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Stephen C. Thaman  
*Saint Louis University School of Law*

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**IS AMERICA A SYSTEMATIC VIOLATOR OF HUMAN RIGHTS IN  
THE ADMINISTRATION OF CRIMINAL JUSTICE?\***

STEPHEN C. THAMAN\*\*

I. INTRODUCTION

The cynical answer to the question asked in the title of this essay is: Yes, it comes with the turf of being a superpower. Superpowers are arrogant. They need not listen to other nations. Our former nemesis, the Soviet Union, was a systematic violator of human rights. After its collapse, however, most successor states of that “evil empire” have petitioned to join the Council of Europe—the “civilized world”—and have been compelled to shed the worst practices of Communist times: use of the death penalty, violations of the rights of the defense, and the lack of an independent judiciary. They still have a long way to go, but they are on the right track. Our only competitor as a superpower nowadays, China, goes it alone as we do, and significantly out-trumps us as a systematic human rights violator.

We selectively brand other countries as “violators of human rights” in our yearly reports, yet cast a blind eye as to our own serious deficiencies—blithely sending criminal justice “experts” to former Communist countries and the developing world to aid them in instituting the rule of law. I have participated in such efforts. I strongly believe that it is not the theory behind our system of criminal justice that is flawed; it is the horrors that have resulted from its politicization and, to a certain extent, its commercialization. Our Bill of Rights was a progressive document in 1791 when it was enacted. It is still a sufficient backbone when the courts interpret it with compassion and in a manner consistent with human dignity. Unfortunately, our courts have not been up to the task. Politicians and law enforcement officials have capitalized on the courts’ narrow and often cruel jurisprudence, creating a situation that has been criticized as violative of human rights both at home and abroad.

The foundation for the protection of the rights of criminal defendants in the United States is found in the Bill of Rights, which is the first ten amendments

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\*\* Associate Professor of Law, Saint Louis University School of Law, U.S.A.

to the U.S. Constitution.<sup>1</sup> These amendments were enacted in 1791 to compensate for the lack of a catalogue of such rights in the original 1787 document.<sup>2</sup> It is in the first eight of these amendments that the bulk of protections for citizens suspected of, or charged with, committing criminal offenses are found.<sup>3</sup> The one exception is the right to trial by jury.<sup>4</sup> I here trace the development of these rights in the context of the two most pernicious human rights violations plaguing the United States: the death penalty and racism in the enforcement of criminal laws.

The United States and Japan are the only industrialized democracies that still impose the death penalty, but the United States uses the death penalty much more frequently and has a dismal record of convicting the innocent.<sup>5</sup> Since 1973, at least eighty-seven innocent persons have been released after being sentenced to death for crimes they did not commit.<sup>6</sup> No one knows how many innocent people languish in prison for non-capital crimes they did not commit. The United States also imprisons more people *per capita* than any other country in the world, except, perhaps, Russia.<sup>7</sup> The “prison industry” is one of the fastest growing in the United States.<sup>8</sup> Communities fight with each other over the opportunity to have prisons built in their regions to provide jobs and a tax base.<sup>9</sup> In California, for instance, the union of prison guards is a

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1. *See generally* U.S. CONST. amend. I-X.

2. ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791* 119-25 (rev. ed. 1983).

3. *See generally* U.S. CONST. amend. I-VIII.

4. *See* U.S. CONST. art. III, § 2, cl. 3.

5. *See generally* BARRY SCHECK ET AL., *ACTUAL INNOCENCE* (2000); Eric Zorn, *Differing Views on Death Penalty Prove Same Thing*, CHI. TRIB., Nov. 12, 1998 at 1 (quoting Justice Moses W. Harrison II of the Illinois Supreme Court).

6. Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1, A16; John Kifner, *A State Votes to End its Death Penalty*, N.Y. TIMES, May 19, 2000, at A16.

7. In February of 2000 the prison population of the United States rose to two million. The United States may now imprison a higher percentage of its population than any nation in history. Although the United States has only five percent of the world's population, it has twenty-five percent of the world's prisoners. Duncan Campbell, *U.S. Jails Two-Millionth Inmate*, MANCHESTER GUARDIAN WEEKLY, Feb. 17-23, 2000, at 1. In 1998 the rate of incarceration in the U.S. was 668 inmates per 100,000 individuals, up from 313 inmates per 100,000 individuals in 1985. Fox Butterfield, *Number of Inmates Reaches Record 1.8 Million*, N.Y. TIMES, Mar. 15, 1999, at A14. This rate is at least five times greater than most industrialized nations. Russia's rate in 1994 was 558 individuals incarcerated per 100,000 unincarcerated individuals, at that time higher than the United States. *America Behind Bars*, SOUTHERN CENTER FOR HUMAN RIGHTS REPORT, Fall 1995, at 5.

8. Craig Haney, *Riding the Punishment Wave: On the Origins of our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 65-66, 68 (1998).

