinafter Sexton, *Types of Perjury*].

60. Sexton, *Types of Perjury*, *supra* note 59 ("A police officer arrests a suspect but has plans for the weekend and doesn't want to spend the next day in court. So he asks his partner not only to take credit for the arrest, but to take the witness stand in front of the grand jury as well.").

61. Clifford Krauss, *Corruption in Uniform: The Overview: 2-Year Corruption Inquiry Finds a "Willful Blindness" in New York's Police Department*, N.Y. TIMES, July 7, 1994, at A1 ("[I]n a practice called 'collars for dollars,' officers sometimes took short cuts to make more arrests to earn more overtime and earn promotions to coveted assignments.").

62. See *id.* ("The commission also found that officers who were otherwise doing their jobs to fight crime falsified records often to obtain convictions. It noted that while street narcotics enforcement units are prohibited from entering buildings to make arrests, members of such squads typically falsified papers to make arrests that actually occurred indoors appear as though they were made on the street.").

63. Sexton, *Types of Perjury*, *supra* note 59, at 28; see also Sexton, *Police Often Lie*, *supra* note 59 (reporting that Brooklyn's district attorney himself acknowledged that "police officers often tried to get around the problem of needing probable cause" by lying about the events surrounding an arrest); *infra* at n. 82 (comparing the ethical roles of prosecutors and defense counsel with respect to perjurious witnesses).

64. See Adam Nossiter, *Two Officers Convicted in 30th Precinct*, N.Y. TIMES, Aug. 7, 1996, at B3 (reporting that "[m]ore than a sixth, or 33, of the officers from the 30th Precinct [in the Bronx] were arrested . . . on charges ranging from perjury to stealing drugs, cash and guns").

65. See Clifford Krauss, *Bratton Says Corruption Sweep Involves Dozens More Officers*, N.Y. TIMES, Apr. 17, 1994, at A1.

66. See Joseph P. Fried, *Officer Arrested in Inquiry of 73d Precinct*, N.Y. TIMES, Mar. 30, 1994, at B3 (describing a "rogue band" of about a dozen officers in the 73rd Precinct in Brooklyn who conducted "hundreds of illegal raids in the Brownsville area").

67. See Clifford Krauss, *3 from Queens Precinct Indicted in Theft of \$1,400 from Man*, N.Y. TIMES, Mar. 29, 1995, at B3.

68. See Robert D. McFadden, *Three More in Precinct Are Accused*, N.Y. TIMES, Apr. 7, 1995, at B1.

and harass citizens. The Mollen Commission described "well organized police 'crews' terrorizing minority neighborhoods" and noted that they were "more akin to street gangs: small, loyal, flexible, fast-moving and often hard hitting."⁶⁹ They engaged in a practice cryptically referred to as "doing doors" — "illegally raiding drug dens for plunder"⁷⁰ — and routinely used "sapgloves" — lead-lined gloves — and heavy flashlights to assault men, women, and teenagers that they encountered during these raids.⁷¹

Moreover, since the publication of *Virtual Justice*, New Yorkers witnessed an episode of police brutality that was as shocking for its cruelty as for its suggestion that at least some police officers believe they are free to act with complete impunity. The officer charged with shoving a wooden rod into the rectum and then the mouth of Abner Louima is alleged to have borrowed a pair of gloves from a colleague in the public lobby of the stationhouse, stripped Louima from the waist down in that public lobby, and then taken him in handcuffs to the bathroom where he committed the assault. After the attack, the officer is alleged to have led Louima to the holding cell with his pants around his ankles and to have then walked through the stationhouse hallway brandishing the stick.⁷² In the period following disclosure of the assault, many observers suggested that Mayor Giuliani's law enforcement policies had created that climate of perceived impunity.⁷³

While Uviller did not focus his book on these extraordinary episodes of corruption, his anxiety that law enforcement is inadequately equipped to address the problem of crime is significantly undermined by their existence. The anxiety, it would seem, is better suited to the prospect of these same officers enjoying a broader range of discretion and authority. Quite simply, it is a problem of credibility for Uviller to have omitted all reference to these contemporaneous developments.

69. *Corruption in Uniform: Excerpts from What the Commission Found: Loyalty over Integrity*, N.Y. TIMES, July 7, 1994, at B2.

