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*681 REFLECTIONS ON CRIME AND PUNISHMENT [FN1]
Charles Fried [FN1]

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Benjamin Cardozo, Learned Hand, William Brennan, Stephen Breyer, and Richard Posner—to name just a few—provide the answer to the question of whether it is proper for judges to write and lecture about improvements in the law which they administer. Nevertheless, some caveats are in order. No less than they, I also feel a constraint when judging that the freedom I claim in speculating here belies. A judge is a subordinate in many respects. He is subordinate to the constitutional and legislative texts that he applies, to the courts above him in the hierarchy, to legal precedent and the traditions of the profession, and finally, a judge is subject to the collaborative process of his court. There are tensions: surely not every decision that constrains him is wise or just, although wisdom and justice play a part in the multitude of textual, precedential and constitutional forces that move him. It would be stultifying if a judge had to pretend that no such tensions exist. Thus, please do not attempt to extrapolate to what I shall do based upon what I say. After all, much of what I discuss rests in the hands of the United States Supreme Court. Judge Henry Friendly—a judge's judge if ever there was one—represents a perfect model. Judge Friendly addressed many of these issues with frankness and force, while leaving no doubt as to his faithfulness to his peculiarly subordinate role as a judge. I depart from his model at least in one way: my conclusions are *682 much more tentative than those he arrived at in his two famous articles: *The Bill of Rights as a Code of Criminal Procedure*, [FN1] and *The Fifth Amendment Tomorrow: The Case for Constitutional Change*. [FN2] Indeed my conclusions amount to no more than a call for research, analysis and experimentation. Further, I shall not comment on the death penalty, mandatory sentences of life without possibility of parole, or three-strikes-and-you're-out legislation. I wish to focus on the vast number of cases where it is clear from the outset that the criminal will eventually be released from prison and will be expected to lead a normal life among us. Finally, I note that the practices and statistics I describe are not specific to the Commonwealth. Indeed, I make no claim that they necessarily apply to the Commonwealth at all. Instead, I have drawn my observations from national trends and national practices.

I

It appears for a number of reasons, including some that do great credit to our commitment to the rule of law and to individual rights, that the United States makes it more difficult than other decent, reasonable democracies to prevent crimes and to apprehend and convict those whose crimes we do not prevent. Once a criminal is convicted in the United States, however, our system subjects the offender to longer sentences in a sometimes degrading regime which is hurtful to criminals and society alike. I do not suggest that prison food, medical care, or amenities are inhumane. This lecture is not about prisoner access to cable television, body building equipment or law libraries. In fact, some of our prisons may appear quite astonishingly luxurious to authorities from other countries. Rather, I am more concerned by the failure of some American prison systems to assure the physical safety of its inmates and by the widespread regime of intimidation by stronger, organized inmates against the weaker or less experienced inmates. [FN3] What we cannot blink away is the astonishing prevalence *683 and tolerance of sexual violence and subjugation particularly among male prisoners. [FN4] These conditions must be evaluated in the context of the very long sentences served by criminals who will eventually be allowed to leave prison. In short, prison life is too often a terrifying and degrading experience endured by prisoners for unimaginably long periods of time—six, ten, twenty years—after which society expects the released individuals to lead self-sufficient, constructive, and law-abiding lives. [FN5]

I do not advocate coddling criminals. The following represents an account of a Japanese prison:

Three months after being put in a Japanese prison, Kevin M. Mara was about to sit down to a meal when the jailer called out his name. Mr. Mara, 32 and Connecticut-born, says he then made a horrible mistake: he opened his eyes and looked up. That apparently broke a rule that before eating, each inmate should close his eyes and look downward.

*684 And so, Mr. Mara's lawyers say, he was kept in solitary confinement for 10 days. There, they say, he was accused of "throwing books" and was stripped and restrained by a wide, thick leather belt around his waist, with both hands bound in steel-and-leather cuffs behind his back.

Mr. Mara spent 20 hours this way and was forced to lap up food from a bowl while lying prone on the floor.

In many ways, Japan's prison system is impressive. Overcrowding is not a problem, assaults or rapes among prisoners are rare, drugs and weapons are virtually nonexistent within prison walls, hardly anyone escapes and Japan has an exceptionally small proportion of its population in prison.

The problem, human rights campaigners say, is that the Japanese system achieves this record in part by draconian rules and mind-boggling regimentation.

"It smacks of totalitarianism," said Joanne Mariner, a prison specialist for Human Rights Watch, a New York-based human rights organization. "There's an obsession with rules and with absolute, strict obedience to rules. When they believe rules have not been followed, then there is arbitrary punishment."....

Mr. Mara's case seems to be unusual. Most prisoners follow the rules scrupulously, partly because of what happens to those who resist, said Toshikuni Murai, dean of the law department at Hitotsubashi University. As a result, many are released early on parole for good behavior....

Moreover, the strictness of the rules means that there is no chance for gangs to develop in Japanese prisons. And while inmates may be subject to the whim of guards, they are unlikely to be brutalized by other inmates. [\[FN6\]](#)

This is not a regime that many potential offenders would readily risk experiencing. But if the prison is healthy, safe and conducive to providing prisoners the opportunity to overcome illiteracy and learn some skills while confined—maybe only the skill of performing useful work competently and regularly—then this system is surely more appropriate than the well-appointed infernos that our criminal justice system sometimes creates. Inside too many prisons—one prison would be too many—the most hardened criminals prey on the weakness of others and all learn that neither order nor justice prevail in prison.

[\[FN7\]](#)

*685 Please keep in mind the quote that the Japanese system "smacks of totalitarianism" as I repeat a tale recounted by James Gilligan, M.D., former Medical Director of Bridgewater State Hospital for the criminally insane, in his recent book *Violence: I first gained some acquaintance with the reality of rape in prison, and of the means through which some inmates are forced into the role of sex slave, when I was asked to see one young man, Jeffrey L., because his behavior had become so bizarre that the prison authorities thought he needed to be evaluated for psychiatric illness. The incident that led to this referral had occurred in the prison Visiting Room, a setting in which inmates sit on one side of a long table and their visitors on the other. Jeffrey L.'s mother had just concluded a visit with him, when instead of merely saying good-bye he leaped over the table in an attempt to follow her out of the Visiting Room and out of the prison, crying hysterically, clinging to her, begging her to take him home with her. Since he would not tell either his mother or the correction officers why he had behaved this way, they asked me to see him.*

When I interviewed Jeffrey, I noted that he was a slightly built nineteen-year old white man (or boy) who appeared even younger than his stated age, who was visibly trembling and appeared nearly frightened to death. What he described to me was a pattern of repeated gang rapes to which he had been subjected since first arriving in prison. He was sent to prison for a relatively minor, nonviolent offense. After he was convicted in court, he had first been sent to the medium-security prison to which all of the younger prisoners convicted of nonviolent crimes are initially sent for a brief "diagnostic" evaluation, on the

basis of which they are assigned or "classified" to whatever long-term prison setting the authorities deem suitable for that particular individual; soon after arriving there, he was raped by a gang of other inmates. Because he felt overwhelmingly ashamed of what had happened to him, and also because he knew enough about the mores of the prison subculture to know that seeking help from the correctional authorities would be seen as informing or "ratting" on his fellow prisoners, and that the penalty for that in the world of the prison is capital punishment (imposed by the inmates themselves, of course, not by the guards), he refused to reveal to anyone what had happened. As ordinarily happens with nonviolent first offenders, he was soon transferred to a minimum security prison, where he was again gang-raped. In terror of a repetition of that experience, and in order to provoke the prison officials to transfer him elsewhere, he refused a direct order to return to the cell block to which he had been assigned (and in which he had been raped), and thus was transferred to a third (mediumsecurity) *686 prison, where he was promptly subjected to a gang rape for a third time. It was following that experience that he behaved as I described above in the Visiting Room. [\[FN8\]](#)

George Stigler is supposed to have once remarked that the plural of anecdote is data, [\[FN9\]](#) and Gilligan offers data to show that this anecdote is not an isolated incident but a feature of prison life. Gilligan cites studies and findings from Florida, Texas, Pennsylvania, Louisiana and Connecticut which demonstrate that rape is endemic in the American prison population. [\[FN10\]](#) In fact, one correction officer stated that a young inmate's chances of avoiding rape are "almost zero.... He'll get raped within the first twenty-four to forty-eight hours. That's almost standard." [\[FN11\]](#) Furthermore,*687 an investigator observed that ten years ago, when the prison population was far smaller than it is today, there were as many as "eighteen adult males raped every minute" of every day. [\[FN12\]](#) Moreover, it is common knowledge that an exceptionally large proportion of male prisoners engage in regular homosexual activity, and rape simply becomes the violent alternative to sexual submission. [\[FN13\]](#) Feminist scholars, including Dworkin, Estrich and MacKinnon, have raised our consciousness about the prevalence of heterosexual rape and the degrading impact that it has upon women. [\[FN14\]](#) Surely, the homosexual rape prevalent in so many prisons is no less destructive of the souls of its victims. [\[FN15\]](#) One of the most distressing features of this infernal system is that the prison authorities are aware of the prevalence of prison rape, yet sometimes choose not to intervene and actually discourage complaints. [\[FN16\]](#) In effect, some prison guards tolerate rape and sexual coercion as a means of making the prison population, particularly the more aggressive and troublesome segment, more manageable. [\[FN17\]](#)

Thus, the one institution in which we have the almost unlimited right to control the lives of our fellow citizens and which is intended to represent the ultimate commitment to order and personal security, is too often deeply disorderly and ultimately insecure. The lesson for the individuals subjected to this system—including their friends, family members, and *688 everyone else close enough to feel it breathing down their necks—is that our commitment to the moral values of order, lawfulness and security are mere hypocrisy. Federal and state governments spend approximately \$25 billion dollars annually to provide peace and security for some, in part by cordoning off the most violent and depraved among us to practice their depravity on others within the cordon. [\[FN18\]](#) We should not be teaching this lesson. No amount of due process, prison law libraries, cable television and the like, can make up for this elementary failing. The seriousness of this phenomenon as an aspect of our national life becomes apparent when we recall that there are now over a million and a half million persons in prison [\[FN19\]](#)—and that is at any one time, so that the number of persons who have endured these conditions in the past as well as those enduring them now must be much higher. [\[FN20\]](#) That is a significant proportion of our total population.

But I am struck by the other, now overt and official, harshness of our penal system: that is, our disposition to use imprisonment at all in some cases and the length of the terms we impose on those whom we do imprison. In both respects we far exceed other developed democratic nations. [\[FN21\]](#) The rate of incarceration in this country has been estimated as *689 from three to five times greater than in most European countries and three times as large as it was in this country twenty years ago. [\[FN22\]](#) For example, 519 out of every 100,000 citizens were confined in American prisons in 1993, [\[FN23\]](#) and in 1996 the figure had increased to 615 per 100,000 or a total of 1,630,040 persons. [\[FN24\]](#) The number has doubled over the last decade

and tripled over the last two decades. It appears that non-violent drug offenses account for approximately half of this growth. The statistics in other western countries are significantly lower: the Netherlands (49), Germany (80), France (84), England and Wales (93). [FN25] It is not clear to me how this vastly larger prison population is achieved.

***690** Although the common wisdom holds that the United States is the most punitive of industrialized democracies, the picture emerging from this discussion is more complex. The United States has the highest per capita rates of incarceration of any industrialized democracy. This is prima facie evidence for punitiveness. The propensity to incarcerate and the length of time served for homicide is not radically different in the United States and other institutionally similar countries. Indeed, there is some evidence that other nations may require longer terms in custody for homicide. Within violent crimes, as the level of violence decreases the disparity between the United States and other common law countries increases with respect to time served, but not the propensity to incarcerate. In the case of property crime, it is clear that the United States incarcerates more and for longer periods than other similar nations. The same appears to be true for drug offenses. The United States, then, is not universally more punitive than other industrialized democracies, but it does seem to be more punitive with respect to property crime and drug offenses. As the type of property crime becomes less severe the disparity between the United States and other common law nations increases both with respect to the propensity to incarcerate and the length of time served. The United States seems to impose longer sentences for crimes such as robbery, but this may be due to more extensive use of weapons in the United States. [FN26]

What is puzzling is that the United States is not three or more times as beset by crime than these other countries. Victimization statistics suggest that our property is actually more secure against crime in comparison to other industrialized countries, including the United Kingdom, Canada, and West Germany. [FN27] We are, however, less secure against personal violence. ***691** [FN28] Homicide rates are much higher and the rates for other crimes of violence—rape, robbery, aggravated assault and assault—are also higher, but less strikingly so. [FN29] So where do these disparities come from? Drug crimes account for some, but not all of this disparity. They account for twenty-five percent of the state and approximately forty percent of the federal prison population. [FN30] The comparison of sentences may relate only ***692** to sentences for first-time offenders and thus may not reflect the sharply higher sentences imposed on repeat offenders. [FN31] Moreover some comparative data may not have caught up with the upward trend in the use and length of incarceration within the United States, so that a better comparison would show longer sentences for all categories of crimes and a greater use of incarceration versus other sanctions. Certainly it is striking that our incarceration rates have gone up as the rate of violent crime has gone down. [FN32]

II

This condition of long prison sentences served in often undisciplined, dangerous and degrading circumstances may perhaps be related to the ***693** earlier part of our criminal justice system which consists of the methods and procedures by which we seek to prevent crimes, to catch those who commit crimes, and to determine the guilt and punishment of those we catch. The two features I mention make up a system. The United States has elaborate—surely the most elaborate—procedures for determining who will be punished, and yet we also have by far the largest prison population of any industrialized country to which we would care to compare ourselves.