9. Kurt Miniclier, *Akron County Ponders Lockup as Start-up*, DENVER POST, Feb. 23, 1999.

powerful force in lobbying for stiffer sentencing laws.<sup>10</sup> Large portions of those incarcerated are members of minority groups, especially African-Americans.<sup>11</sup>

In observing these trends one finds a disturbing politicization of the administration of criminal justice. Candidates for political office promise to be tougher in enforcing the death penalty, to stiffen penalties for non-capital crimes, and to build more prisons.<sup>12</sup> Politically elected judges try to show how tough they can be in their sentences,<sup>13</sup> and politically elected prosecutors seek maximum sentences and cheat and bend the law to garner convictions.<sup>14</sup>

How could this happen in one the world's oldest democracies, a country with one of the oldest charters of freedom, in the midst of unprecedented economic prosperity? Why are there still dreadful pockets of poverty in the countryside, and, worst of all, in the decaying and haunted cities?<sup>15</sup> Why do politicians vote to imprison more and more of the poor who violate the law due to poverty, ignorance, and degradation, rather than use some of the unprecedented wealth to ameliorate these problems?

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10. Haney, *supra* note 8, at 67-8, 70-1.

11. See Fox Butterfield, *Study Examines Race and Justice in California*, N.Y. TIMES, Feb. 13, 1996, at A12. Almost 40% of black men in their twenties in California are imprisoned, or on probation or parole on any given day, in comparison with 5% of whites and 11% of Hispanics in that age group. Blacks make up 18% of those arrested and 32% of the prison population. In New York approximately one of every three black men in his twenties is in prison, on probation, or on parole. *Id.* Blacks and Hispanic juveniles are also treated more severely throughout the juvenile justice system than white teenagers charged with comparable crimes. Fox Butterfield, *Racial Disparities Seen as Pervasive in Juvenile Justice*, N.Y. TIMES, April 26, 2000, at A1, A18.

12. See generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995). The sons of ex-president George Bush are good examples. George W. Bush, Governor of Texas, is proud that under his administration, Texas has the largest criminal justice system in country with 545,000 people in prison or jail or on probation or parole. Prisons in Texas hold 724 inmates for every 100,000 residents, second only to Louisiana with 736. Minnesota has the lowest incarceration rate with 117 inmates per 100,000 Minnesota citizens. In Texas, money had to be taken away from public education to build more prisons. George W. Bush also presided over a record 127 executions. He claims all of these individuals were guilty! Paul Duggan, *In Texas, Defense Lapses Fail to Halt Executions*, WASH. POST, May 12, 2000, at A1. Jeb Bush, Governor of Florida, recently agreed to sign a bill replacing electrocution with lethal injection, but only if legislation passed that would shorten the wait on death row from ten years to five years. See generally *id.*

13. See generally Bright & Keenan, *supra* note 12, at 768.

14. Ken Armstrong & Maurise Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1.

15. A study has shown that poor children in the United States are poorer than children in most other Western industrialized nations. Only in Israel and Ireland are poor children worse off. Keith Bradsher, *Low Ranking for Poor American Children*, N.Y. TIMES, Aug. 14, 1995, at A7.

## II. THE BELATED ENFORCEMENT OF THE BILL OF RIGHTS ON A NATIONAL SCALE

The Bill of Rights was enacted to limit the power of the new federal government, and thereby ensure continuing sovereignty of the state governments. The protections for criminal defendants in the first eight amendments were not meant to apply directly to state governments.<sup>16</sup> Almost all criminal law was the province of the states. Federal law originally punished only uniquely federal crimes: treason, smuggling, and crimes involving more than one state.<sup>17</sup> Only when the federal government began enacting crimes of sedition, prohibition, and later regulatory offenses involving narcotics and other health and safety hazards, did the federal government prosecute more criminal cases.<sup>18</sup>

The states all had their own constitutions, bills of rights, penal codes, and procedural rules. The states' bills of rights mirrored those of the federal system, but enforcement and interpretation of those rights varied from state to state. Blacks in southern states suffered the worst fate. If they were not lynched when suspected of a crime, a farcical jury trial could be orchestrated. This usually ended in their execution, taking only a little more time than it would have taken to lynch them in the first place.<sup>19</sup> There was no right to appeal a criminal case until the late Nineteenth Century, so higher courts had no occasion to rule on the meaning and enforcement of the various amendments to the constitution.<sup>20</sup>

With the enactment of the Fourteenth Amendment to the U.S. Constitution after the Civil War in 1865, a vehicle was created to enforce the requirements of the U.S. Bill of Rights on the states. It provided: "nor shall any State deprive any person of life, liberty or property, without due process of law."<sup>21</sup> The Fourteenth Amendment as well as the Thirteenth and Fifteenth Amendments, were enacted to protect the freed slaves after the Civil War. For many years, the U.S. Supreme Court recognized as violations of "due process" only those practices that were contrary to "immutable principles of justice, as

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16. *Barron v. Baltimore*, 32 U.S. 243 (1833).

17. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138 (1999).

18. *Id.* at 1139.

19. At least 4743 people were killed by lynch mobs, and 90% of those were in the South. Stephen B. Bright, *Discrimination, Death and Denial: the Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 440 (1995). Three-quarters of the victims were black. *Id.* The death penalty with white juries was seen to legalize such lynchings. *Id.* Only a few days elapsed from arrest to jury verdict and execution. Georgia was the bloodiest state, executing 337 black people and 75 whites from 1924 through 1972. *Id.* at 441.

20. *U.S. v. Scott*, 437 U.S. 82, 88 (1978).