70. Selwyn Raab, *Similarities in Inquiries into Crimes by Officers*, N.Y. TIMES, Oct. 3, 1993, at A38.

71. See Selwyn Raab, *Detailing Burglars in Blue: Violent Search for Booty*, N.Y. TIMES, Sept. 30, 1993, at B3 (quoting one ex-officer's testimony before the Mollen Commission that he participated in five raids per day, that he used to "tune people up," a "police word for beating people up," that "his sergeant encouraged him and two other rookies to assault everyone found in suspected drug-trafficking locations," and that he did not fear arrest or dismissal because of these activities because "[w]ho's going to catch us? We're the police. We're in charge.").

72. See Dan Barry, *Two More Officers Held in Attack on Haitian Man*, N.Y. TIMES, Aug. 19, 1997, at A1.

73. See Dan Barry, *Charges of Brutality: The Overview: Leaders of Precinct Are Swept Out in Torture Inquiry*, N.Y. TIMES, Aug. 15, 1997, at A1.

Uviller also fails to address an ancillary, and perhaps more insidious, problem that arises from police abuse: judicial tolerance of these practices. The heated public controversy surrounding the decision of U.S. District Judge Baer to suppress evidence seized by New York City police officers from the automobile of an African-American woman on a Washington Heights street demonstrates how pliant even life-tenured judges can be in the face of public and political pressure about crime.⁷⁴ Judge Baer initially found, based in significant part upon the officers' lack of credibility, that the police lacked a reasonable suspicion that the defendant's car was involved in criminal activity at the time of the stop.⁷⁵ He subsequently reversed himself, credited the testimony of the police, and rejected that of the defendant.⁷⁶ Additional examples of judicial capitulation to anticrime rhetoric and prosecutorial pressures have surfaced nationwide.⁷⁷ Uviller does not address the impact

74. See Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1 (reporting that presidential candidate Bob Dole had suggested during a campaign appearance that Judge Baer should be impeached for his ruling and that Second Circuit Chief Judge Newman characterized the criticism as an "extraordinary intimidation").

75. See *United States v. Bayless*, 913 F. Supp. 232, 239-40 (S.D.N.Y. 1996) (finding that one officer's testimony "is at best suspect" and that he could not "keep from finding [the officer's] story incredible" and also expressing concern that the other officer involved was never called to testify although "presumably available to corroborate this officer's gossamer").

In addition, Judge Baer observed that in light of the findings of the Mollen Commission that permitted "residents in this neighborhood . . . to regard police officers as corrupt, abusive and violent," "had the men [alleged to have run at the sight of the officers] not run when the cops began to stare at them, it would have been unusual." 913 F. Supp. at 242.

76. See *United States v. Bayless*, 921 F. Supp. 211, 216 (S.D.N.Y. 1996), *vacating* 913 F. Supp. 232 (S.D.N.Y. 1996) (holding that defendant's "story is now less convincing" and that "with more evidence and upon review, the Government's version is more credible").

Indeed, Judge Baer did not merely reverse himself but concluded his opinion with a somewhat cloying apology and self-flagellation: "[u]nfortunately, the hyperbole (dicta) in my initial decision not only obscured the true focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol the streets of our great City." 921 F. Supp. at 217. The passage stands in stark contrast to his earlier sense of being "shatter[ed]" by the lack of security of people of color in their own communities, 913 F. Supp. at 240, and his acid observation that "the same United States Attorney's Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood," 913 F. Supp. at 242.

77. See, e.g., *Commonwealth v. O'Brien*, 673 N.E.2d 552 (Mass. 1996) (reversing a trial court determination that a juvenile charged with homicide was amenable to rehabilitation and should therefore be tried in juvenile rather than adult trial court); Judy Rakowsky, *Judge Dismissed from O'Brien Case*, BOSTON GLOBE, Mar. 4, 1997, at A1 (reporting that supreme judicial court, exercising "power of general superintendence," removed trial judge after reversal to "eliminate controversies and unnecessary issues in further proceedings and in any appeal").

Carol Steiker has noted that even if the judicial will to address flagrant police misconduct existed, an array of procedural doctrines has either emerged or been greatly expanded that has had the effect of precluding any relief. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468-69 (1996).

that reduced standards for police intervention might have when conjoined with an increasingly superficial judicial review of police conduct.

