

# The democratic issues in Bill Cosby's release

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On Thursday, the Pennsylvania Supreme Court overturned the April 2018 conviction of actor and entertainer Bill Cosby, ordering his immediate release from prison. Cosby, who is 83, had served three years of a 10-year sentence on three aggravated felony counts of indecent assault against Andrea Constand. Constand, a former employee at Temple University, alleged Cosby had drugged and sexually assaulted her at his home in 2004.

Though differing in their reasons, all seven judges agreed that the conviction violated Cosby's fundamental right to due process and a fair trial under the Fifth and Fourteenth Amendments of the US Constitution. The violation was so severe that the majority barred the prosecution from retrying the case.

Four of the seven judges (three Democrats and one Republican) ruled the conviction violated Cosby's due process right to protection against forced self-incrimination, ordering his release. Two judges (both Democrats) concurred in part and dissented in part, agreeing with the majority's ruling but stating they would have ordered a new trial instead of releasing Cosby outright.

The remaining judge (a Republican) dissented, ruling that Cosby's due process rights *were* violated, but not by an infringement on the right to protection from self-incrimination. Rather, the dissent found the trial judge violated Cosby's due process rights by unfairly allowing prosecutors to call five "character witnesses" to argue that Cosby had assaulted them in the past and was therefore guilty in this case. The court majority declined to address this issue and neither affirmed nor overturned the trial court's allowance of broad character witnesses. The first time Cosby was tried in 2017, prosecutors brought only one character witness and failed to secure conviction, with the case ending in a mistrial.

## #MeToo proponents, media attack court for freeing Cosby

The Pennsylvania Supreme Court decision was denounced by the proponents and supporters of the #MeToo campaign. Times Up President Tina Tchen wrote, "Let's be clear, even the Pennsylvania Supreme Court decision did not challenge the finding of the jury that Bill Cosby committed sexual assault."

Dylan Farrow, sister of Ronan Farrow, said, "The fact that Bill Cosby, after being accused by 60 brave women, could have his conviction overturned by a technicality" is "a travesty." Christian Nunes, president of the National Organization of Women, also said the court "failed survivors" by releasing Cosby on a "technicality." Others accused the judges of facilitating future sexual assault crimes.

Such statements testify to the dangerously low level of democratic consciousness in official circles. One does not have to sympathize with Cosby or condone his actions—which are presently the subject of numerous civil lawsuits—to oppose prosecutors violating the democratic rights of the accused.

The court overturned the conviction after finding that police prosecutors

forced Cosby to self-incriminate himself, a tactic used by police against untold numbers of poor and working people who are detained in police precincts and coerced, deceived and cheated into making forced confessions. By attacking the Supreme Court decision, the #MeToo proponents pave the way for future frame-ups like the NYPD frame-up of the Central Park Five, young men who were also coerced into self-incrimination. In a very concrete way, a Pennsylvania Supreme Court ruling against Cosby would have created binding precedent depriving many future defendants of democratic rights.

The argument that violations of due process are acceptable to ensure that guilty people do not "get away with" crimes has always been a hallmark of right-wing "tough on crime" campaigns that have resulted in the incarceration of millions of impoverished people in the US. It flies in the face of Blackstone's democratic adage, "It is better that ten guilty persons escape than one innocent person suffer."

The fact is that the #MeToo proponents vocally demanded prosecutors take actions which the highest court in Pennsylvania has now ruled violated constitutional due process. The claim that the court's ruling was based on a "technicality" is aimed at covering up this embarrassing fact which exposes the right-wing character of the #MeToo initiative.

## The decision of the Pennsylvania Supreme Court

The 79-page majority opinion authored by Judge David Wecht exhaustingly explains what the concurrence called the prosecution's "coercive bait-and-switch."

The court explained that the jury reached its "guilty" verdict based on self-incriminating statements Cosby made in depositions in a separate civil (i.e., non-criminal) lawsuit filed by Constand in 2005. The court found that Cosby had only agreed to give civil depositions because he relied on a 2005 agreement made with then-Montgomery County District Attorney Bruce Castor, who stated that Cosby would not face criminal prosecution for the allegations in exchange for a waiver of Cosby's Fifth Amendment right to protection against self-incrimination. Castor explained that he felt the evidence against Cosby was too weak to bring a conviction, but felt a civil settlement would bring some measure of justice to Constand. Constand's attorneys voluntarily agreed to this proposal, and Constand successfully settled the civil suit for \$3.5 million in 2006.

In Thursday's ruling, the Pennsylvania Supreme Court explained that after Castor had been replaced as district attorney by Kevin Steele, the latter betrayed the prior promise made by the district attorney's office and brought charges in December 2015. Steele then introduced Cosby's civil depositions as evidence in the criminal case, even though Cosby only gave those depositions after waiving his right to plead the Fifth.

Judge Wecht's decision explains that Cosby found himself in a nightmarish situation where prosecutors used the coercive power of the state to trick him into depriving himself of a fair trial. Wecht wrote that the facts and law "compel only one conclusion."