21. U.S. CONST. amend. XIV.

conceived by a civilized society”<sup>22</sup> or those which were “implicit in the concept of ordered liberty [without which] a fair and enlightened system of justice would be imperfect.”<sup>23</sup> This did not include all of the provisions included in the first eight amendments of the Bill of Rights, such as double jeopardy, right to jury trial, right to be free of unreasonable searches and seizures, the privilege against self-incrimination, and the right to indictment by Grand Jury.<sup>24</sup> The states remained free to interpret their own constitutions in this respect without interference by the U.S. Supreme Court, unless the conduct was barbarous or uncivilized.

The U.S. Supreme Court did reverse convictions of state defendants, often when it determined that confessions were extracted by torture, coercion, deception, or other practices that made the confession involuntary.<sup>25</sup> It also overturned the notorious conviction of the Scottsboro Boys in Alabama because the young boys were convicted without the aid of a lawyer<sup>26</sup> in a capital case (rape was a capital case at that time).<sup>27</sup>

During the Civil Rights Movement in the late 1950s and early 1960s, however, things began to change. A majority of the U.S. Supreme Court recognized that the notion of “due process” in the Fourteenth Amendment included nearly all of the rights protected in the first eight amendments of the Bill of Rights: the right to be free from unreasonable searches and seizures and search warrants based on less than probable cause, guaranteed by the Fourth Amendment,<sup>28</sup> and the right to exclude evidence seized in violation thereof;<sup>29</sup> the privilege against self-incrimination in the Fifth Amendment;<sup>30</sup> the protection against double jeopardy, also guaranteed by the Fifth Amendment;<sup>31</sup> the rights to a speedy and public trial,<sup>32</sup> trial by jury,<sup>33</sup> to confront the prosecutions witnesses,<sup>34</sup> to have compulsory process for obtaining defense witnesses<sup>35</sup> and to have the assistance of counsel,<sup>36</sup> all guaranteed by the Sixth Amendment; and the protection against cruel and unusual punishment

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22. *Adamson v. California*, 332 U.S. 46, 60 (1947) (Frankfurter, J., concurring).

23. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

24. *See infra* notes 29-40 and accompanying text.

25. *Brown v. Mississippi*, 297 U.S. 278, 282 (1936).

26. *Powell v. Alabama*, 287 U.S. 45 (1932).

27. *Id.* at 50.

28. *Wolf v. Colorado*, 338 U.S. 25 (1949).

29. *Mapp v. Ohio*, 367 U.S. 643 (1961).

30. *Malloy v. Hogan*, 378 U.S. 1 (1964).

31. *Benton v. Maryland*, 395 U.S. 784 (1969).

32. *Klopper v. North Carolina*, 386 U.S. 213 (1965).

33. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

34. *Pointer v. Texas*, 380 U.S. 400 (1965).

35. *Washington v. Texas*, 388 U.S. 14 (1967).

36. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

guaranteed by the Eighth Amendment.<sup>37</sup> Today, the only right not binding on the states through the Due Process Clause is the right to indictment by Grand Jury, guaranteed in the Fifth Amendment.<sup>38</sup> The protection against excessive bail is assumed to be part of due process, but the U.S. Supreme Court has never explicitly held so in a state case.<sup>39</sup>

The enforcement of the Bill of Rights against the states has been called the “criminal procedure revolution”<sup>40</sup> and it took place primarily during the term of Earl Warren as Chief Justice of the U.S. Supreme Court (1958-1969). Conservative appointments to the Supreme Court by presidents Richard Nixon (1968-1974), Ronald Reagan (1980-1988), and George Bush (1988-1992), however, gradually undermined protections read into the Constitution by the Warren Court.

Decisions of the Burger and Rehnquist Courts have produced a number of undesirable results. First, police may unfairly target minorities in the enforcement of narcotics and weapons laws.<sup>41</sup> Second, police interrogations have become more coercive and inquisitorial,<sup>42</sup> falling below standards recognized in Western Europe,<sup>43</sup> and have led to the conviction of innocent people.<sup>44</sup> Third, undercover police informants not only surreptitiously gather evidence against suspects and defendants, but also testify in court as witnesses for the prosecution,<sup>45</sup> occasionally leading to the imposition of death sentences against innocent persons.<sup>46</sup> Fourth, the ruling that the death penalty is neither cruel and unusual punishment nor a violation of due process has led to increasing death judgments and their quicker execution.<sup>47</sup> Fifth, a system of draconian punishments, combined with the power of the prosecution to grant leniency, has produced a system in which there usually are no trials because defendants plead guilty to minimize their losses.<sup>48</sup> Finally, ineffective assistance of counsel for indigent defendants has contributed to miscarriages of justice.<sup>49</sup>

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37. *Robinson v. California*, 370 U.S. 660 (1962).

38. *Hurtado v. California*, 110 U.S. 516 (1884).

39. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 67 (2d ed. 1992).

40. Cf. CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

41. See *infra* notes 71-81 and accompanying text.

42. See *infra* notes 86-106 and accompanying text.

43. See, e.g., §§ 163a(3), 136 StPO (Germany); §§ 63, 64(3), 350 CPP (Italy); § 520(2)(a)-(c) LECr (Spain); Art. 51 Const. RF (Russia).