III. EMPATHY AND CONTEMPT: THE ROLE OF DEFENSE COUNSEL

Using similarly specious arguments to advocate radical reforms, Uviller shows disgust and frustration with a number of other well-established rules of criminal procedure, such as the right to counsel⁷⁸ and the right against self-incrimination.⁷⁹ But he reserves his

78. Uviller's subheading for his chapter on this part of the criminal process says it all: "Dramatic, Deceitful, and Dilatory Assistance." P. 132. Here he is arm-in-arm with Judge Rothwax, *see* ROTHWAX, *supra* note 4, at 79-82 (arguing that "interrogation and trial have disparate goals" and that "straightforward questioning in a nonhostile, nonthreatening environment . . . [is] the very essence of respect"), advocating a limit on the assistance of counsel that would keep counsel out of the investigatory phase of all criminal proceedings and allow them a role only at the trial itself:

As we have seen, critical stages may occur outside the courtroom — at lineup identifications, for example, and interviews with police or their covert agents at which some incriminating admission may be elicited. But the core of the counsel clause (the true meaning of the provision, some — like me — would argue) is the promise of professional assistance at the most critical stage: courtroom proceedings.

Pp. 136-37; *see also* H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1138 (1987) (characterizing the right to counsel as "the villain of the piece" and arguing that the right to counsel has been misapplied as "an artificial device of cloture on government efforts to obtain cognitive evidence").

Uviller ignores — or purposely avoids accounting for — the basic principle of trial advocacy holding that preparation in large part determines one's likelihood of success at trial. Assistance in the courtroom only is too little too late. *But see id.* at 1169 (arguing that "[m]ost" of the "critical" stages for purposes of the assistance of counsel "occur after the case has crossed the courtroom threshold, of course, but some may arise during the investigatory or preparatory stages").

In addition, Uviller does not account for the fact that the prosecution largely controls the time of indictment and hence the time that the right to counsel attaches. *See, e.g.,* *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (declining to construe no-contact rule of ethics as limited to the moment of indictment, because "[t]he timing of an indictment's return lies substantially within the control of the prosecutor. . . [who] could manipulate grand jury proceedings to avoid its encumbrances").

79. Pp. 123-31. Again, Uviller here is in perfect harmony with Rothwax, *see* ROTHWAX, *supra* note 4, at 79 (criticizing *Miranda's* reasoning as "result[ing] in a system where we deny people the opportunity to take responsibility for their criminal acts"), arguing, as did the judge, that "[t]he social imperative that has been with us at least since people began to write about social imperatives is that, along with their taxes, citizens owe the government a duty of disclosure." P. 111. This position amounts to little more than an expression of frustration with the drafters of the Fifth Amendment, which cannot more plainly state an abrogation of this duty in the context of criminal proceedings. *Cf.* ROTHWAX, *supra* note 4, at 230-31 ("What would be so wrong with a system that requested a defendant to testify in a court of law, on the record, and in the presence of his lawyers and the judge, after a showing of his probable guilt had been demonstrated by the evidence?").

Uviller reveals his prosecutorial bias quite plainly at the chapter's end when, in response to the proposition that either "[a]ll but spontaneous confessions could be banned . . . [o]r . . . the moment of official accusation could be advanced to the point of arrest and the attached right of counsel decreed unwaivable except in the presence of counsel," he states, "[l]ooking boldly at the prospect of a law enforcement landscape stripped utterly of confession evidence, we cannot suppress a shudder." P. 130. He prophesies that if confessions are to be

particular contempt for criminal defense attorneys, presumptuously imagining a typical such lawyer and her attitudes toward her work and her clients in a manner that demonstrates a profound unfamiliarity with those who do this work.⁸⁰ He proudly declares that he has

actually dared to take the question to several acquaintances in the defense bar. "How can you do it?" I asked. "Case after case, year after year. Putting your own integrity on the line for a clientele that is, in the overwhelming proportion, guilty and ungrateful?" Most lawyers do not quarrel with the premise — at least those who know me well enough to be candid.⁸¹

I do quarrel with the premise, and I am not alone.⁸²

suppressed based upon Fifth or Sixth Amendment grounds, "[p]ublic anger would be so intense, [he] can see the return of the lynch mob." P. 130.

80. Pp. 280-82. Uviller's fictional public defender turned judge, Karen Meadows, follows a trite trajectory from "[y]outhful idealism" that "inclined her to serve those she thought of as 'victims of the system,'" to the discovery:

that something was happening to her attitude. And she didn't like it. It started when she noticed a new, urgent tone in her voice as she told her friends, wryly, as she had so many times before, "I just wish I could have a client I *like* once in a while." It was not that she had never had a client who just might be innocent. Even some of the guilty ones had stories that could break your heart. But for the most part, her clients were indifferent, suspicious, unrepentant, and ungrateful. And, let's face it, they were in the main the predators of her community. Every now and then as Karen stood to challenge, discredit, even humiliate a victim of her client's callous aggression, she asked herself, Why am I doing this? There must be a better way to have fun while earning a living.