Consider the cost of accomplishing approximately the same level of deterrence as other countries, but with our harsher, longer punishments. In 1990, the United States (federal, state, and local governments) spent some \$74.25 billion on the justice system. [FN33] This figure includes some \$31.8 billion on police protection, \$16.55 billion on judicial and legal services, \$24.96 billion on corrections and \$934.45 million on other justice activities. [FN34] Anyone who works in the system, however, knows that the real cost is much higher. Courts are overwhelmed with criminal matters, not only trials, but also pre-trial motions, post-trial motions, appeals, post-conviction remedies, and prisoner litigation. Trials themselves are lengthy. We are truly unique in this respect. Other systems concentrate on the issue of guilt or innocence. We, by comparison, use the

criminal process to explore a large number of ancillary issues relating principally to the conduct of the law enforcement authorities in investigating the crime and building its case. Surveys show that the public has no confidence, not to mention pride in this system. [\[FN35\]](#)

***694** If there is a connection between these two aspects of the system, then it may be seen as an enactment of Cesare Beccaria's formula that the efficacy of punishment is a function of its severity, its swiftness and its certainty. [\[FN36\]](#) On that hypothesis, if the American criminal justice system has ***695** made punishment seem cumbersome, slow and uncertain, then it is only by increasing the severity of the punishment that the public feels that it will get the measure of deterrence to which it merits. I shall call this the Beccaria hypothesis. Such a relationship between the two aspects of the system would also be dynamic, because one effect of such greater severity of penalty would be an even greater deployment of those procedures designed to assure that the punishment was truly deserved and fairly imposed. The death penalty is the most extreme example of this spiral. Surely, one source of the pressure for the death penalty is the sense that without it the actors in the criminal process will lack the will to punish severely and isolate indefinitely the most dangerous and depraved among us. Another source is the belief that because so many escape the punishment they deserve, we should punish those convicted of the most terrible crimes with a severity that announces our abhorrence, not just of the crimes they have committed, but of crime in general. The death penalty is so severe, however, that some courts have insisted on an almost unattainable level of certainty and fairness in identifying those who will be put to death, and thus have multiplied procedures and safeguards that are then applied to all crimes generally. These procedural safeguards then contribute to further delays and uncertainties which only increases the public pressure for severity.

Crime and punishment data suggest an alternative, and I must say, still a more discouraging hypothesis. There is reason to believe that prison has been an effective tool for reducing crime not primarily because it works as a deterrent, but for the more straightforward reason, that so many of those we lock up would be committing enough crimes if they were at large that their incarceration actually leads to a significant reduction in crime. A recent study by Steven Levitt published in the *QUARTERLY JOURNAL OF ECONOMICS* reviews the very large literature on this subject and analyzes familiar statistics in a methodologically sophisticated and innovative way. [\[FN37\]](#) Levitt concludes that "incarcerating one additional prisoner reduces the number of crimes by approximately fifteen per year, ... and ***696** that the marginal social costs of incarceration are at or below the accompanying social benefits of crime reduction." [\[FN38\]](#) The author's conclusions appear to accord with other studies. [\[FN39\]](#)

I find this hypothesis more discouraging than the one I have floated so tentatively for two reasons. First, it entails the further proposition that our extraordinarily high incarceration rate is a necessary and effective device without which crime rates would be much higher than they are now. The author of the same study notes that while incarceration rates more than tripled in the last two decades, victimization rates for violent crimes remained unchanged and fell for property crimes. [\[FN40\]](#) But far from showing that our harsh incarceration practices have been unnecessary, Levitt concludes that this shows they have been effective. [\[FN41\]](#) The vivid implication of this dryly statistical picture is that we are indeed inherently far more violent and prone to crime than those other countries to which I have been comparing us, and that only through the use of harsh and repressive measures can we achieve comparable levels of peace and security.

The Beccaria hypothesis supposes that punishment reduces crime by influencing the behavior of those who are not punished. That is the essence of deterrence. [\[FN42\]](#) Every punishment represents a failure of deterrence, however, it is also used to avoid many more (it is hoped) other failures. Levitt's thesis posits a different mechanism, that of incapacitation. [\[FN43\]](#) Prison reduces crime by incapacitating criminals. Deterrence assumes ***697** that we can influence those disposed to criminal behavior and influence them to avoid it. The second mechanism assumes quite explicitly-Levitt bases his conclusions in part on self-reporting by offenders of the average number of crimes they commit while not in prison-that those subject to imprison-

ment have a constant disposition to offend, such that if left at large they predictably will offend and at a predictable rate. [FN44] On this hypothesis, offenders are like germs and prison is a form of quarantine. Now of course these two mechanisms are not mutually exclusive: we might use the incapacitation of some to deter others; yet the emphasis of each strategy is quite different. The deterrent strategy is more hopeful, more humanistic (though perhaps not more humane) in its assumption that crime is a matter of choice and that persons can choose not to be criminals. In this respect it is a cousin, though not an identical twin to reformatory strategies, which are not much in vogue these days. Reformatory approaches assume that people can change and become better, although the reeducation is compulsory. [FN45] And finally, if incapacitation rather than deterrence is a prime mover of our harshly punitive system, then the case for our present high procedural threshold is on much stronger ground.

III

The Beccaria hypothesis proposes that we are driven—maybe rationally, maybe only because of public perception—to increase the severity of punishment because the first stage of the criminal justice system is so drawn out and so fraught with uncertainty. To put it in more coldly analytical language: the present system causes a double discount of the actual penalty imposed. The penalty is discounted first by the chance that it will not be imposed, and then by the time discount of its delay. If the penalty followed more swiftly and more certainly on the offense, it would not have to be as severe in order to have the same effect. [FN46] The factor of delay may be particularly important with a population which is likely to have a very heavy time discount—that is people who do not plan very *698 much and for whom distant events seem especially remote. To see how much uncertainty and delay actually exists in the system we would need to know what percentage of each type of crime are cleared by arrest [FN47] and what percentage of those arrested for such crimes are eventually convicted. [FN48] It does seem that the more serious the crime the higher the clearance rate, so that in respect to burglaries thirteen percent are cleared by arrest, [FN49] compared to fifty-one percent for reported rapes [FN50] and sixty-five percent for homicides. [FN51] In sum, " i n 1992, of the 10.3 million violent crimes committed, only 165,000 led to convictions, and of these only 100,000 led to prison sentences. Fewer than one convicted criminal was sent to prison for every hundred violent crimes." [FN52] What is striking is that in this country eighty percent of persons charged with all crimes either plead guilty or are convicted after trial. In the United Kingdom, by contrast, about one quarter of the trials end in acquittal. A complicating factor is the far greater disposition in America to engage in plea bargaining, so that many arrests result in convictions only because of a more or less greatly reduced charge and therefore a much reduced penalty. Anecdotal impressions suggest that the more serious the charge, the less likely the prosecution is to bargain it down in return for a plea. All this makes an estimate of the uncertainty discount very hard to arrive at. The impression *699 of many observers is that serious crimes of violence should be assigned a smaller uncertainty discount, while property crimes, regulatory and victimless crimes, and drug offenses all enjoy higher uncertainty discounts. [FN53]

As to the time discount, the average time between arrest and conviction for murder is 267 days while the average time between arrest and conviction for an individual charged with burglary, theft, drug trafficking, or a driving-related offense is forty days. [FN54] The more serious the crime the longer the delay between arrest and conviction. [FN55] No comparable data exists that shows the delay between the commission of a crime and conviction. This delay may be a function, in part, of the greater disposition of the prosecution to press for a conviction on a maximum charge and thus lessen the likelihood of a guilty plea. [FN56] Also we may suppose that the less *700 serious the offense, particularly a property offense, the more likely that the police will simply drop the case after a certain time goes by. It is, however, a serious complication in any calculation that for certain offenders arrest is the effective beginning of punishment. [FN57] This is a factor that must contribute greatly to the disposition to plead to a lesser offense.

It would seem that no firm estimate of either the uncertainty or the time discount factor can be made, such that if criminals were rational calculators they would know just what combined discount to apply to the penalties they face. [FN58] Yet, the

more relevant question is what criminals and potential criminals perceive the factors of delay and uncertainty to be. After all, if they think that they are very likely to get away with crime, and that even if caught it will be a long time before they are brought to justice, then that is what will influence their behavior—even if their suppositions were quite wrong. I wonder though, about how wrong they are likely to be in the long run. I would suggest that the guesses of those most intimately affected by the criminal justice system may be the best approximation to reality available. And on these scores, I would suggest that the *701 perception of criminals and potential criminals do not differ too much from that of the general public. Though not finely differentiated, that perception is of a system which offers numerous opportunities for diversion and delay. And true or not, the rules about questioning and searches and seizures figure prominently as levers for diversion and delay.

IV

The regulation of questioning of suspects and of the search for and seizure of evidence of crime have led to a very large and complex body of doctrine. There is considerable controversy but little convincing proof that these doctrines have significantly hampered solution of crimes or the ability to convict persons accused of crimes. [FN59] There is even controversy about whether they have had much impact on police misbehavior, although it seems undeniable that police practices are far more orderly, professional and respectful of appropriate limits, in short more decent and civilized, than when the Supreme Court embarked on devising these doctrines some thirty-five years ago. [FN60] What seems evident, however, is that these doctrines have added a great deal to the complexity and delays at every stage of the criminal justice process and that they have little—usually nothing at all—to do with the question of guilt or innocence. Everyone in the process knows this, most importantly the accused himself and those to whom the deterrent effect of the criminal law is addressed: persons disposed to commit crimes.

It has been argued that a rational system of investigation, prosecution, and trial would allow prompt questioning of suspects, since it is when the crime or the apprehension of the suspect is freshest that the person or *702 persons questioned are most likely to give useful and reliable information. [FN61] There is, of course, no intrinsic virtue in discouraging suspects and witnesses from assisting the investigation by telling the authorities what they know. The claim that it is somehow better for the police to develop information and solve crimes without questioning suspects is best understood in terms of the danger that police questioning may lead to brutality, intimidation, prolonged confinement and isolation—particularly of vulnerable persons—and the fabrication of false statements. [FN62] These abuses must be prevented by any decent system of law enforcement and criminal justice. But it has been suggested by responsible commentators that our present system for controlling these abuses of police interrogation does a poor job of subjecting to the rule of law the interrogation function, while at the same time depriving law enforcement of an important tool for solving crimes at the most opportune moment. [FN63] These commentators have suggested that prompt production before a magistrate responsible for conducting the questioning, with an audio and visual record, would far better serve both functions. [FN64] For instance, the witness might have his lawyer present, and the lawyer might suggest lines of questioning, but could not interfere with the magistrate. The often repeated concern that a nervous, unappealing or ignorant suspect might destroy himself under the barrage of shrewd questioning, only applies at the trial stage and particularly at a trial before a jury. [FN65] The greatest danger that the suspect faces at the investigatory stage is that he will confirm the suspicions against him. If the suspicions are incorrect, however, that problem can be solved at trial when *703 the accused would enjoy the right not to testify. And if the suspicions are rightly confirmed, it simply makes no sense to consider that a defect. The price such a system might have to pay is the exclusion from evidence of the statements the suspect made at the investigatory stage.