44. See *infra* note 104 and accompanying text.

45. See *infra* notes 107-113 and accompanying text.

46. Steve Mills & Ken Armstrong, *The Failure of the Death Penalty in Illinois: The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at 1, 8-9.

47. See *infra* notes 124-28 and accompanying text.

48. At least 90% of defendants plead guilty. LAFAVE & ISRAEL, *supra* note 39, at 899.

49. See *infra* notes 181-90 and accompanying text.

This combination of factors has contributed to a flawed criminal justice system where the poor are a target for serious invasions of protected interests and are then convicted in trials with inadequate assistance of counsel. These convictions are based on evidence that is not only of questionable probative value, but also has often been gathered in suspect manners.<sup>50</sup> Juries are kept in the dark about many aspects of the case and are unable to discern the weaknesses of the prosecution's case or properly assess the credibility of prosecution witnesses.<sup>51</sup> Police and undercover informants routinely lie about evidence on the witness stand.<sup>52</sup> Prosecutors intentionally allow this to happen, refusing to disclose exculpatory evidence, and using improper tactics and arguments to influence the jury.<sup>53</sup> Finally, judges, who, along with prosecutors, are usually elected at the state level, are unwilling or unable to stop these questionable practices or to set aside unsafe verdicts returned by juries.<sup>54</sup>

### III. POLICE HARASSMENT, DETENTION AND SEARCHING OF MINORITIES

Following its decision to apply the Fourth Amendment and its exclusionary rule to the states,<sup>55</sup> the Warren Court attempted to limit the power of the police in its confrontations with citizens, especially minorities.<sup>56</sup> The Court had previously held that searches and seizures of the person could only be conducted upon "probable cause" that the person had committed a crime, or that evidence of a crime, contraband, or instrumentalities of crime could be found on the person or in the person's home or effects.<sup>57</sup> This left the juridical interpretation of the typical police-citizen encounter in limbo. Did this mean that police could not detain someone to investigate crime unless they already had "probable cause" of the person's guilt?

In 1968, a year of racial riots following the assassination of Martin Luther King, Jr., the Supreme Court noted the practice of harassment of black citizens by predominantly white police forces in the investigation of a crime,<sup>58</sup> but

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50. See *infra* notes 55-113 and accompanying text.

51. See *infra* notes 181-85 and accompanying text.

52. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 456-59 (1999). On "testilying," see Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 396-403 (1999).

53. See *infra* notes 182-85 and accompanying text.

54. McClurg, *supra* note 52, at 403-06. On how popularly elected judges refuse to set aside death sentences and yet impose the death penalty when a jury recommends only a life sentence in the four states where this is still possible, see Bright & Keenan, *supra* note 12, at 793.

55. *Mapp v. Ohio*, 367 U.S. 643 (1961).

56. See *Terry v. Ohio*, 392 U.S. 1 (1968).

57. *Id.* (Douglas, J., dissenting).

58. See generally *id.*



decided, that a “temporary detention” could be conducted on less than “probable cause,” that is, upon a reasonable suspicion that a person had, or was about to, commit a criminal offense.<sup>59</sup> The Court also held that if an officer reasonably feared for his safety, he could conduct a superficial pat-search of the suspect’s outer clothing to see if he or she was carrying a weapon.<sup>60</sup> The police could only remove items from the suspect’s clothing if they were hard and in the shape of a weapon (usually a knife or firearm).<sup>61</sup> The courts were careful to indicate that a person could not be “temporarily detained” because of the fact that he was located in a “high crime community,”<sup>62</sup> because of the color of his skin,<sup>63</sup> or because he walked or ran away from the oncoming police due to the tension between predominantly white police officers policing the black community.<sup>64</sup> There had to be some objective information or conduct indicating the person had committed, or was about to, commit a crime.

The post-Warren Supreme Court undermined these protections in many ways. They allowed police officers to remove drugs from a suspect following a pat-search if they could immediately articulate that the object was contraband.<sup>65</sup> The Court held that it was not a violation for the police to attempt to detain a person unlawfully, as long as that person had not submitted to the unlawful attempt before discarding incriminating evidence.<sup>66</sup> Finally, and quite recently, the Court decided that running from the police (even after incidents like the beating of Rodney King) in high crime neighborhoods is sufficient to constitute “reasonable suspicion” justifying a temporary detention.<sup>67</sup> This was true even if the police did not know what crime the person was suspected of committing.<sup>68</sup> This decision is regrettable, especially in the face of widespread reports of police using terror and being involved in drug trafficking and extortion.<sup>69</sup>

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59. *Id.* at 30.

60. *Id.*

61. *See Terry*, 392 U.S. at 30.

62. *Brown v. Texas*, 443 U.S. 47 (1979).

63. *See, e.g., State v. Barber*, 823 P.2d 1068 (Wash. 1992).

64. *See, e.g., State v. Hicks*, 488 N.W.2d 359 (Neb. 1992).

65. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

66. *California v. Hodari D.*, 499 U.S. 621 (1991).

67. *Illinois v. Wardlow*, 120 S.Ct. 673 (2000).