Pp. 280-81.

81. P. 151. As if this were not bad enough, Uviller then offers his own answer, underscoring his contempt with such trivializing justifications as "*It's fun*," a category of rationale that he describes as "All my life, I've wanted to sass a cop and get away with it. Now I do that almost every day — and get paid for it!" P. 151.

Uviller's tirade against defense counsel spans several chapters and contains such observed truths as:

The defense lawyer, born to the role, is a person who is more concerned with appearances and perceptions than with underlying facts; who puts greater reliance in "personality" (including his or her own) than in knowledge; who has little concern for general public disapprobation despite a high ego investment.

P. 153.

Perhaps as bad as these distortions are the arrogance and condescension that accompany them. Uviller assures his readers that "I'm sorry, but I believe that in a calmer frame of mind even [defense attorneys] will recognize the traits in themselves and colleagues." P. 153. He observes, helpfully, that "[p]erhaps for this law professor, at least, the work of the defense Bar in the adversary system would seem less reprehensible if so many did not feel called upon, as a matter of diligence, to lie for their clients." P. 155.

Uviller attributes ego and "personality" only to defense counsel, and, worse, makes only defense counsel responsible for the perjury of their witnesses. For him, prosecutors can do no wrong. See *infra* note 82 (comparing ethical roles of prosecutor and defense counsel).

82. Like Rothwax, Uviller also embraces a remarkably lopsided vision of the respective roles of prosecution and defense. He believes, inexplicably, that for prosecutors, "public responsibility . . . is considerably broader than control. The prosecutor can do little, for example, about police brutality or perjury." P. 158. For defense counsel, conversely, Uviller proposes that "[s]urely, the lawyer should do more to discourage perjury" than raise a "rather mild objection" to his client's story. P. 232. Rothwax similarly limited his criticism to defense attorneys based upon his view that "[i]n a court of law, only the prosecution is assigned the task of seeking the truth." ROTHWAX, *supra* note 4, at 129. Why? Every lawyer is responsible to the same extent for his or her own witnesses, and the rules of professional

The experience of those who practice as criminal defense attorneys is far different from the cartoon that Uviller offers as incontrovertible truth. Lawyers for those charged with crimes who face the full weight of the state's power suffer not from a contempt for those they represent, but rather from an overabundance of care that is continually challenged by the many biases latent in the criminal justice system. It is an excess of empathy, not the detachment that Uviller supposes.⁸³

Charles Ogletree writes about this characteristic of the public defender's relationship to his or her clients:

My relationships with clients were rarely limited to the provision of conventional legal services. I did not draw rigid lines between my professional practice and my private life. My relationship with my clients approximated a true friendship. I did for my clients *all* that I would do for a friend. I took phone calls at all hours, helped clients find jobs, and even interceded in domestic conflicts. I attended my

conduct in this area make no distinction that is contingent upon the lawyer's role at trial. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1995) (prohibiting "[a] lawyer" from offering evidence "that the lawyer knows to be false").

Uviller further absolves the prosecution of responsibility for witness testimony by arguing that "if (as is sometimes the case) the prosecutor simply does not know whether the identification her witness swears to is accurate . . . the prosecutor is entitled to bring the facts out fairly and fully and let the jury decide." Pp. 192-93. Uviller's views on the respective roles of prosecution and defense echo those of Justice White in his partial dissent in *United States v. Wade*, 388 U.S. 218, 256-57 (1967), which is so lopsided as now to be deemed reversible error if read to a jury. See, e.g., *Bardonner v. State*, 587 N.E.2d 1353, 1358-61 (Ind. Ct. App. 1992) (reading *Wade* language during voir dire "not only negates the defendant's presumption of innocence, but also runs afoul of [the Indiana Rules of Professional Conduct]"). Compare p. 232 ("[T]he prosecutor is obliged to refuse to call witnesses believed to be false and to dismiss charges against a defendant believed to be innocent. Defense counsel is not charged with any public responsibility to the truth.") with *Wade*, 388 U.S. at 256 (White, J., dissenting) ("Law enforcement officers . . . must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of [a] crime. . . . But defense counsel has no comparable obligation to ascertain or present the truth."). Why is there no comparable entitlement on the part of defense counsel to be uncertain, and to present to the factfinder evidence that he or she does not "know" to be false? See *infra* text accompanying notes 83-86.