Thus, the system that has been suggested might prove to be more restrictive than the one that exists today, where statements made in police custody are generally admissible and play an important role in many prosecutions. But the exclusion of statements made before the magistrate need not entail that the fruits of the suspect's statements must also be excluded. If the questioning is conducted by a judicial officer and thus free of the dangers of improper pressures, the reason for excluding the

fruits drops away. The fruits are excluded to remove any incentive for the police to do what they ought not do. But by hypothesis the questioning before the magistrate is not improper. The reliability of these fruits-including further statements, real evidence, and other witnesses-is not compromised by the fact that the police were led to them through the accused's own statement. Here in Massachusetts, our Declaration of Rights has been interpreted to require the exclusion of fruits [\[FN66\]](#) and of full transactional immunity. [\[FN67\]](#) As I point out later, this interpretation rests on a text which is fuller and more protective than the Fifth Amendment. A further counter-weight to exclusion of the suspect's statements to the magistrate that has been suggested is relaxation of the rule that the prosecution may not comment upon, nor invite the drawing of an inference from the accused's failure to take the stand. [\[FN68\]](#) In 1965 the United States Supreme Court in *Griffin v. California* [\[FN69\]](#) forbade such comment which several jurisdictions had permitted until then, although already forbidden in federal proceedings. [\[FN70\]](#)

***704** It is argued, as in the case of interrogation, statements, and the fruits of statements, that like it or not the Constitution requires the system of exclusion of evidence we now administer in all its complexity. We revere the Constitution. And if we did not, it would still be our duty to obey it. It is worth recalling, however, that the actual text of the Constitution does not unambiguously require any of the rules I have discussed. The Fifth Amendment speaks only of compelled self-incrimination in any criminal proceeding, and thus it has been argued that investigatory questioning of the sort I mention does not fall within the scope of the prohibition. [\[FN71\]](#) By contrast, the version of the prohibition against self-incrimination in the Massachusetts Declaration of Rights speaks of furnishing proofs against oneself and so on its face would appear to extend to such pre-trial judicial inquiry. [\[FN72\]](#) This stronger language quite plausibly also extends to the fruits of the investigatory statements. It might also be argued that because the federal Constitution was in many respects modeled on John Adams' 1780 Constitution for the Commonwealth, this more ample prohibition should also be carried forward to the Fifth Amendment.

The tension between enforcing constitutional norms and the pursuit of truth grows more acute when we come to the exclusionary rule as applied to evidence obtained by a search or seizure. Real evidence-weapons, bodies, contraband-are among the most objective and reliable kinds of ***705** evidence that exist. Also it is more likely than in the case of a confession that the real evidence will not only be the best but perhaps the only evidence of guilt. So the price of the exclusionary rule here is quite high. The rules regarding searches and seizures have been subject to a sustained textual and historical critique. The critique is quite well known, so I will only recall its principal features. First, it is argued that the text of the Fourth Amendment does not readily support the presumption in modern law in favor of the warrant. [\[FN73\]](#) What the text prohibits are unreasonable searches and seizures, so that "reasonableness" appears to be the most general criterion for the lawfulness of a search or seizure. [\[FN74\]](#) Only in a separate and subsequent clause does the Fourth Amendment go on to lay down the requirements for obtaining warrants. Historical research suggests that warrants presented a distinct and serious threat to civil liberties, and that these clauses were intended to discipline their use. [\[FN75\]](#) Second, as to the exclusionary rule, it is well known that it was not even considered an ***706** appropriate, much less an intrinsic part of the protection against unreasonable searches and seizures, until this century [\[FN76\]](#)-in 1914 in federal prosecutions [\[FN77\]](#) and 1961 in state prosecutions. [\[FN78\]](#)

There is logic on both sides of the dispute about the exclusionary rule. In favor of the exclusionary rule, it must be said that whatever its contours, there can be no doubt that the Fourth Amendment was certainly meant to be obeyed, and if it had been obeyed, it follows that the improperly obtained evidence would not have been available. There is much to be said on the other side as well-and Judge Cardozo, before he became Justice Cardozo, said it best in 1926 in *People v. Defore*, [\[FN79\]](#) when he reasoned that the price to society is too high if the "criminal is to go free because the constable has blundered." [\[FN80\]](#) Clearly, the emphasis on the warrant at the expense of reasonableness, together with the exclusionary rule, have led to the elaboration of a body of law of great complexity, a complexity that is deployed at the threshold of many criminal prosecutions and as a precondition to their successful continuation. I do not mean to reargue Cardozo's point here. It is worth noting, however, that the logic of the exclusionary rule would be a good bit more immune to Cardozo's counterthrust if judges ex-

cluded evidence only if they determined that the conduct leading to the seizure had been unreasonable. Yet the present law of search and seizure is much more complex-perhaps as complex as any aspect of our law of criminal procedure. There are rules governing when a warrant is necessary, what evidence will support a warrant, what searches may accompany a stop and an arrest, what constitutes a seizure, how these rules apply to motor vehicles and to open or closed containers found inside motor vehicles, what constitutes consent to a search and who may give it, and finally what fruits of illegally seized materials must also be suppressed. To be sure, some of the complexity has arisen as a response to the exclusionary rules' restrictions. The Terry [FN81] stop, the Leon [FN82] good *707 faith exception, the emphasis on reasonableness implicit in Illinois v. Gates, [FN83] the doctrine of inevitable discovery, [FN84] and the more permissive rules on search accompanying arrest provide the most salient examples. It is not clear, however, whether these rules have helped to dismantle the prior intricate edifice or merely added to it, creating yet more complexity and yet another set of rules to argue about.

V

My point is not to argue in isolation the wisdom of any of the controversial rules that have been instituted-almost always in the first instance by the Supreme Court and during the last thirty-five years. I wish rather to suggest a possible relation between those rules and the long, often harsh penalties that characterize our penal system. That is the Beccaria hypothesis. Would the swiftness and certainty of punishment be increased if some of these rules were altered or relaxed? And even if no gain in swiftness and certainty could be demonstrated, would the public and those to whom criminal sanctions are addressed perceive such an increase? And finally, if such gains were either shown or perceived would this lead to a milder yet equally effective penal regime?

Should we even contemplate a relaxation and simplification of the regime by which we investigate and prosecute crime? I have suggested that the United States Constitution may not impose such an iron and categorical constraint as the rhetoric of decisions insists. But rhetoric apart, there is reason to believe that we have in the same thirty-five year period which developed this regime also succeeded in disciplining the number and seriousness of police excesses. Would not a relaxation also invite a return to intolerable abuses of power? Perhaps if police abuses were litigated in a distinct proceeding-a civil suit, a suit for a statutory penalty, a disciplinary proceeding-the complexity might not weigh so heavily. This complexity may have accomplished all that it can and now is not a safeguard, but instead contributes to the disillusion experienced by many who participate in the criminal justice system-including those against whom it is directed. My colleague Alan Dershowitz-and many others-have claimed that in respect to these rules a great deal of winking and nodding goes on, that police, prosecutors and even judges expect and tolerate a great deal of what may politely be called "stretching a point." [FN85] I do not know if this *708 claim is correct. If it is, this too may in part be a response to the legal maze we have constructed and now force the prosecution to negotiate in order to prove a case about the substance of which there may be very little doubt.

It is said that alternative remedies would be powerless to restrain excess zeal and just plain lawlessness in law enforcement. Can we be sure? Federal damage remedies against municipalities and individual officers were made available at about the same time as the substantive rules were toughened. It is striking that Justice John Marshall Harlan, who dissented so forcefully in Mapp v. Ohio, [FN86] was also a proponent of expanded damage remedies (in Monroe v. Pape [FN87] and Bivens [FN88]) for the very abuses to which Mapp was addressed. The difference between Mapp and Monroe/Bivens is that Mapp benefits only the guilty; it does nothing for the innocent citizen victimized by abusive police action. It is often said that civil juries are unlikely to assess damages against law enforcement officers or agencies in favor of a convicted criminal. This may well be true, but it is an incomplete argument. If the will existed there might be ways to plug this gap: for instance, a statutory fine assessable against the employing unit of government and payable to the victim of the wrong would obviate the need for a jury trial, which would still be available in a civil rights or damage action. [FN89] Part of this fine might go to the subject of police impropriety. Perhaps it all might. Or some of this fine might go to his lawyer. There should also be adjustments of the law of standing as it has been developed in the different context of the exclusionary rule. I do not think we can be entirely

sure that only by an unflinching imposition of exclusionary remedies can we assure decent behavior by police. In any event, however we resolve this issue the question still remains whether the substantive rules of search and seizure have not become unduly complex and restrictive, moving too far from the Fourth Amendment's emphasis on reasonableness.

***709** Unless we beg the question by measuring decency by the furthest restriction proposed in the furthest dissenting opinion, we need some point of reference for such judgments of decency other than the direction of the very trends we judge. Nor will "the Constitution" supply such an Archimedean point, since the meaning of its text is just what the disputants are contesting. Let me suggest one such point of reference external to the argument that may help a little. I am struck that criminal investigation and criminal trials are generally far simpler and less restricted in just those other developed Western democracies against which we measure ourselves when we deplore our high rate of incarceration and the length of our prison sentences. Thus, for instance, whatever you may think of Leon, Gates, or Terry, most of our western counterparts would not suppress the evidence in similar circumstances. In England, courts exclude evidence only if it "would have such an adverse effect on the fairness of the proceeding that the courts ought not to admit it." [\[FN90\]](#) Similarly, in Canada statutory law mandates the suppression of evidence upon a showing that the admission of such evidence "would bring the administration of justice into disrepute." [\[FN91\]](#) In the Netherlands trials place a considerable amount of emphasis on evidence accumulated by the police and investigative judge at the closed pretrial stage. [\[FN92\]](#) Furthermore, this system allows hearsay evidence and a state may convict an individual simply on statements collected from anonymous witnesses. [\[FN93\]](#) In Norway, the defendant has a right to remain silent although a statute provides: "If the person charged refuses to answer, or states that he reserves his answer, the president of the court may inform him that this may be considered to tell against him." [\[FN94\]](#) In England again, [s]uspects ... have the right to refuse to answer, but at the same time, it is understood that the police have the right to question. Thus, when a suspect refuses to answer a question, the police will often proceed to the next question. And while there is the right to representation during interrogation, it is not seen as the function of the defense solicitor to bar all interrogation, but rather to make sure that the questioning is fair and that the suspect is treated properly. Should a suspect refuse to answer questions, it will be reported at trial by the interrogating officer that the defendant was "cautioned" following his arrest and said nothing. [\[FN95\]](#)

***710 VI**

What I have called the Beccaria hypothesis is just that, a guess, a research program. But it seems to me that it is worth some more systematic exploration. One form that exploration might take is a more fine grained analysis of the comparisons between what we do and what other developed constitutional democracies do. I have adverted to a few such comparisons-not to prove a point but to raise the questions. But I am afraid that cross-country comparisons will not do much more than raise questions, because conditions and traditions even in countries as similar to us as Canada and the United Kingdom may be just too different. They do not have the same availability of firearms, their systems of social support are different, and their legal traditions and professions are different. The only real laboratories for this experiment are the states of the United States. Yet genuine experimentation will not be easy to come by. In resonance with a famous speech by Justice William Brennan, [\[FN96\]](#) some state courts have invoked their own state constitutions in declining to follow the Supreme Court's more recent attenuations of a number of Warren Court precedents. [\[FN97\]](#) This movement has been noted and applauded, [\[FN98\]](#) but it seems to me that it deserves more critical examination. There is no reason in principle why state and federal constitutions should offer identical rights with respect to all matters that implicate fundamental social values. Sometimes state constitutions-as may be the case with the Massachusetts more stringent version of the privilege against self-incrimination-require that a divergent route be followed from that of the federal courts. But often the provisions in the state and federal constitution will be similar if not identical, and then the divergence requires some explanation. I ask for an explanation because, of course, there is nothing presumptively correct about the ebb and flow of Supreme Court jurisprudence. As Justice Jackson put it, "we are not final because we are infallible, but we are infallible only because we are final." [\[FN99\]](#) And in a situation where a

state supreme court *711 interprets a state constitutional provision—even one textually indistinguishable from the federal provision—the Supreme Court, far from being final, has nothing at all to say. Although constitutional interpretation is not science, where reproducibility of results in different laboratories is a hallmark of truth, constitutional interpretation nonetheless remains a rational undertaking, drawing on texts, values, traditions and expert judgment. When a state supreme court reasons that the same or similar words constrain the democratic processes of legislation more tightly than the Supreme Court has found, there is at least a tension and a question to answer.

I emphasize that constitutional provisions, after all, do constrain democracy, for there is no constitutional issue at all when a state legislature enacts policies more favorable to suspects, more restrictive of the search for truth than the Constitution requires. We have a number of instances of such legislation in the Commonwealth, [\[FN100\]](#) but they are imposed as policy judgments by the people's representatives. State and federal courts, however, are not supposed to make policy as they interpret constitutions; rather, they elucidate fundamental values embodied in constitutional texts. Thus there is a burden of explanation when a state deliberately chooses to diverge from the Supreme Court's interpretation of just what these restraints on democratic choice mean. One such explanation refers to the traditions and doctrines of a particular community, a particular state. Just as such materials are appropriate elements in the United States Supreme Court's decisions, [\[FN101\]](#) they are also appropriate considerations in decisions of state supreme courts, and it is entirely possible that different states embrace different communities of value and tradition. This explanation for divergence is less convincing, however, where the state court simply opts to stay with an earlier Supreme Court decision now overruled—often one *712 only recently imposed by the Supreme Court. In such cases no claim of a distinct state tradition can plausibly be made. For instance, many states did not employ an exclusionary rule of the sort imposed in *Mapp*, and indeed very strong and well-reasoned rejections of the exclusionary rule in the jurisprudence of the highest courts of New York and Massachusetts may be used to suggest that the rejection of the rule better corresponds to those states' doctrinal and constitutional traditions. [\[FN102\]](#) And there is equally good reason to believe that there is no distinct historical or textual basis for the warrant preference in Massachusetts law, [\[FN103\]](#) but rather only a preference for the Warren Court over the Burger and Rehnquist Court precedents.