68. *See id.*

69. In 1997 alone, there were 1768 complaints of misconduct against New York City Police and the city had to pay \$19.5 million in damages as a result. Deborah Sontag & Dan Barry, *When Brutality Wears a City Badge*, N.Y. TIMES, Nov. 11, 1997, at A1, A25; Deborah Sontag & Dan Barry, *Challenge To Authority: A Special Report; Disrespect as a Catalyst for Brutality*, N.Y. TIMES, Nov. 11, 1997, at A1. Six Philadelphia police officers, five white and one Asian, pleaded guilty to conducting illegal searches, planting evidence, and lying under oath. Fifty-six drug convictions involving the officers have been overturned and 1,600 other arrests between 1987 and 1994 are being reviewed. Michael Janofsky, *A Philadelphia Police Scandal Results in a Plan for*

Police have notoriously concentrated their enforcement of routine traffic laws against African-Americans and other minorities as a pretext to conduct a narcotics investigation, especially in the current "War on Drugs." Among critics, the practice is known as "driving while black."<sup>70</sup> Police stop someone for speeding, failing to signal, or even for having a defective license plate light, and then look for further suspicious conduct or request permission for a "consent search" of the automobile. While some courts earlier claimed that such a stop was legal only if a reasonable police officer would have stopped the person for the same violations,<sup>71</sup> the Supreme Court gave its stamp of approval for such "pretext" stops.<sup>72</sup>

The Supreme Court has also approved the practice in around 28 states<sup>73</sup> of allowing a full custodial arrest of a person for minor traffic violations, the subsequent search of that person,<sup>74</sup> and the passenger compartment of his car, without probable cause.<sup>75</sup> Thus, a minor violation of the state vehicle code could lead to a full search for narcotics, otherwise not permissible due to the absence of reasonable suspicion to detain or probable cause to search. The Supreme Court has also allowed police departments to implement "inventory policies" permitting them to tow automobiles to the police department and search them without probable cause when the driver has been arrested.<sup>76</sup> Even if the car was searched illegally at the scene of the arrest, courts have admitted evidence because it would "inevitably" have been discovered as a result of the police inventory policies.<sup>77</sup>

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*Suit Claiming Racism*, N.Y. TIMES, Dec. 12, 1995, at D23. Six police officers in Atlanta were arrested for robbing drug dealers and extorting money from citizens for protection. Ronald Smothers, *6 Held in Atlanta Police Corruption Case*. N.Y. TIMES, Sept. 7, 1995, at A12. Up to 3,200 criminal cases in Los Angeles may have to be reviewed as a result of an inquiry into police corruption. The charges range from selling cocaine taken from an evidence locker to murder. Thirteen officers have been suspended and up to 100 may have falsified evidence. Duncan Campbell, *Police Corruption Embroils LA in a Legal Nightmare*, MANCHESTER GUARDIAN WEEKLY, Jan. 6-12, 2000, at 5.

70. David A. Harris, "Driving While Black" and All Other Traffic Offenses: the Supreme Court and Pretextual Traffic Stops. 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997).

71. Cf. U.S. v. Miller, 821 F.2d 546 (11th Cir. 1987).

72. Whren v. United States, 517 U.S. 806 (1996).

73. Barbara C. Salken. *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*. 62 TEMPLE L. REV. 221, 250 (1989).

74. United States v. Robinson, 414 U.S. 218, 236 (1973); Gustafson v. Florida, 414 U.S. 260, 266 (1973).

75. New York v. Belton, 453 U.S. 454, 460 (1981).

76. South Dakota v. Opperman, 428 U.S. 364, 369 (1976); Colorado v. Bertine, 479 U.S. 367, 375-76 (1987).

77. United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986); United States v. Seals, 987 F.2d 1102, 1007-08 (5th Cir. 1993); United States v. Martin, 982 F.2d 1236, 1240 (8th Cir. 1993); United States v. Zapata, 18 F.3d 971, 978 (1st Cir. 1994).

Such “pretext” stops are also made of persons on foot in high crime communities. In St. Louis, for example, city police routinely arrest young black males for violations of the St. Louis Municipal Code for “street demonstration,” an ordinance aimed at preventing sales, singing, juggling, or other activity that could disturb traffic.<sup>78</sup> Police then search a suspect incident to arrest to get around Fourth Amendment limitations.

Groups of citizens are now bringing civil suits against police departments for alleged “racial profiling,” that is, singling out blacks or Hispanic Americans for discriminatory enforcement of, for instance, the traffic laws or for random stops without reasonable suspicion to investigate drug-trafficking.<sup>79</sup> Presidential candidate Bill Bradley even made it an issue in his presidential campaign.<sup>80</sup>

Even if courts admit that police have violated the Fourth Amendment in conducting a search, evidence is still admissible if, for instance, a police officer relied “in good faith” on a search warrant issued by a judge.<sup>81</sup> The Burger Court decided that the only reason for excluding evidence seized in violation of the Constitution was to deter unlawful police conduct, not to protect the rights of citizens.<sup>82</sup> It also ruled that only someone whose privacy rights have been violated may move to suppress incriminating evidence found as a result of an unlawful search at trial.<sup>83</sup> Thus, police may illegally stop and search an automobile with several passengers in it, and, only the driver of the automobile has “standing” to question the validity of the search at trial.<sup>84</sup>

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78. ST. LOUIS, MO. ORDINANCE 57831, § 17.16.270.