Cosby did not invoke the Fifth Amendment before he incriminated himself because he was operating under the reasonable belief that D.A. Castor's decision not to prosecute him meant that the potential exposure to criminal punishment no longer existed. Cosby could not invoke that which he no longer possessed, given the Commonwealth's assurances that he faced no risk of prosecution. Not only did D.A. Castor's unconditional decision not to prosecute Cosby strip Cosby of a fundamental constitutional right, but, because he was forced to testify, Cosby provided Constand's civil attorneys with evidence of Cosby's past use of drugs to facilitate his sexual exploits.

The court then explained the constitutional basis for its decision: "Due process is a universal concept, permeating all aspects of the criminal justice system. Like other state actors, prosecutors must act within the boundaries set by our foundational charters. ... The privilege constitutes an essential restraint upon the power of the government, and stands as an indispensable rampart between that government and the governed."

The court also addressed the prosecution's argument that because of Cosby's wealth, privilege and media savvy, he should have known better than to rely on the district attorney's promise and the advice of his own lawyers in agreeing to the deal. This argument is a slightly-more-refined version of the argument made by #MeToo proponents who cover their right-wing "law-and-order" campaign against due process under the false guise of challenging the wealthy and "speaking truth to power."

The court disagreed with the prosecution, writing that this argument offended basic notions of due process and the right to counsel, guaranteed under the Fifth and Sixth Amendments. At this point, the court came closest to addressing the mood of mob justice that sat in the trial courtroom like the proverbial elephant:

The contours of the right to counsel do not vary based upon the characteristics of the individual seeking to invoke it. Our Constitution safeguards fundamental rights equally for all. The right to counsel applies with equal force to the sophisticated and the unsophisticated alike. The most experienced defendant, the wealthiest suspect, and even the most-seasoned defense attorney are each entitled to rely upon the advice of their counsel. Notwithstanding Cosby's wealth, age, number of attorneys, and media savvy, he, too, was entitled to rely upon the advice of his counsel. No level of sophistication can alter that fundamental constitutional guarantee.

Those who denounce the court for releasing Cosby on a "technicality" have no concept of the historical significance of the right to protection from self-incrimination, which was secured through nearly 1,000 years of progressive social development and revolutionary struggle.

### **The history of the right to protection against forced self-incrimination**

In 1637, on the eve of the English Civil War, "Freeman" John Lilburn was arrested for distributing anti-clerical literature from free Holland, which had not been approved by the crown censors of the Stationers' Company. Lilburn was arrested and the Star Chamber attempted to coerce him into incriminating himself. This process had acquired prominence as a method for forcing confessions during the religious inquisitions of the

prior centuries and was closely associated with torture.

Lilburn refused to incriminate himself and denounced forced self-incrimination as an illegal usurpation of the Magna Carta of 1215 and the 1628 Petition of Rights. He was held in contempt of court and dragged behind an oxcart from London's Fleet Prison to Palace Yard as he was lashed with a three-pronged whip 200 times. He was then pilloried but still refused to testify against himself. Lilburn became a hero and leader of the 17th-century Leveller movement, which represented among the most radical and egalitarian factions of the progressive forces in the English Revolution of 1642–51.

These democratic principles were carried forward in the American Revolution against the British monarchy. Members of the Sons of Liberty would raise their glasses in the bars of Boston and proclaim a toast: "No answer to interrogatories, when tending to accuse the persons interrogated."

Over the course of the 19th and early 20th centuries, the right to protection against forced self-incrimination was denied to broad sections of the US population, especially in the Jim Crow South, and was not "incorporated" to apply to the states until 1964. The central importance of this right from the standpoint of securing due process as a whole was made plain in the landmark 1966 decision *Miranda v. Arizona*, where US Supreme Court Chief Justice Earl Warren ordered police departments to inform all arrested persons they have the right to remain silent.

### **The role of the corporate media**

The corporate media is not trying to hide its sanctimonious anger over Thursday's decision. "Cosby no longer lives in prison, but he will always live in shame," writes Eugene Robinson in the morally-pure *Washington Post*, which the same day published another op-ed piece titled, "Donald Rumsfeld was a great man, whose lessons I will never forget." The *New York Times* published a piece denouncing Castor by a former prosecutor entitled "There's one man to blame for Bill Cosby's release."

At the same time, there is a sense of nervousness in the press coverage of the recent decision, which reads like an indictment of the media hysteria over the last four years. Not once did the *New York Times*, *Washington Post* or other "left" publications give serious treatment to Cosby's due process arguments, which his lawyers raised consistently over the course of the trial and appeal.

No publication has played a more foul role than the *New York Times*, which cheer-led Cosby's prosecution from the start. In January 2016, the *Times* belittled Cosby's due process argument, calling it a "court maneuver." In April 2018 it published a gushing profile of Cosby's prosecutor, Kristen Gibbons Feden, who, as it turns out, was primarily responsible for violating Cosby's rights by insisting that charges be brought. The entire corporate press cheered and jumped for joy when Cosby, who was then 80 years old, was convicted and shuffled away into prison as a result of a massive violation of the Constitution. The *Times* and other publications called it a "watershed moment."

For socialists, the principle of the defense of democratic rights is not determined by the personality or even the actions of the accused. Only dishonest people claim defending due process means endorsing the conduct of the defendant. These arguments—and the #MeToo campaign as a whole—serve the interests of historical and political reaction.



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