There is a further reason why a court, in interpreting its own constitution, has a greater burden to explain its departure from the Supreme Court's decisions interpreting similar clauses than if it diverges from the decision of a sister state's supreme court. The Supreme Court represents a unifying force in our system that few would want to deny, except when they chafe under some particular decision or some trend with which they disagree. That prestige does not require deference, but it does require respect, which entails careful explanation of divergence. When a state court declines to follow a decision of the Supreme Court it is something of a rejection and perhaps a rebuke. This may be warranted, but it should be justified. An example where such a divergence seems to have been warranted and the justification convincing is the Supreme Judicial Court of Massachusetts' rejection of the Supreme Court's decision in *California v. Hodari D.* [\[FN104\]](#) In *Hodari D.*, the Court held that a seizure for Fourth Amendment purposes is not effected at the time the police chase a suspect with a show of force but only when they bring him under control. [\[FN105\]](#) It might be suggested that the Due Process Clause of the Fourteenth Amendment represents only a lowest common denominator, so that the identical terms with no different history might mean something different to a state *713 court interpreting them in a state constitution. But the very term lowest common denominator begs the question, as it assumes that more restrictions on law enforcement (like better health care or public parks) are, other things being equal, always better than less: a proposition which is, to say the least, far from self-evident. Along the same lines, there are those who would respond to my concerns by invoking principles of federalism and—as I do here—Brandeis's notion of the states as laboratories of social experimentation. [\[FN106\]](#) State courts, on this view, should feel quite free to fashion their own constitutional rules to allow the benefits of experimentation and diversity to flourish. This argument, however, should be accepted only with considerable reservation. First, Brandeis meant it to apply to legislative schemes, which are subject to fine-tuning and abandonment, unlike the more unwieldy and unbending constraints of constitutional law.

Second, the scope for experimentation is severely limited. A state may experiment in its constitutional law of criminal procedure by imposing even more confining limitations than the Supreme Court has imposed, but it is not permitted to experiment in the opposite direction. Indeed, it may not even contemplate ratcheting down in one respect and compensating with a tightening in another. A limitation like that, however, does not allow any true experimentation at all. Real experimentation would test a penal system that allows for shorter sentences for individuals whom it will eventually release. Such a system would offer prisoners a strong guarantee of personal safety and security, particularly against sexual coercion and intimidation—a guarantee perhaps backed up with a damage action against the state when it fails to provide such security to those in its exclusive custody [\[FN107\]](#)—while demanding useful work or genuine educational improvement during incarceration. Real experimentation would balance these changes with quicker, more informal adjudication that focusses on the issue of guilt or innocence and puts to one side the pursuit of other goals. Real experimentation would test alternative systems that guarantee citizens, whether or not accused of crime, against abusive treatment at the hands of the police. In short, such real experimentation would test whether we can come up with a system of criminal justice which in its firmness, swiftness and moderation demonstrates to offenders and the public alike, that we are in no doubt about society's right to demand compliance with the law and to punish non-compliance.

[\[FN1\]](#). This article is based upon a speech that Justice Fried delivered in February 1997 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the Suffolk University Law Review to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

[\[FNd1\]](#). Associate Justice, Supreme Judicial Court of Massachusetts; Carter Professor of General Jurisprudence, emeritus, Harvard Law School; J.D. 1960, Columbia University School of Law; M.A. 1960, Oxford University; B.A. 1958, Oxford University; A.B. 1956, Princeton University. I am grateful for the helpful comments that Philip Heymann, Carol Steiker, Randall Kennedy, Paul Liacos, Lloyd Weinreb, Daniel Meltzer, David Shapiro, Steven Levitt, Akhil Amar and James Wilson made on earlier drafts. The views and mistakes remain my own. I had invaluable research assistance from Kara Moheban of the class of 1997 at Suffolk Law School.

[\[FN1\]](#). Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965) [hereinafter *The Bill of Rights*].

[\[FN2\]](#). Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). In his articles, Judge Friendly discusses the myriad conflicting interpretations of the Fourth Amendment's exclusionary rule and the Fifth Amendment's self-incrimination clause. See *id.* at 721-22 (recognizing differing opinions regarding scope of Fifth Amendment and proposing amendment to self-incrimination clause); *The Bill of Rights*, *supra* note 1, at 951-53 (discussing difficulties inherent in exclusionary rule and proposing alternatives).

[\[FN3\]](#). See, e.g., JAMES GILLIGAN, M.D., *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES*, 168-69 (1996) (exposing prevalence of sexual abuse and rape in American prisons); DANIEL LOCKWOOD, *PRISON SEXUAL VIOLENCE*, 87-101 (1980) (recounting inmates' experiences with violence, rape and sexual assault in prison); WAYNE S. WOODEN & JAY PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISONS*, 13-24 (1982) (discussing prevalence of violence and sexually aggressive behavior within American prisons); see also JOHN J. DIJULIO, JR., *NO ESCAPE: THE FUTURE OF AMERICAN CORRECTIONS*, 11-59 (1991) (offering examples of excellent systems to support argument that better management equals better prisons). DiJulio's compelling argument rests on the premise that organization

and management are essential components to a more humane and orderly prison system. *Id.* at 12. According to DiIulio, poor prison management produces cruel and unusual conditions. *Id.* DiIulio observes that good prison management and organization produces an environment where inmates can serve their sentences "without fearing for their lives, without being pressured by their peers for sex, drugs, or money, without being abused by their officers, and without being abandoned to their educational (or other basic life skills) deficiencies." *Id.* A maximum-security prison guard explained that his job is to "protect, feed, and try to educate scum who raped and brutalized women and children; who robbed a convenience store and then, just for kicks, shot the old man and old lady who ran it; who didn't get paid for the drugs they sold and so killed to enforce the deal; who, if I turn my back, will go into their cell, wrap a blanket around their cellmate's legs, and threaten to beat or rape him if he doesn't give sex, carry contraband, or fork over radios, money, or other goods willingly. And they'll stick a shank [knife-like weapon] in me tomorrow if they think they can get away with it." *Id.* at 268.

[FN4]. See [Young v. Quinlan](#), 960 F.2d 351, 354 (3d Cir. 1992) (recounting assault where razorarmed prisoner forced cellmate to perform oral sex); [McGill v. Duckworth](#), 944 F.2d 344, 346 (7th Cir. 1991) (describing shower-room gang rape of gagged inmate by three armed attackers); see also Robert Blecker, [Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment, Justified](#), 42 STAN. L. REV. 1149, 1156-57 (1990) (discussing sexual violence in Lorton Central Prison); David M. Siegal, Rape in [Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter](#), 44 STAN. L. REV. 1541, 1544-47 (1992) (commenting on alarming frequency of brutal instances of prison rape). See generally Richard D. Vetstein, Note, [Rape and AIDS in Prison: On a Collision Course to a New Death Penalty](#), 30 SUFFOLK U. L. REV. 863 (1997) (explaining rampant nature of prison rape and deadly implications when HIV virus added to equation).

[FN5]. See Josh Getlin, I'm Still Fighting, L.A. TIMES, May 20, 1994, at E1 (explaining Senator Arlen Specter's findings that prison rape victims often commit worse crimes after incarceration). After conducting extensive investigations of rapes occurring in Philadelphia jails as a Philadelphia District Attorney, Senator Specter concluded that rapes were occurring at a rampant pace. *Id.*; see also CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT ix (1974) (maintaining Specter's study found many criminals demonstrated more violent behavior after release).

Moreover, researchers have concluded that prison rape devastates the human spirit. Victims often experience shame, depression, loss of self-esteem as well as suffer from Rape Trauma Syndrome, a complex psychological and physiological disorder. See Brief of Stop Prisoner Rape, at 14, [Farmer v. Brennan](#), 511 U.S. 825 (1994) (No. 92-7247) (explaining psychological trauma of prison rape); Vetstein, *supra* note 4 (discussing psychological impact of prison rape on inmates).

[FN6]. Sheryl WuDunn, Prisons in Japan Are Safe but Harsh, N.Y. TIMES, July 8, 1996, at A6.

[FN7]. See [Taylor v. Michigan Dep't of Corrections](#), 69 F.3d 76, 82 (6th Cir. 1995) (recounting warden's testimony stating small, young prisoners especially vulnerable to sexual assault); [Redman v. County of San Diego](#), 942 F.2d 1435, 1437-38 (9th Cir. 1991) (describing rape of 5'6" tall, 130 pound young victim by hardened elder convict).

To make matters worse, prison rapists often force victims into a morbid form of sexual slavery, promising them protection from future rapes by other prisoners in exchange for an ongoing sexual "relationship." See Brief of Stop Prisoner Rape, at 8-11, [Farmer v. Brennan](#), 511 U.S. 825 (1994) (No. 92-7247) (commenting on protective pairing agreements between inmate aggressors and victimized inmates). One former victim has published an informative article for male prisoners, advising them of the institution of prison rape and coerced sexual relationships behind cell walls. See Stephen Donaldson, The Deal Behind Bars, HARPER'S MAGAZINE, August 1, 1996, at 17 (providing advice and information concerning pairing agreements).

[FN8]. GILLIGAN, *supra* note 3, at 166-67.

[FN9]. See Jonathan B. Baker & Timothy F. Bresnahan, [Empirical Methods of Identifying and Measuring Market Power](#), 61 [ANTITRUST L.J.](#) 3, 6 (1992) (quoting George Stigler).

[FN10]. See GILLIGAN, supra note 3, at 174-79 (providing accounts of widespread rape and violence in Florida, Texas, Pennsylvania, Louisiana and Connecticut prisons). For example, a highly acclaimed 1982 study revealed that approximately twelve rapes occurred per week among inmates in the Prince George County Detention Center, despite an official figure of less than ten rapes per year. Id. at 174. Illustrating that many low figures of sexual violence in prisons may be attributable to indifference of prison officials, Gilligan cites a report of the Philadelphia jail system stating numerous security guards discouraged sexual assault complaints because they refused to be bothered. Id. at 170. Moreover, a study of Connecticut juvenile institutions charged that the prison guards actually foster sexual aggression among the juveniles. Id.

William Laite, a Texas prisoner, recounted his immediate terror when approached by five other prisoners upon entering the Tarrant County Jail in Fort Worth. Id. at 177. One of the prisoners remarked to the group, "I wonder if he [Laite] has any guts. We'll find out tonight, won't we? Reckon what her name is.... You figure she will make us fight for it, or is she going to give up to us nice and sweet like a good little girl? Naw, we'll have to work her over first, but hell, that's half the fun isn't it?" Id. Instead of assaulting Laite, however, the five prisoners preyed on a seventeen-year-old prisoner who caught their attention. Id. According to Laite, the men "were on him at once like jackals, ripping the coveralls off his limp body. Then as [Laite] watched in frozen fascination and horror, they sexually assaulted him, savagely and brutally like starving animals after a raw piece of meat." Id. at 177-78.

An inmate in a Louisiana prison describes his experiences as a sex slave to some of the other inmates. Id. at 178-79. The inmate explains, "an inmate shoved me into a dark room where his partner was waiting. They beat me up and raped me. That was to claim me.... When they finished, they told me that I was for them, then went out and told everyone else that they had claimed me." Id. at 178.

Moreover, a comprehensive study of sexual assaults in the Nebraska penal system found that 22.3% of respondent inmates had been pressured or forced into sex. *Prison Studies Are Few, But Point to 'Targets' of Sexual Assault*, SEATTLE TIMES, April 23, 1995, at A16. An unwritten code of silence among the prisoners causes most acts of violence to remain unreported. [Alberti v. Heard](#), 600 F. Supp. 443, 450 (S.D. Tex. 1984), aff'd sub. nom., [Alberti v. Klevenhagen](#), 790 F.2d 1220 (5th Cir. 1986).

Researchers, however, agree that the real level of sexual violence in prison is much higher than the reported level because victims seldom report attacks in fear of violent reprisals made by the original attacker or other inmates. See Siegal, supra note 4, at 1545-46 (maintaining victims disinclined to report attackers due to violent threats). A federal judge agreed with this thesis, postulating that the actual number of reported inmate rapes "may only be the tip of the iceberg." [Alberti](#), 600 F. Supp. at 450.

[FN11]. See GILLIGAN, supra note 3, at 174 (discussing prevalence of rape in Florida prison system). Florida has recently reformed the prison system by introducing "chain gangs" into the prison culture in an effort to decrease recidivism and in-traprisson violence. 1995 Fla. Sess. Law Serv. 283 (West); see also [Recent Legislation: Criminal Law-Prison Labor-Florida Reintroduces Chain Gangs](#), 109 HARV. L. REV. 876, 876 (1996) (criticizing introduction of chain gangs in Florida prisons).