79. *Brown v. Oneonta*, N.Y., 195 F.3d 111, 115 (2nd Cir. 1999); *National Congress for Puerto Rican Rights v. New York*, N.Y., 75 F.Supp.2d 154 (S.D.N.Y. 1999); *Maryland State Conference of NAACP Branches v. Department of Md. State Police*, 72 F. Supp.2d 560, 564 (D. Md. 1999); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999). In New Jersey at least 17 motions to suppress evidence were granted due to “racial profiling” and the State of New Jersey has entered a consent decree compelling the state to collect thorough statistics as to the race of persons detained by police. 66 CRIM. L. REP. 251 (2000). Statistics on the practice are now being collected by federal law enforcement agencies, 65 CRIM. L. REP. 292 (2000), and the American Bar Association. 65 CRIM. L. REP. 535 (2000).

80. See Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, N.Y. TIMES, April 21, 1999, at A1, A23; Jodi Wilgoren, *Police Profiling Debate Hinges on Issue of Experience, or on Bias*, N.Y. TIMES, April 9, 1999, at A21. See generally Kevin Flynn, *State Cites Racial Inequality in New York Police Searches*, N.Y. TIMES, Dec. 1, 1995, at A22. On racial profiling of Hispanics in the States which border on Mexico, which included the stopping of a judge, see Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A1, A17.

81. *United States v. Leon*, 468 U.S. 897, 919 (1984).

82. *Id.*

83. *Rakas v. Illinois*, 439 U.S. 128 (1978).

84. *Id.*

## IV. POLICE INTERROGATION AND THE RIGHT TO REMAIN SILENT

Once the Fifth Amendment privilege against self-incrimination was made binding on the States,<sup>85</sup> the Supreme Court passed the landmark case of *Miranda v. Arizona*<sup>86</sup> in an attempt to bring an end to police use of coercion, threats, psychological pressure, promises, and deception to get suspects to confess in criminal cases. In doing so, they reviewed police manuals documenting the tactics used by police, usually in the 24 to 48 hours between arrest and arraignment in court, to coerce a reluctant defendant to confess.<sup>87</sup> Even in the absence of overt coercion, threats, promises, or deception, the Warren Court held that custody is itself inherently coercive.<sup>88</sup> As a result, the Court held that a person in custody had to be advised of his right to be silent and to consult with a lawyer before being questioned.<sup>89</sup> Before being questioned, he had to waive both of these rights.<sup>90</sup>

Such admonitions, now accepted in most European jurisdictions,<sup>91</sup> are in jeopardy in the United States. Although the Supreme Court initially decided that failure to advise a suspect in custody of the so-called *Miranda*-rights and failure to obtain a waiver thereof would result in suppression of any statement,<sup>92</sup> it later held a statement obtained in violation of *Miranda* could nevertheless be used to impeach a defendant in rebuttal if he testifies contrary thereto.<sup>93</sup> The Supreme Court then began stating that the *Miranda* rule was not “of constitutional stature” but only a “prophylactic” rule to enforce the Fifth Amendment.<sup>94</sup> Therefore, any leads gained in a statement taken in violation of *Miranda* could be followed, and evidence thereby gathered would not be excluded as “fruit of the poisonous tree.”<sup>95</sup> As a result, police departments would deliberately not advise suspects of their rights to gather leads or evidence to use in impeachment, or after a person invoked his or her rights, the police would question them anyway.<sup>96</sup> Courts have even admitted statements taken in violation of *Miranda* when the police stated they had a departmental policy to do this!<sup>97</sup> The Supreme Court has also refused to order suppression

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85. *Malloy v. Hogan*, 378 U.S. 1 (1964).

86. *Miranda v. Arizona*, 384 U.S. 436 (1966).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 443.

91. *See, e.g.*, §§ 163a(3), 136 StPO (Germany); §§ 63, 64(3), 350 CPP (Italy); § 520(2)(a)-(c) LECr (Spain); Art. 51 Const. RF (Russia).

92. *Miranda v. Arizona*, 384 U.S. 436 (1966).

93. *Harris v. New York*, 401 U.S. 222, 225 (1971).

94. *Michigan v. Tucker*, 417 U.S. 433 (1974).

95. *Id.* at 451.

96. *Davis v. U.S.*, 724 A.2d 1163 (D.C. App. 1998).

97. *California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327, 338 (C.D. Cal. 1996); *People v. Peevy*, 73 Cal. Rptr. 2d 865 (Cal. 1998).

of statements after the giving of *Miranda* warnings, even when the suspect “let the cat out of the bag” during a custodial interrogation without *Miranda* warnings.<sup>98</sup>

In 1968, Congress passed a law repealing *Miranda* and other progressive decisions of the Warren Court,<sup>99</sup> but the Attorney General refused to assert this law as a reason for allowing the admissibility of statements taken in violation of *Miranda* and courts ignored the entire issue.<sup>100</sup> Finally, in 1999, a federal district court ruled that the 1968 law had overruled *Miranda* and the case is now before the Supreme Court.<sup>101</sup> If *Miranda* is overturned, the protection given to criminal defendants in the United States will fall well below that given to defendants in most European countries,<sup>102</sup> with the exception, perhaps, of France.<sup>103</sup>

False confessions have led to a number of innocent persons being convicted of murder; some of them have been sentenced to death.<sup>104</sup> One police precinct in Chicago has been accused of using torture in no less than nine convictions for capital murder.<sup>105</sup> This torture consisted in the use of electric wires, beatings, and systematic asphyxiation.<sup>106</sup>

#### V. THE USE OF UNDERCOVER INFORMANTS

The American system of unlimited prosecutorial and police discretion and draconian sentencing schemes have lead to a mushrooming of the use of undercover police informants to snitch on acquaintances and partners in crime in order to escape convictions for serious crimes or lengthy terms of imprisonment.<sup>107</sup> If an informant does not produce in a satisfactory fashion, the person can often be sentenced to the full extent of the law.<sup>108</sup> As a result,

98. *Oregon v. Elstad*, 470 U.S. 298 (1985).