83. See, e.g., Michael J. Lightfoot, *On a Level Playing Field*, 30 LOY. L.A. L. REV. 69, 73, 78 (1996) (criticizing the "one-sidedness" of the criminal system and noting that "young [criminal defense] lawyers learn after a short while that, for many clients, there is little they can do to achieve results that seem to be objectively rational and fair. The sense of hopelessness can become overwhelming to the point that it compromises the lawyer's dignity"); Lefcourt, *supra* note 54, at 61-62 ("Representing an innocent client is an easy situation for the public to support. In practice it is the hardest because of the overwhelming fear of loss.").

Even James S. Kunen, author of "*How Can You Defend Those People?*": *The Making of a Criminal Lawyer* and a harsh critic of his criminal experiences, described feelings of empathy during his experience at the Public Defender Service in Washington, D.C.:

Nor can you afford to feel a lot of sympathy for the clients . . . Some of them earn the courthouse epithet "dirtball," but most of them are likable enough when you're trying to help them, and you'd have to be a moral moron not to see that they are victims, too. It's just that too much sympathy for the clients gets in the way of doing your job. You have to sell them on the advantages of doing five years instead of ten. You have to watch the iron doors closing behind them all the time.

"HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER 143 (1983).

clients' weddings and their funerals. When clients were sent to prison, I maintained contact with their families. Because I viewed my clients as friends, I did not merely feel justified in doing all I could for them; I felt a strong desire to do so.⁸⁴

In the real world of crime victims, as opposed to the tabloid world of true crime stories and *America's Most Wanted*, the capacity for empathy is surprisingly strong and seems to be inversely proportional to our distance from the object.⁸⁵ Not surprisingly, juries presented with the "stories" of actual people respond, as do their counsel, with empathy and compassion, not with contempt and detachment.⁸⁶

It is in this respect that Uviller's rhetoric begins to echo the crime rhetoric of the city from which he writes, accepting as truths things that are either distorted or in doubt, and then constructing elaborate and unnecessary remedies on their backs. The fundamental characteristic that unites Uviller and his cohorts with the police — and against existing rules of criminal procedure, criminal defendants, and their lawyers — is a want of empathy. Like Travis Bickle,⁸⁷ they rage against a tidal wave of crime that exists in the imagination, fueled by the media and by the isolation from others that is part of modern urban life.

It seems reasonable to ask that before we embrace changes that impair fundamental rights, there should be some demonstration that the flaws are real and have costs. If, instead, the flaws are imagined or the costs, if any, are minimal, then the only justification

84. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1272 (1993). Ogletree surveys the literature in this area and notes that defense attorneys experience "burnout" most often because of excessive caseloads, see *id.* at 1268, n.112 (citing NATIONAL INST. OF JUSTICE, *ASSESSING CRIMINAL JUSTICE NEEDS* 4 (1984)), as a result of which they must "appear regularly in court without adequate preparation or sufficient time to meet with clients," *id.* (citing Stewart O'Brien et al., *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283, 301 (1977)). This source of burnout evinces an empathy with clients, rather than a disdain of them.

85. See Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 76-79 (1996) (discussing norm theory, which holds that "reaction to a [] person in distress varies according to the normalcy or abnormalcy of his or her plight in [another's] eyes"). Delgado uses norm theory to explain why "[w]e find it easy to empathize with the victims of crime . . . particularly if they are middle-class people like us." *Id.* at 89.

86. See generally Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1932 (1991) (noting that "most punishment now tends to take place out of public view . . . [especially] in densely populated urban settings, where anonymity and disinterest in others' lives often are governing rules of public interpersonal relations. Accordingly, the public can distance itself psychologically from the process and results of punishment"). This is certainly true in capital cases, in which the object of defense counsel is to "humanize" the defendant and thereby enhance jury empathy, a phenomenon well-illustrated by the respective defenses of, and sentences imposed upon, Timothy McVeigh and Terry Nichols, co-conspirators in the Oklahoma City bombing. It also accounts for the recent success of so-called abuse excuse defenses, in which a jury relieves an offender of criminal liability on grounds that the community outside the courtroom finds suspect or contrived. See generally ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* (1994).

87. See TAXI DRIVER, *supra* note 1.

for the reforms that Uviller advocates is the bare political preference for a different allocation of power between government and individual. In that case, give me Judge Rothwax, a wolf in wolf's clothing, rather than the sheepishness of *Virtual Justice*.