[FN12]. GILLIGAN, supra note 3, at 175. Noting that the incarceration population has significantly increased since 1984, Dr. Gilligan indicates that today eighteen rapes per minute equates roughly to 1,000 per hour, 24,000 per day, 168,000 per week, or just under 9,000,000 rapes per year. Id. at 175- 76.

[FN13]. See, e.g., GILLIGAN, supra note 3, at 166-68 (noting prisoners brutally rape inmates who refuse to passively submit to role of sex slave); LOCKWOOD, supra note 3, at 87-101 (discussing experiences of male rape victims and victims of sexual assault in prisons); WOODEN ET AL., supra note 3, at 13- 24 (exposing dynamics and prevalence of sex among male

prison inmates).

[FN14]. See generally ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979) (examining impact of male and female relations); SUSAN ESTRICH, *REAL RAPE* (1987) (raising concerns regarding rape outside prison context); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (considering influence law has upon female victims).

[FN15]. See LOCKWOOD, *supra* note 3, at 59-86 (exploring emotional reactions and force of victimization on prisoners); WOODEN ET AL., *supra* note 3, at 13- 24 (portraying nature of prison exploitation, emphasis on sexually aggressive behavior, and coping strategies).

[FN16]. See WEISS ET AL., *supra* note 5, at 27 (finding that prison officials seldom discourage sexual assaults). In their study of rape in America's prisons, Weiss and Friar conclude that prison administrators do not discourage rape in prison because it "facilitates greater control over the inmates ... divides the prisoners ... [and] gives them real cause to suspect, fear, fight, and hate each other." *Id.*

[FN17]. See GILLIGAN, *supra* note 3, at 168-70 (indicating prison guards tolerate sexual exploitation in order to maintain control of prison population). Dr. Gilligan observes that prison guards enter into an "implicit, tacit agreement with the rapists, in which the officers will permit the rapists whatever gratifications they get from raping the weaker prisoners, and the rapists agree in turn to cooperate with these officers by submitting to the prison system as a whole." *Id.* at 168; LOCKWOOD, *supra* note 3, at 129-40 (analyzing response of prison staff to sexual aggression).

[FN18]. American Correctional Association, *Vital Statistics: Correctional Statistics Summary 73* (Glenda J. Beal ed., 1994). The 1992 federal spending figure of \$2,229,754,000 includes operating costs of prisons, capital, new construction, and renovation. *Id.* State expenditure costs toward adult correctional facilities in 1992 totaled \$21,809,271,987. *Id.* In addition, the District of Columbia spent \$234,584,000 on adult correctional facilities. *Id.* The 1992 federal and state figures include funds for nine state departments with combined adult and juvenile authority. *Id.*; see also *infra* notes 33-35 and accompanying text (providing 1990 justice system expenditures for United States).

In 1992, the United States (federal, state, and local governments) spent approximately \$94 billion on the entire justice system. U.S. Department of Justice, Bureau of Justice Statistics, *Bulletin, Justice Expenditure and Employment Extracts, 1992: 1992 Data from the Annual General Finance and Employment Surveys*, at 1, U.S. Government Printing Office, Washington, D.C., January 1997 [hereinafter *Justice Expenditure Extracts 1992*]. This figure includes \$41.33 billion on police protection, \$20.99 billion on judicial and legal services, and \$31.46 billion on corrections. *Id.* at 3.

[FN19]. See Stephen D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. OF ECON. 319, 319 (1996) (noting prison population in United States exceeded one million in 1994); see also Fox Butterfield, *Slower Growth in Number of Prisoners*, N.Y. TIMES, January 20, 1997 (outlining prison population). Levitt notes that the incarceration rate has more than tripled in the last twenty years. *Id.*; see also MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA*, 21- 23 (1995) (providing American crime statistics and incarceration rates in state and federal prisons).

[FN20]. See WEISS ET AL., *supra* note 5, at 61 (estimating ten million rapes occurred in prisons in 1974).

[FN21]. See James Lynch, *Crime in International Perspective*, in *CRIME* 32-36 (James Q. Wilson & Joan Petersilia eds., 1995) [hereinafter *Crime in International Perspective*] (offering statistics demonstrating that United States has highest per capita incarceration rates of any industrialized country); *id.* at 26 (noting United States has most punitive sentencing policies

of any industrialized country); Levitt, *supra* note 19, at 319 (emphasizing high rate of imprisonment in United States compared to other industrialized countries); James P. Lynch, *A Cross-National Comparison of the Length of Custodial Sentences for Serious Crime*, 10 JUST. Q. 639, 639 (1993) (hereinafter *A Cross-National Comparison*) (acknowledging perception that United States sentencing policies most punitive of all industrialized countries). James Lynch notes that the United States imposes longer sentences than other industrialized democracies for persons imprisoned for similar offenses. *A Cross-National Comparison*, *supra*, at 646-47. Lynch further emphasizes, however, that the differences are reduced when one examines estimates of time actually served rather than imposed. *Id.* at 655. While the average time served for violent crimes does not differ greatly between the United States and other industrialized countries, James Lynch's study indicates that time served in the United States for property crimes is considerably greater. *Id.* at 651; see also *infra* notes 23, 26 and accompanying text (comparing violent crimes and property crimes in United States with crimes in other industrialized nations).

[FN22]. See Levitt, *supra* note 19, at 319 (emphasizing rate of imprisonment in United States is three to four times greater than most European countries); Louis M. Seidman, [Criminal Procedure as the Servant of Politics](#), 12 CONST. COMMENTARY 207, 207-08 (1995) (noting United States has second highest incarceration rate in world).

[FN23]. See William T. Pizzi, [Punishment and Procedure: A Different View of the American Criminal Justice System](#), 13 CONST. COMMENTARY 55, 57 (1996) (providing 1993 United States incarceration statistics). FBI Crime statistics indicate that 13.9 million Crime Index offenses were reported in the United States in 1995. UNIFORM CRIME REPORTS FOR THE UNITED STATES 1995, HIGHLIGHTS, FEDERAL BUREAU OF INVESTIGATION, FBI NATIONAL PRESS OFFICE, at 1 (October 13, 1996) [hereinafter UNIFORM CRIME REPORTS]. The figure represents a rate of approximately 5,278 offenses for every 100,000 United States citizens. *Id.* The crime rate dropped 2% from 1994, and the number of crimes declined 1% from 1994 and 7% from 1991. *Id.* The number of violent crimes declined 3%. *Id.* Furthermore, the FBI reports that the number of violent crimes decreased 8% in the eight cities with a population of more than one million. *Id.* In the 64 U.S. cities with populations over 250,000, Crime Index totals dropped 3%. *Id.* Reported violent crimes (murder, forcible rape, robbery, and aggravated assault) during 1995 dropped below 1.8 million offenses, signifying the lowest violent crime rate since 1989. *Id.* at 1-2. Property crime in 1995 declined 1% to 12.1 million offenses, the lowest figure since 1987. *Id.* at 2. The 1995 property crime rate was 4,593 offenses per 100,000, 1% lower than the 1994 rate and 11% lower than the 1991 rate. *Id.*

Furthermore, a New York Times article reported that the decline in random murders in New York City through December 28, 1995 represents the lowest overall rate in twenty eight years. Michael Cooper, *Decline in Random Murders Cuts Overall Rate to a 28-Year Low*, N.Y. TIMES, December 29, 1996, at 25. Homicides in New York City in 1995 totaled 972, compared to the 1993 total of 1,946. *Id.* The 1995 figure is less than half of the 1990 homicide record of 2,245. *Id.*

Finally, in 1996 the homicide rate in the United States declined to 7.3 per 100,000 persons, the lowest rate in many years. The rate in Japan is .6 per 100,000 persons, Great Britain .7, Germany 1.0 and France 1.1. N.Y. TIMES, June 2, 1997, at A1.

[FN24]. See Butterfield, *supra* note 19, at A10 (basing data upon report of Bureau of Justice Statistics).

[FN25]. See Pizzi, *supra* note 23, at 57 (comparing incarceration statistics of Western European Countries with United States figures).

[FN26]. See *Crime in International Perspective*, *supra* note 21, at 36-37 (comparing punitiveness of United States to other industrialized democracies). In a cross-national comparison of sentence length in the 1980s, James Lynch discovered that time served in the United States for violent crimes is similar to that in other industrialized countries. See Lynch, *supra* note 21, at 649-51 (comparing length of sentence for violent crimes in United States with other industrialized democracies). Lynch's study also reveals, however, that time served for property crimes in the United States is substantially greater than the time

served in Australia, Canada, and England and Wales. *Id.* Lynch's cross-national comparison of sentence length in the 1980s indicated that:

Time served in confinement in the United States is generally longer than in Australia and in England and Wales for similar offenses, except homicide. The differences between Canada and the United States are minimal for violent offenses. Persons convicted of violent crimes receive longer sentences in West Germany than in common-law countries, including the United States. Prisoners serving sentences for property crimes in the United States spend substantially more time in custody than persons sentenced for similar offenses in Australia, Canada, or England. Only in West Germany do prisoners serve more time for property offenses than in the United States.

Id. at 657-58.

[FN27]. See *Crime in International Perspective*, *supra* note 21, at 16-17 (comparing United States property crimes to statistics in other industrialized democracies). The United States actually has a considerably lower rate of serious property crime than other industrialized democracies. *Id.* For example, the burglary rate in Australia is 40% higher than the rate in the United States, 12% higher in Canada, and 30% higher in England and Wales. *Id.* Moreover, the burglary rates in Sweden and the Netherlands are 35% and 84% higher, respectively, than in the United States. *Id.* An FBI report noted that in 1995 property crime in the United States—estimated at 12.1 million offenses—dropped 1% to its lowest total since 1987. UNIFORM CRIME REPORTS, *supra* note 23, at 36.

In 1992, police in England and Wales reported about 5.4 million crimes, the majority of which were property crimes. See U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Inmates in the United States in England and Wales*, at 4-5, U.S. Government Printing Office, Washington, D.C., October 1994 [hereinafter *Profile of Inmates*] (comparing length of prison terms in United States with England and Wales in 1991). For example, of the 5.4 million crimes reported by police in England and Wales in 1991, 1.35 million represented burglary. *Id.* at 4. In comparison, of the 14.4 million crimes recorded by the police in the United States in 1991, 2.98 million represented burglary. *Id.* Moreover, 11% of the inmates in U.S. prisons were charged with burglary in 1991, while 17% of the inmates were charged with burglary in England and Wales. *Id.* at 8.

[FN28]. See *Profile of Inmates*, *supra* note 27, at 15-17, 25 (noting United States has much higher rates of serious violence than other industrialized democracies).

[FN29]. Compare U.S. Department of Justice, Bureau of Justice Statistics, *Bulletin, Criminal Victimization 1994*, at 3, U.S. Government Printing Office, Washington, D.C., April 1996 [hereinafter *Criminal Victimization 1994*] (finding 23,305 murders and nonnegligent manslaughters constitute murder rate of 9 persons per 100,000), and *Criminal Victimization 1994*, *supra*, at 2 (reporting total of 9,128 assaults establishing 31 simple assaults and 12 aggravated assaults per 1,000 persons), with *Criminal Victimization 1994*, *supra*, at 3 (contending 2,770 reported incidents of household burglaries in 1994), and *Criminal Victimization 1994*, *supra*, at 3 (observing 6,365 reports of theft).

In 1995, it is estimated that one violent crime occurred every 18 seconds in the United States; including one murder every 24 minutes, one forcible rape every five minutes, one robbery every 54 seconds, and one aggravated assault every 29 seconds. UNIFORM CRIME REPORTS, *supra* note 23, at 4. Further, in 1995, it is estimated that one property crime occurred every three seconds; including one burglary every 12 seconds, one larceny-theft every four seconds, and one motor vehicle theft every 21 seconds. *Id.*

[FN30]. See U.S. Department of Justice, Bureau of Justice Statistics, *Bulletin, Felony Sentences in the United States, 1992*, at 3, U.S. Government Printing Office, Washington, D.C., May 1996 [hereinafter *Felony Sentences*] (maintaining 30% of state and 58% federal prisoners arrested for drug crimes); U.S. Department of Justice, Bureau of Justice Statistics, *Bulletin, Jails and Jail Inmates, 1993-94*, at 14, U.S. Government Printing Office, Washington, D.C., April 1995 [hereinafter *Jails and Jail Inmates*] (contending 91,000 persons in state jails were arrested for drug offenses, or one out of every four persons); see also

U.S. Department of Justice, Bureau of Justice Statistics, Drug and Crime Facts, 1994, at 5, U.S. Government Printing Office, Washington, D.C., June 1995 [hereinafter Drug and Crime Facts] (indicating 60% of federal and 79% of state prisoners had used drugs during lifetime); cf. Drug and Crime Facts, [supra](#), at 5 (finding 31% of state prison inmates under influence of drugs at time of offense); U.S. Department of Justice, Bureau of Justice Statistics, Comparing Federal and State Prison Inmates, 1991, at 3, U.S. Government Printing Office, Washington, D.C., October 1994 [hereinafter Federal and State Prison Inmates] (asserting 11% of federal prison population under influence of drugs at time of offense).