99. 18 U.S.C. § 3501(a) (1994).

100. *See Davis v. U.S.*, 512 U.S. 452 (1994) (Scalia, J., concurring).

101. *U.S. v. Dickerson*, 166 F.3d 667, 687 *cert. granted* 120 S.Ct. 578 (1999).

102. *See, e.g.*, §§ 163a(3), 136 StPO (Germany); §§ 63, 64(3), 350 CPP (Italy); § 520(2)(a)-(c) LECr (Spain); Art. 51 Const. RF (Russia).

103. *See* JEAN PRADEL, *PROCEDURE PENALE* 354-55, 391-98 (9th ed. 1997).

104. Steve Mills & Ken Armstrong, *The Failure of the Death Penalty in Illinois: A tortured path to Death Row*, CHI. TRIB., Nov. 17, 1999, at 1. *Cf.* Carolyn Tuft & Bill Smith, *Deputy Admits Tricking Convict into Confessing*, ST. LOUIS POST DISPATCH, Feb. 22, 1999, at A1; Terry Ganey, *Pardoned Man Wants to “Pick up My Life,”* ST. LOUIS POST DISPATCH, Sep. 30, 1995, at A1.

105. *See* Mills & Armstrong, *supra* note 104.

106. *Id.* The police in Russia employ similar methods. *Confessions at Any Cost: Police Torture in Russia*, HUMAN RIGHTS WATCH 1, 21 (2000).

107. *See* FRONTLINE: “Snitch” available at <<http://www.pbs.org/wgbh/pages/frontline/shows/snitch/>>.

108. In *Ricketts v. Adamson*, 483 U.S. 1 (1987), the defendant was charged with capital murder in the car bombing assassination of an Arizona reporter who was investigating political

informants not only provide evidence used to investigate criminal offenses and make arrests, but act as star witnesses for the prosecution.<sup>109</sup> It is now a common practice for so-called “jailhouse informants” to testify to alleged admissions of guilt made by cellmates, sometimes between arrest and arraignment, but often after arraignment, filing of charges, and appointment of a lawyer. The U.S. Supreme Court has allowed virtually unlimited questioning of pre-arraignment suspects by jailplants<sup>110</sup> and has allowed testimony of jailplants as to admissions made even after appointment of counsel and filing of charges, if the jailplant did not actively engage the suspect in conversation.<sup>111</sup> Such practices, outlawed in many European countries,<sup>112</sup> have led to the conviction of many innocent persons and even subsequent death sentences.<sup>113</sup>

## VI. THE VICTORIOUS MARCH OF THE DEATH PENALTY

Perhaps as a result of the Civil Rights movement, support for the death penalty declined steadily in the 1950s and 1960s.<sup>114</sup> In 1972, the Supreme Court declared that the death penalty was cruel and unusual punishment and a violation of due process not *per se*, but because of the way it was enforced.<sup>115</sup> Not only were those sentenced to death almost always poor and unable to hire a good lawyer, but the sentence was also disproportionately executed against racial minorities.<sup>116</sup> The determination of who would receive a death sentence and who would then be executed had become entirely arbitrary.<sup>117</sup> In the same year, the Supreme Court of California ruled that the death penalty was cruel and unusual punishment under the California Constitution *as such*.<sup>118</sup>

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corruption in that state. *Id.* at 3. In exchange for a guarantee of a 20-year sentence he agreed to testify against his two co-defendants. *Id.* at 3-4. They were convicted and Adamson was given the agreed-upon sentence. *Id.* at 4. After the co-defendants’ convictions were overturned on appeal, Adamson refused to again testify without a guarantee of further reducing his sentence. *Id.* The prosecutor, claiming a violation of the agreement, re-charged Adamson with capital murder and dismissed the case against the co-defendants. *Id.* at 5. He was convicted and sentenced to death and the Supreme Court upheld his sentence. *Id.* at 7.

109. See Mills & Armstrong, *supra* note 104.

110. Illinois v. Perkins, 496 U.S. 292, 298 (1990).

111. United States v. Henry, 447 U.S. 264, 273 (1980); Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

112. For Germany see, e.g., BGHSt 34, 362, at 363-364; BGH, 18 StV, 10/98, at 527, 527-530.

113. Mills & Armstrong, *supra* note 46, at 1, 8-9.

114. Support for the death penalty was around 42% in 1966, rose to 66% by 1976, and now is somewhere between 70% and 80%. Tony Mauro & Mark Potok, *Death Penalty Becoming ‘Real’ Four Could Be Executed This Week*, USA TODAY, Dec. 7, 1994, at 3A.