A greater percentage of inmates in the United States than inmates in England and Wales were in prison for drug offenses in 1991. Profile of Inmates, *supra* note 27, at 2. Approximately 24% of the inmates in the United States were in custody for drug offenses, compared to 8% of the inmates in England and Wales. *Id.* at 8. Furthermore, in 1995 law enforcement agencies made 15.1 million arrests for all criminal violations apart from traffic violations. UNIFORM CRIME REPORTS, *supra* note 23, at 2. Drug abuse violations and larceny-theft represented the highest arrest accounts each, at 1.5 million. *Id.*

[\[FN31\]](#). Offenders with a record of prior convictions are substantially more likely to be sentenced to incarceration than first time offenders. See U.S. Department of Justice, Bureau of Justice Statistics, Bulletin, Compendium of Federal Justice Statistics, 1993, U.S. Government Printing Office, Washington, D.C., Oct. 1996 [hereinafter Compendium 1993]. For example, in 1993 convicted offenders with no prior convictions received sentences 44% shorter than those sentences imposed on offenders who had previously served prison terms exceeding one year. *Id.* at 51.

[\[FN32\]](#). See Crime in International Perspective, *supra* note 21, at 33-34 (providing temporal comparisons between property crimes in United States and other industrialized countries); see also *supra* note 23 (providing crime statistics). Interestingly, the most significant difference in time served between the United States and other industrialized countries occurs in property crimes: burglary and larceny. *Id.* The average time spent in American prisons for burglary is 16.2 months, while the average time served in Canada is 5.3 months and in England is 6.8 months. *Id.* at 34. Furthermore, the average length of sentences served for larceny, excluding motor vehicle theft, in the United States is 7.01 to 12.5 months. *Id.* In Canada, however, the average time served for larceny is two months and the average time served is 4.65 months in England. *Id.* These statistics track sentencing patterns for the early and mid-1980's. See *id.* (offering early and mid-1980s statistical evidence).

On average, inmates in the United States received longer sentences for comparable offenses than inmates in England and Wales. See Profile of Inmates, *supra* note 27, at 10 (comparing length of prison terms in United States with England and Wales in 1991). In 1991, 34% of sentenced inmates in the United States received a prison sentence for a term of more than 10 years but less than life, compared to only four percent in England and Wales. *Id.* Approximately 71% of U.S. inmates convicted of a violent offense, compared to 37% of British inmates, received sentences of more than ten years to life. *Id.* at 11. In the United States, six percent of inmates serving a sentence for robbery received a term of three years or less, while 56% received a term of more than 10 years. *Id.* In England and Wales, however, 24% of the inmates serving time for robbery received a sentence for three years or less, while only 11% were sentenced to more than 10 years. *Id.* In the United States, 16% of inmates in prison for burglary received a sentence of three years or less, compared to 81% of inmates in England and Wales. *Id.* Furthermore, approximately 27% of U.S. inmates sentenced for a drug offense received a sentence of more than ten years compared to only six percent in England and Wales. *Id.* The 1991 percentages represent imposed sentences and not time actually served. *Id.* at 10. Furthermore, the study reveals that on average, inmates in the United States actually serve slightly more than a third of their sentences while prisoners in England and Wales serve less than one-half of their sentences. *Id.*; see also *supra* notes 21-22, 26 and accompanying text (comparing crime and punishment in United States with other industrialized democracies).

[\[FN33\]](#). See U.S. Department of Justice, Bureau of Justice Statistics, Justice Expenditure and Employment, 1990, U.S. Government Printing Office, Washington, D.C., September 1992 [hereinafter Justice and Expenditure Extracts 1990] (providing 1990 justice system expenditures in United States); see also Justice and Expenditure Extracts 1992, *supra* note 18, at 1, 3

(providing 1992 figures). In 1990, Massachusetts spent a total of \$1.82 billion on the justice system. Justice Expenditure Extracts, [supra, at 10](#). This figure includes \$775 million on police protection, \$354 million on judicial and legal services (which includes \$215 million for court expenditures, \$87 million for prosecution and legal services, and \$52 million for public defense), \$685 million on corrections and \$9 million on other justice activities. Id.

[FN34]. Justice Expenditure Extracts 1990, *supra* note 33, at 10. Judicial and legal services include \$9.31 billion for court expenditures, \$5.5 billion for prosecution and legal services, and \$1.74 billion for public defense. Id.

[FN35]. See Pizzi, *supra* note 23, at 56-57 (citing U.S. Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1992, at 164, table 2.4 U.S. Government Printing Office, Washington, D.C., 1993) (offering poll results to indicate public perception of criminal justice system). A 1993 poll indicated that "only 17% of the public had a high level of confidence in the criminal justice system". Id. A 1989 Gallop public opinion survey revealed that 83% of the respondents believed that courts do not deal harshly enough with criminals, while only three percent thought courts were too harsh on criminals. Id.; see also COUNCIL ON CRIME IN AMERICA, THE STATE OF VIOLENT CRIME IN AMERICA, JANUARY 1996, at 5 n.3 (1996) [hereinafter COUNCIL ON CRIME IN AMERICA] (noting 1993 and 1994 Gallop polls reveal lack of confidence in criminal justice system). The Council on Crime in America observed that "crime-weary" Americans share a "profound displeasure with a justice system that is not doing nearly enough to restrain convicted violent and repeat criminals from committing more crimes." COUNCIL ON CRIME IN AMERICA, [supra, at 4](#); cf. DI IULIO, *supra* note 3, at 66-68 (providing survey statistics demonstrating public's support for incarceration and opposition to alternative methods of punishment). A 1987 survey indicated that a majority of citizens surveyed preferred prison sentences to alternative methods as punishment for offenses except minor theft. Id. at 66. DiIulio, Steven K. Smith, and Aaron J. Saiger explain:

Historically, Americans have demanded a justice system that apprehends and visits harm upon the guilty (delivers punishment); makes offenders either more virtuous or more law abiding, or both (provides rehabilitation); dissuades actual and would-be offenders from criminal pursuits (achieves specific and general deterrence); protects innocent citizens from being victimized by convicted criminals in state custody (effects incapacitation); and invites most convicted criminals, following a court-sanctioned period of state custody, to return to society with most or all of the rights of free citizenship restored to them (accomplishes reintegration).

JOHN J. DI IULIO, JR., ET AL., The Federal Role in Crime Control, in CRIME 448 (James Q. Wilson & Joan Petersilia eds., 1995).

[FN36]. See Matthew A. Pauley, [The Jurisprudence of Crime and Punishment from Plato to Hegel](#), 39 AM. J. JURIS. 97, 110-20 (1994) (surveying criminal jurisprudence in early modern era and focusing on Beccaria's view of punishment); See generally CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci, trans., 1963) (setting forth Beccaria's theory of punishment). In his 18th century essay, Cesare Beccaria advocated prompt punishment. Id. at 56-57. Beccaria believed that "when the length of time that passes between the punishment and the misdeed is less, so much the stronger and more lasting in the human mind is the association of these two ideas, crime and punishment; they then come insensibly to be considered, one as the cause, the other as the necessary inevitable effect." Id.

A number of scholars have studied the economics of crime and punishment and improved upon Beccaria's framework in an attempt to determine an optimal approach to deterring criminal activity. See, e.g., Gary S. Becker, Crime and Punishment: An Economic Approach, in ESSAYS IN THE ECON. OF CRIME AND PUNISHMENT 1, 43-45 (Gary S. Becker & William M. Landes eds. 1974) (utilizing economic analysis to determine optimal public and private policies to combat criminal activity); Lucian A. Bebchuk & Louis Kaplow, Optimal Sanctions When Individuals Are Imperfectly Informed About the Probability of Apprehension, 21 J. LEGAL STUD. 365, 365-70 (1992) (responding to Becker's economic theory regarding optimal sanctions); Michael Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U. L. REV. 395, 395 (1991) (noting "significant number" of scholarly works have refined economics analysis of criminal penalties); see also

Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 290 (1983) (opining goal of criminal procedure based upon maximizing deterrence from resources allocated to crime control); John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation*, 21 J. LEGAL STUD. 159, 161-85 (1992) (examining monetary penalty associated with individuals convicted of drug offenses upon returning to labor force); A. Mitchell Polinsky & Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J.L. & ECON. 133, 133 (1992) (concluding optimal fine equals harm, inflated for possible non-detection, plus variable enforcement cost of fine).

Gary Becker's seminal article *Crime and Punishment: An Economic Approach*, introduced the first comprehensive discussion of modern optimal penalty theory. See Block, *supra*, at 395 (noting pioneering nature of Becker's application of economics to crime and punishment). In his article, Becker posited that a person commits a criminal act if the expected utility to him is greater than the utility to be gained from engaging in an alternative legal activity. Becker, [supra](#), at 9. Becker noted that "[p]ractically all the diverse theories agree, however, that when other variables are held constant, an increase in a person's probability of conviction or punishment if convicted would generally decrease ... the number of offenses he commits." *Id.* According to Becker, some individuals choose to engage in criminal activity primarily based upon a cost-benefit analysis. *Id.* But see Block, *supra*, at 395 (contending legal scholars, policymakers, and commentators have generally ignored optimal penalty theory).

In addition, many scholars have examined the effectiveness of criminal sanctions. See generally DARYL A. HELLMAN & NEIL O. ALPER, *ECONOMICS OF CRIME: THEORY AND PRACTICE* (2d ed. 1990) (illustrating economic approach to understanding of criminal behavior and analyzing lost benefits of incarceration); DAVID J. PYLE, *THE ECONOMICS OF CRIME AND LAW ENFORCEMENT* (1983); William N. Trumbull, *Estimations of the Economic Model of Crime Using Aggregate and Individual Level Data*, 56 S. ECON. J. 423 (1989) (using aggregate and individual level recidivism methods to examine crime).

[FN37]. See Levitt, *supra* note 19, at 319-48 (analyzing statistics demonstrating that rise in prison population reduces crime through deterrence or incapacitation).

[FN38]. *Id.* at 348. Levitt contends that violent crime in the United States would be approximately 70% higher and property crime would be approximately 50% higher if the prison population had not increased. See *id.* at 319-47 (citing studies and statistics to show that increased prison population substantially reduces crime).

[FN39]. See, e.g., COUNCIL ON CRIME IN AMERICA, *supra* note 35, at 2 (arguing incarceration has significant marginal reduction-effect on crimes today); Patrick A. Langan, *Between Prison and Probation: Intermediate Sanctions*, SCIENCE, May 6, 1994, at 791, 792-93 (estimating rise in prison population from 1975-1989 reduced violent crime 10-15%); Thomas B. Marvell & Carlisle E. Moody, Jr., *Prison Population Growth and Crime Reduction*, 10 J. QUANTITATIVE CRIMINOLOGY 109, 136 (1994) (noting imprisoning one additional state prisoner averted at least 17 index crimes on average). Marvell and Moody, however, argue that the real impact may be greater, estimating that 21 crimes are averted with each additional prisoner, including some 3.3% fewer burglaries, and 10% fewer robberies. Marvell, *supra*, at 136. The Council on Crime in America emphasizes that "[m]illions of violent and property crimes are averted each year by keeping plea-bargained convicted criminals behind bars; tens of thousands of Americans have been killed or maimed by prisoners who were released early; and, as both empirical studies and common sense clearly suggest, if we freed any significant number of imprisoned felons tonight, we would have more murder and mayhem on the streets tomorrow." COUNCIL ON CRIME IN AMERICA, *supra* note 35, at (i). Furthermore, the Council concludes that every year a "significant number of murders, rapes, robberies, assaults, burglaries, and drug crimes are committed by criminals whom the system has repeatedly had in hand but repeatedly let go, offenders who are serially placed in custody and released back to the streets under-supervised, ill-supervised, or not supervised at all." *Id.* at 1.

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[FN40]. Levitt, *supra* note 19, at 319-20.

[FN41]. See *id.* at 348.

[FN42]. See *supra* note 36 and accompanying text (explaining Beccaria's formula).

[FN43]. Levitt, *supra* note 19, at 321-24. Levitt contends that "increased use of prisons may simply be masking what would have been a far greater rise in criminal activity." *Id.* at 321.

[FN44]. *Id.* at 321-22.

[FN45]. See DIJULIO, *supra* note 3, at 103-47 (discussing rehabilitation of convicted criminals).

[FN46]. See, e.g., Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 *ECON. INQUIRY* 297, 308 (1991) (concluding increased certainty of punishment generates significant deterrent effects while increased severity produces insignificant results); Trumbull, *supra* note 36, at 427-37 (analyzing data to conclude certainty of punishment has greater deterrent effect than severity); Ann Dryden Witte, *Estimating the Economic Model of Crime with Individual Data*, 94 *Q.J. ECON.* 57, 81-83 (1980) (maintaining certainty of punishment produces greater deterrent effect than severity of punishment). But see Samuel L. Meyers, Jr., *Estimating the Economic Model of Crime: Employment Versus Punishment Effects*, 98 *Q.J. ECON.* 157, 163-64 (1983) (concluding that employment opportunities reduce recidivism more effectively than increasing severity or certainty). Downplaying the importance of certainty of punishment, Myers argues that "better wages reduces recidivism." Meyers, *supra*, at 163.

[FN47]. A crime is said to be cleared by arrest when law enforcement agencies have arrested and charged at least one person for the offense and have placed that person into the court's custody. See *UNIFORM CRIME REPORTS*, *supra* note 23, at 197 (defining 1995 clearance rates).

[FN48]. See *COUNCIL ON CRIME IN AMERICA*, *supra* note 35, at 24 (citing 1992 statistics on crimes committed, arrests, and convictions). The First Report of the Council on Crime in America cites Bureau of Justice statistical data and concludes: "[I]n 1992, over 10.3 million violent crimes were committed, but just 3.3 million were reported to the police. About 641,000 led to arrests, barely 165,000 to convictions, and only 100,000 or so to state prison sentences, which on average ended before the convict had served even half his time behind bars." *Id.* The survey, however, does not explain for the more than 1:3 underreporting, the 1:5 clearance rate, and the 4:1 conviction rate. See also *id.* at 6 (highlighting other limitations of statistical evidence). The reasons at each step are likely to be quite different. *Id.*

[FN49]. See *UNIFORM CRIME REPORTS*, *supra* note 23, at 198 (analyzing crimes cleared by arrest chart on percentage of burglaries cleared).

[FN50]. See *id.* (comparing statistics between cleared rapes and cleared burglaries).

[FN51]. See *id.* (distinguishing percentage of homicides cleared by arrest and burglaries cleared by arrest). Clearance rates in urban areas have dropped significantly as killings have increased. See Frederic N. Tulsy & Ted Rohrlich, *Only 1 in 3 Killings in L.A. County Led to Any Punishment*, *L.A. TIMES*, Dec. 1, 1996, at A1. Curiously, countries with less advanced technology in the apprehension of criminals seem to be achieving greater success. DEREK BOK, *THE STATE OF THE NATION: GOVERNMENT AND THE QUEST FOR A BETTER SOCIETY* 222 (1996). For example, the clearance rate for homicides in Japan was 98% in 1987, compared to a clearance rate of 66% in the United States in 1993. *Id.* The robbery

clearance rate in Japan was 78%, while the robbery clearance rate in the United States in 1993 was considerably lower at 24%. *Id.* Furthermore, the clearance rates for rape and aggravated assault in Japan were 87% and 93% respectively, while the clearance rates for rape and aggravated assault in the United States were 53% and 56% respectively. *Id.*

[FN52]. WILLIAM BENNETT, ET AL., BODY COUNT (1996).

[FN53]. This would suggest that a person engaged in retail narcotics trafficking may have little to fear as to any particular transaction--each transaction being a distinct offense--but because most such traffickers engage in many, perhaps hundreds of transactions monthly, the likelihood of arrest is very high.

[FN54]. U.S. Department of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 1992*, at 25, U.S. Government Printing Office, Washington, D.C., July 1995 [hereinafter *Felony Defendants, 1992*]. According to a Department of Justice report, released defendants can expect to wait longer than their detained counterparts from the date of arrest to adjudication. *Id.* Specifically, released murder defendants can expect to wait 316 days as opposed to the 267 day wait of the detained murder defendant. *Id.* The greatest discrepancy, however, exists between detained drug trafficking defendants and released drug trafficking defendants. *Id.* Released defendants can expect to wait 144 days from day of arrest to adjudication while detained defendants wait an average of 41 days. *Id.*

In cases where the defendant was convicted, the conviction was for the same identical felony offense as the original arrest charge in most of the cases. *Id.* at 27. Seventy-eight percent of the defendants arrested for murder were later convicted of murder. *Id.* In comparison, 71% of the defendants charged with robbery were convicted of robbery, 61% of those charged with rape were convicted of rape, and 58% of those charged with assault were convicted of assault. *Id.* In cases where the defendant was charged with a nonviolent offense and later convicted of the same offense were as follows: driving-related offense (83%), burglary (74%), drug sales (74%), weapons offense (71%), and theft (65%). *Id.*

The Bureau of Justice Statistics (BJS) introduced the National Pretrial Reporting Program (NPRP) in February 1988 to gather demographic, criminal history, pretrial processing, adjudication, and sentencing information on felony defendants in state courts of the Nation's largest counties. *Id.* at 1. The study does not include Federal defendants. *Id.* The 1992 NPRP gathered data for 13,206 felony cases filed during May in 40 of the largest counties in the United States. *Id.* These cases were followed for up to one year and are representative of the estimated 55,513 felony cases filed in the 75 largest counties during that month. *Id.* Moreover, in 1992, the 75 most populous counties accounted for 37% of the population in the United States and about one-half of all reported crimes, arrests, and felony convictions. *Id.*

[FN55]. *Id.* at 25. Ninety percent of all cases were adjudicated within the one-year NPRP study period. *Id.* According to the 1992 study, the median elapsed time from arrest to adjudication for murder defendants in the 75 largest counties was 267 days while the next longest medians were for robbery defendants who waited 112 days and rape defendants who waited for a period of 105 days. *Id.* "Approximately 29% of murder defendants were still awaiting adjudication of their case after 1 year, compared to a maximum of 13% in any other offense category". *Id.* Additionally, while 61% of convicted defendants and 83% of the misdemeanor defendants received their sentences within one day of adjudication, only 56% of the felony defendants were likely to receive a sentence that quickly. *Id.* at 30.

[FN56]. See *id.* at 33 (providing mean prison sentence for felony convictions). Ninety-eight percent of murder convictions resulted in a prison sentence. *Id.* at 31. Moreover, defendants convicted of murder received a prison sentence for a mean of 223 months and a median of 192 months. *Id.* at 33. Defendants convicted of rape received the next longest median sentence of 72 months, followed by robbery at 64 months, assault at 60 months, and other violent offenses at 60 months. *Id.* Sixty-nine percent of the individuals convicted of murder received a prison term of more than 10 years, while 25% of those convicted of robbery and 18% of those convicted of rape received a prison term longer than 10 years. *Id.* at 33. Moreover, a sixth of all

murder convictions resulted in life sentences, compared to 2% for rape, 1% for robbery, and 1% for drug trafficking. *Id.* In addition, the study revealed that 92% of convictions that took place within one year of arrest were obtained through a guilty plea. *Id.* at iv. According to the report, about 4 in 5 guilty pleas involved a felony. *Id.* "Murder defendants (27%) were the most likely to have their case adjudicated by a trial. About 4 in 5 trials resulted in a guilty verdict, including three-fourths of murder trials". *Id.*

[FN57]. See *id.* at 17 (noting wide disparities in ability to obtain pretrial release). The study indicated that while 63% of all defendants were released prior to the final disposition of their case, the likelihood of release depended upon the offense. *Id.* For instance, 24% of murder defendants were released before trial compared to 48% for defendants arrested for rape, 50% arrested for robbery, and 68% arrested for assault. *Id.* Sixty-six percent of defendants charged with drug trafficking were released pretrial, compared to 71% charged with other drug offenses. *Id.*

Among property defendants, defendants facing theft charges (67%) were more likely to obtain release than burglary defendants (51%). *Id.* Furthermore, the NPRP data revealed that pretrial release rates differ between individuals with a prior record and those without. *Id.* at 19. For example, defendants with no prior arrests (81%) were more likely to obtain release before trial than defendants with a record of prior arrest (55%). *Id.* The type of release varies as well. *Id.* Twenty-four percent of all defendants were released on personal recognizance, 8% obtained a conditional release, and 4% were released on an unsecured bond. *Id.* at 17.

[FN58]. See BOK, *supra* note 51, at 221 (relating expert opinion that violent crime is often product of rational calculation). At the same time, however, "[t]he fear of apprehension and punishment inevitably fails to deter some wrongdoers either because they think that they can escape detection or because they act impulsively without considering the consequences. Moreover, deterrence will always be hampered by the fact that Americans not only insist on a criminal justice system that prevents crime; they want one that neither inflicts punishments so severe as to seem inhumane nor ignores procedural safeguards that minimize the risk of convicting innocent suspects." *Id.*

[FN59]. Compare Yale Kamisar, [Comparative Reprehensibility and the Fourth Amendment Exclusionary Rule](#), 86 MICH. L. REV. 1, 36 n.151, 47-48 (1987) (espousing view that Fourth Amendment imposes cost of setting criminals free and not exclusionary rule), and Carol S. Steiker, [Second Thoughts About First Principles](#), 107 HARV. L. REV. 820, 848 & n.162 (1994) [hereinafter *Second Thoughts*] (arguing that societal costs of exclusionary rule overexaggerated), and Stephen J. Schulhofer, [Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs](#), 90 NW. U. L. REV. 500, 505-06 (1996) (concluding that any harm caused by Miranda on law enforcement almost nonexistent), with Paul G. Cassell, [All Benefits, No Costs: The Grand Illusion of Miranda's Defenders](#), 90 NW. U. L. REV. 1084, 1084 (1996) [hereinafter *Cassell, All Benefits, No Costs*] (asserting that Miranda warnings cause loss of approximately 3.8% of all criminal cases each year), and Paul G. Cassell, [Miranda's Social Costs: An Empirical Reassessment](#), 90 NW. U. L. REV. 387, 497-98 (1996) (deeming Miranda's stifling effect on alternative approaches to police interrogation remains its greatest societal cost), and Paul G. Cassell & Brett S. Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of Miranda*, 43 U. CAL. L. REV. 839, 917-18 (1996) (analyzing empirical data to conclude Miranda hinders confessions, hampers prosecution, and impedes conviction of criminals).

[FN60]. See *Second Thoughts*, *supra* note 59, at 851-52 (finding regardless of deterrent effect, exclusionary rule offers "good cops" guidance and provides positive vision); see also Kamisar, *supra* note 59, at 32-33 (asserting that police will continue unconstitutional behavior if courts allow use of tainted evidence).

[FN61]. Akhil Reed Amar & Renée B. Lettow, [Fifth Amendment First Principles: The Self-Incrimination Clause](#), 93 MICH. L. REV. 857, 873-74 (1995) (reasoning that suspects typically possess valuable information relating to crime); John H. Lang-

bein, [The Historical Origins of the Privilege Against Self-Incrimination at Common Law](#), 92 MICH. L. REV. 1047, 1055 (1994) (suggesting accused useful because of potential ties to true perpetrators of crime).

[FN62]. See Amar, supra note 61, at 873 (noting that reports describe police interrogation as fraught with violence and sneaky, guerilla tactics).

[FN63]. See id. at 874 (suggesting that formal doctrine may "drive police interrogations underground" beyond reach of Fifth Amendment principles).

[FN64]. See id. at 898-99 (advocating admissibility of involuntary testimony under watchful eye of magistrates); Friendly, supra note 2, at 713 (endorsing judicial supervision of police interrogation); LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 122-137 (1977) (discussing role of magistrate in questioning criminal and compiling evidence for trial); see also John H. Langbein & Lloyd L. Weinreb, Continental Criminal Procedure: "Myth" and Reality, 87 YALE L.J. 1549, 1551-52 (1978) (describing French system and role of magistrate in investigation).

[FN65]. See Amar, supra note 61, at 894, 904 (recognizing privilege prevents defendants from performing poorly before jury). But see Friendly, supra note 2, at 699-701 (suggesting that danger of bullying causing false testimony more likely during secret pre-trial proceedings). Judge Friendly views the danger of a defendant testifying at trial as also stemming from another source, that the prosecution may trot out the defendant's entire criminal history. Id. at 699. Judge Friendly recognized, however, that the secrecy of grand jury proceedings keep a defendant's poor performance from the "ultimate triers of fact." Id. at 701.

[FN66]. See [Commonwealth v. White](#), 374 Mass. 132, 139, 371 N.E.2d 777, 781 (1977) (believing similarly compelling needs exist to exclude "fruits" gained from Miranda violation); cf. [Commonwealth v. Ford](#), 394 Mass. 421, 426, 427 N.E.2d 560, 563 (1985) (holding Article 14 of Declaration of Rights requires exclusion of evidence improperly seized during search).

[FN67]. See [Carney v. City of Springfield](#), 403 Mass. 604, 611, 532 N.E.2d 631, 636 (1988) (extending transactional immunity to public employees); [Attorney General v. Colleton](#), 387 Mass. 790, 792-96, 444 N.E.2d 915, 917-19 (1982) (holding Article 12 of Declaration of Rights provides for transactional immunity for private citizens).

[FN68]. See Amar, supra note 61, at 865-67, 904-05 (suggesting that the law should permit adverse inferences from defendant's failure to testify at sentencing phase). But see Yale Kamisar, On the "[Fruits](#)" of Miranda Violations, Coerced Confessions, and Compelled Testimony, 93 MICH. L. REV. 929, 1005 (1995) (criticizing Amar's approach to the Fifth Amendment body of law). Kamisar contends that Amar "seem[s] to be unaware, that for more than thirty years, the dominant rationale for excluding coerced confessions has been the court's disapproval of and attempts to discourage the offensive police methods that produce such confessions, regardless of their reliability." Id.

[FN69]. [380 U.S. 609 \(1965\)](#).

[FN70]. See [id. at 615](#) (holding judge's and prosecution's comments regarding defendant's failure to testify in criminal case violative of Fifth Amendment). The defendant, who was eventually convicted of first degree murder after a jury trial, did not testify at trial on the issue of guilt. [Id. at 609-10](#). Although the trial court instructed the jury that a defendant has a constitutional right not to testify, the court informed the jury:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury

may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

Id. at 610.

The Griffin Court held that the judge's and prosecutor's comments regarding the defendant's failure to testify in the California criminal case violated the Fifth Amendment. Id. at 615. Specifically, the Court noted that the self-incrimination clause of the Fifth Amendment forbids both comment by prosecution concerning the accused's refusal to take the stand and instructions by the court indicating that silence is considered evidence of guilt. Id.

[FN71]. [U.S. CONST. amend. V](#). The Fifth Amendment prohibits the Government from requiring the accused to stand as a witness at his or her own trial. Id. The Fifth Amendment provides, in pertinent part: "No person ... shall be compelled in any criminal case to be a witness against himself." Id.; see also [Griffin, 380 U.S. at 615](#) (holding Fifth Amendment forbids comment on accused's silence under self-incrimination clause). The Fifth Amendment applies to the states through the Fourteenth Amendment. See [U.S. CONST. amend. XIV, § 1](#) (prohibiting states from depriving any person of liberty without due process of law); see also [Malloy v. Hogan, 378 U.S. 1, 13-14 \(1964\)](#) (extending self-incrimination clause to states); Amar, *supra* note 61, at 898-901 (advocating against application of self-in-crimination clause in non-trial proceedings).

[FN72]. [Mass. Const. Pt. 1, art. 12](#). The Massachusetts Declaration of Rights states: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself." Id.; see [Commonwealth v. Bennett, 2 Mass. App. Ct. 575, 578-80, 317 N.E.2d 834, 837-38 \(1974\)](#) (deeming unconstitutional prosecutor's adverse comments on defendant's failure to speak prior to trial).

[FN73]. See [California v. Acevedo, 500 U.S. 565, 581 \(1991\)](#) (Scalia, J., concurring) (asserting terms of Fourth Amendment do not prescribe warrants for searches and seizures); [Robbins v. California, 453 U.S. 420, 438 \(1981\)](#) (Rehnquist, J., dissenting) (stating Fourth Amendment does not require warrants to conduct searches); see also Akhil Reed Amar, [The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1179-80 \(1991\)](#) (proposing view that Supreme Court has reversed original meaning of Fourth Amendment); James J. Tomkovicz, [California v. Acevedo: The Walls Close in on the Warrant Requirement, 29 AM. CRIM. L. REV. 1103, 1125-29 \(1992\)](#) (comparing conflicting arguments surrounding textual debate regarding warrants); see generally Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 287 (1984) (emphasizing incomprehensible nature of Fourth Amendment law). Albert Alschuler explains the confusion surrounding the application of the Fourth Amendment:

What renders substantive Fourth Amendment law incomprehensible, however, is not the lack of categorical rules but too many of them. The application of different principles to seizures of persons than to seizures of things, the development of differing rules for arrests in restaurants than for arrests in houses, the attempt to articulate two tiers of justification for a thousand kinds of seizures, the proliferation of distinctions between and among containers—all of these and more have rendered the fourth amendment a Ptolemaic system.

Id. at 287-88.

[FN74]. [U.S. CONST. amend. IV](#). The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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.

Id.

[FN75]. See Akhil Reed Amar, [The Fourth Amendment, Boston, and the Writs of Assistance, 30 SUFFOLK U. L. REV. 53, 54-65 \(1996\)](#) (relating historical underpinnings of Fourth Amendment); Akhil Reed Amar, [Fourth Amendment First Prin-](#)

[ciples, 107 HARV. L. REV. 757, 771-74 \(1994\)](#) (recalling how Framers had cause to view warrants as instruments of abuse). But see Second Thoughts, *supra* note 59, at 824 (labeling Professor Amar's historical analysis of Fourth Amendment law as "short-sighted" in her spirited reply); Carol S. Steiker, [Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 MICH. L. REV. 2466, 2485-505 \(1996\)](#) (contrasting Burger and Rehnquist Courts effect on Warren Court precedents). Professor Steiker asserts that the Burger and Rehnquist Courts left intact the Warren Courts police conduct rules, but altered the consequences of violating those rules. Steiker, *supra*, at 2504.

[FN76]. See [Adams v. New York, 192 U.S. 585, 596-98 \(1904\)](#) (finding gaming slips competent evidence despite their illegal seizure); [Jones v. Root, 72 Mass. \(6 Gray\) 435, 436-37 \(1856\)](#) (upholding warrantless seizure of liquors); [Rohan v. Sawin, 59 Mass. \(5 Cush.\) 281, 284-85 \(1850\)](#) (stating warrant not required under either federal or state constitution); see also [People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 588 \(1926\)](#) (rejecting recently promulgated federal exclusionary rule until some "over-mastering consideration of principle" requires otherwise).

[FN77]. See [Weeks v. United States, 232 U.S. 383, 398 \(1914\)](#) (holding U.S. Marshall's warrantless search violated Fourth Amendment).

[FN78]. See [Mapp v. Ohio, 367 U.S. 643, 654-57 \(1961\)](#) (overturning precedent and holding that Weeks exclusionary rule applies to states).

[FN79]. [242 N.Y. 13, 150 N.E. 585 \(1926\)](#).

[FN80]. [Id. at 21, 150 N.E. at 587](#).

[FN81]. See [Terry v. Ohio, 392 U.S. 1, 29-31 \(1968\)](#) (allowing police officers to stop persons when officers have reasonable grounds to fear for safety).

[FN82]. See [United States v. Leon, 468 U.S. 897, 922 \(1984\)](#) (creating exception to exclusionary rule when officers act with objective good faith).

[FN83]. [462 U.S. 213 \(1983\)](#). In *Gates*, the Court abandoned the two-part Aguillar and Spinelli test in favor of the "totality of the circumstances" analysis for determining the existence of probable cause. [Id. at 238](#).

[FN84]. See [Nix v. Williams, 467 U.S. 431, 444 \(1984\)](#) (adopting doctrine of inevitable discovery as exception to exclusionary rule).

[FN85]. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 376-83 (1982) (asserting prevalence of perjury on behalf of police officers and prosecutors in criminal justice system).

[FN86]. See [367 U.S. 643, 672-86 \(1961\)](#) (Harlan, J., dissenting) (arguing against extending federal exclusionary rule to states).

[FN87]. [365 U.S. 167 \(1961\)](#).

[FN88]. See [Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388, 398-411 \(1971\)](#) (Harlan, J., concurring) (opining that federal law provides remedy against flagrant, unjustified and unconstitutional police conduct).

[FN89]. When Title VII of the Civil Rights Act was first enacted in 1964, the remedial scheme was deliberately limited so as

to bypass juries, which it was feared, would be hostile to civil rights plaintiffs. The 1991 revisions of that Act added remedies which juries would impose—including punitive damages, presumably because with time the attitudes of juries had changed. See [42 U.S.C. 1981a \(b\)\(1\) \(1996\)](#) (granting recovery of punitive damages where complaint demonstrates respondent engaged in malicious or reckless discrimination); see also [United States v. Burke, 504 U.S. 229, 241 n.12 \(1992\)](#) (recognizing that victims of intentional discrimination entitled to punitive damages under Civil Rights Act of 1991).

[\[FN90\]](#). Pizzi, *supra* note 23, at 63-64.

[\[FN91\]](#). *Id.* at 64.

[\[FN92\]](#). *Id.* at 60.

[\[FN93\]](#). *Id.* at 60-61.

[\[FN94\]](#). *Id.* at 61.

[\[FN95\]](#). Pizzi, *supra* note 23, at 64-65 (footnotes omitted).

[\[FN96\]](#). William J. Brennan, Jr., [State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 \(1977\)](#).

[\[FN97\]](#). See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 13 (1995) (listing cases in which state courts have extended protection beyond federally proscribed minimums); Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 920-29 (1980) (arguing that Massachusetts Constitution offers similar if not greater protection to criminal defendants); Honorable Charles G. Douglas III, *State Judicial Activism--The New Role for State Bill of Rights*, 12 SUFFOLK U. L. REV. 1123, 1142-46 (1978) (discussing when and how state law applies instead of federal law).

[\[FN98\]](#). See Kaye, *supra* note 97, at 11-12 (applauding Justice Brennan's "wake-up" call to state courts to resuscitate state constitutions).

[\[FN99\]](#). See [Brown v. Allen, 344 U.S. 443, 540 \(1953\)](#) (Jackson, J., concurring) (suggesting Supreme Court's reversals not necessarily proof that justice is better served).

[\[FN100\]](#). Compare [Mass. Gen. Laws ch. 272, § 99 \(8\) \(1997\)](#) (granting investigative or law enforcement officer power to intercept wire communications during investigation for designated offenses) and [Mass. Gen. Laws ch. 272, § 99 \(7\) \(1997\)](#) (defining designated offenses), with [18 U.S.C. § 2510 \(7\) \(1997\)](#) (giving investigative or law enforcement officer ability to conduct investigations for permissible offenses), and [18 U.S.C. § 2516 \(1997\)](#) (outlining offenses giving investigative authority power to intercept wire communication). The Massachusetts statute that grants an investigative officer the power to intercept wire communications is much more limited than those provided under the Federal statute. See [Mass. Gen. Laws ch. 272, § 99 \(A\) \(1997\)](#) (limiting use of electronic surveillance to investigations of organized crime).

[\[FN101\]](#). See [Planned Parenthood v. Casey, 505 U.S. 833, 849-50 \(1992\)](#) (quoting [Poe v. Ullman, 367 U.S. 497, 542 \(1961\)](#) (Harlan, J., dissenting)) (recognizing "tradition" as established principle when considering state's interest); [Michael, H. v. Gerald, D., 491 U.S. 110, 121-130 \(1984\)](#) (recognizing importance of history and tradition in determining existence of fundamental liberty interests); [Moore v. City of East Cleveland, 431 U.S. 494, 503-06 \(1977\)](#) (balancing restriction of person's liberty against values deeply rooted in Nation's history and tradition); [Moore, 431 U.S. at 516-17](#) (Stevens, J., concurring)

(maintaining courts recognize "valid community interests" when imposing restrictions on liberty).

[FN102]. See [People v. Defore, 242 N.Y. 13, 22, 150 N.E. 585, 588 \(1926\)](#) (declaring evidence not excluded because private litigant gathered evidence unlawfully); [Commonwealth v. Tibbetts, 157 Mass. 519, 521, 32 N.E. 910, 911 \(1893\)](#) (arguing pertinent evidence admissible despite irregular or illegal procurement); [Commonwealth v. Dana, 43 Mass. \(1 Met.\) 329, 337-38 \(1841\)](#) (explaining illegally seized evidence may still be relevant and admissible); see generally Paul G. Cassell, The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example, 3 UTAH L. REV. 751 (1993).

[FN103]. [U.S. CONST. amend. IV](#); see also supra note 74 (providing language of Fourth Amendment's warrant requirement).

[FN104]. [California v. Hodari D., 499 U.S. 621 \(1991\)](#); see [Commonwealth v. Cao, 419 Mass. 383, 386-87, 644 N.E.2d 1294, 1296-97, cert. denied, 115 S. Ct. 2588 \(1995\)](#) (distinguishing Hodari D. from Massachusetts case law).

[FN105]. See [Hodari D., 499 U.S. at 626-29](#) (defining "seizure" under Fourth Amendment as requiring some form of submission).

[FN106]. See [New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 \(1932\)](#) (Brandeis, J., dissenting) (cautioning Court against squelching states' opportunity to serve as laboratories for social and economic experiments).

[FN107]. See [Davidson v. Cannon, 474 U.S. 344, 349-356 \(1986\)](#) (Blackmun, J., dissenting) (arguing prisoner should have cause of action against prison officials for failure to provide protection).

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