115. Furman v. Georgia, 408 U.S. 238 (1972).

116. *Id.*

117. *Id.* at 250.

118. People v. Anderson, 493 P.2d 880, 895 (Cal. 1972).

Politicians in the death lobby did not wait. Legislators in over thirty-five states drafted new death penalty laws to remove discretion and guide the sentencing decisions of juries.<sup>119</sup> In 1976, the Supreme Court upheld several of these laws and the moratorium on executions was over.<sup>120</sup> Gary Gilmore, who refused to appeal and desired to be executed, was killed by firing squad in Utah in 1977, and the killing began.<sup>121</sup> California amended its Constitution by referendum in 1972 to provide that the death penalty was not cruel and unusual punishment<sup>122</sup> and now thirty-eight states and the federal system impose capital punishment for a number of aggravated murders.<sup>123</sup>

Since 1977 over 600 persons have been executed in thirty states.<sup>124</sup> The leader, by far, is Texas, followed closely by other Southern states and Missouri.<sup>125</sup> Independent investigations by journalists, lawyers, and religious groups have revealed that at least eighty-seven innocent persons have been sentenced to death.<sup>126</sup> In all of these cases, the state has recognized the actual innocence of the person, often by virtue of confession of the actual culprit<sup>127</sup> or DNA evidence.<sup>128</sup> It is not known how many innocent persons have been executed, sit in custody, or are serving prison sentences.<sup>129</sup> One bright spot on

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119. Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, 146 U. PA. L. REV. 795, 800 (1998).

120. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

121. See NORMAN MAILER, *THE EXECUTIONER'S SONG* 986-88 (1977).

122. CAL. CONST. art. I, § 27.

123. The following States have no death penalty: North Dakota, Minnesota, Iowa, Wisconsin, Michigan, West Virginia, Maine, Vermont, Rhode Island, Massachusetts, Hawaii, and Alaska. Steve Mills & Ken Armstrong, *Yet Another Death Row Inmate Cleared*, CHI. TRIB., May 18, 1999, at 1, 16.

124. Dirk Johnson, *Illinois, Citing Verdict Errors, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

125. As of December 1999, there had been 445 executions in the Southern States, with 197 in Texas, 73 in Virginia, and 44 in Florida. Missouri had executed 41 persons. In contrast, only 16 persons were executed since 1977 in the Northeast U.S. Paul Duggan, *To Kill or Not to Kill*, WASH. POST, Dec. 20-27, 1999, at 31, 33.

126. Johnson, *supra* note 124; Kifner, *supra* note 6.

127. Michael Higgins, *Tough Luck for the Innocent Man*, ABA JOURNAL 46, 48-9, March 1999.

128. DNA analysis has exonerated 65 persons in the U.S. and in 18 of them prosecutors used hair analysis, a notoriously unreliable method, to help convince the jury. Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois: Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, at 1, 8.

129. A study in the mid-1980s found that since 1900, 350 innocent persons had been convicted of potentially capital crimes. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 22-24 (1987). In 309 of these cases, the state had actually recognized the convicted person's innocence. *Id.* One hundred and thirty-nine were sentenced to death and, of them, 23 were actually executed. *Id.* at 35-36, 71. As of

the horizon has been the actions of Illinois Governor George Ryan, a Republican and a supporter of the death penalty. Because twelve of the eighty-seven erroneous verdicts occurred in his state, he has recently ordered a moratorium on executions until a commission completes a study on the reasons for such egregious miscarriages of justice.<sup>130</sup>

The U.S. Supreme Court and politicians have not stopped at introducing the death penalty. There is a movement to expand the punishment to more crimes. For instance, President Clinton signed a bill expanding the death penalty to fifty new offenses.<sup>131</sup> State and federal politicians run on platforms to strengthen the death penalty and to limit appellate rights of persons sentenced to death.<sup>132</sup> The Supreme Court has also issued opinions that, in many ways, lessen the procedural safeguards in capital cases as compared to non-capital cases, strange as that may seem.

For instance, in choosing a jury, the prosecutor may exclude as “biased” all jurors who could not return a death penalty.<sup>133</sup> Assuming that between 70% and 80% of Americans support the death penalty,<sup>134</sup> that means that between 20% to 30% of the most liberal or compassionate citizens are prevented from sitting in capital cases. This arguably leads to a jury that is more likely to reach a guilt-finding.<sup>135</sup>

Because prosecutors routinely excluded all prospective black jurors in cases where the defendant was black, the Supreme Court ruled that prosecutors may not exclude all members of a minority group by using peremptory

1992 the number had risen to 416 errors and 29 executions. Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125 (Autumn 1998).

130. Governor Ryan called it a “shameful record of convicting innocent people and putting them on death row.” Johnson, *supra* note 124. “I cannot support a system, which, in its administration, has proven so fraught with error and has come so close to the ultimate nightmare, the state’s taking of innocent life.” *Id.* He continued: “Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate.” One hundred fifty persons are currently on death row in Illinois. *Id.*

The State of New Hampshire voted in May 2000 to abolish the death penalty, but the bill was vetoed by Democratic Governor Jeanne Shaheen. Dirk Johnson, *No Execution in Illinois Until System is Repaired*, N.Y. TIMES, May 21, 2000, <[www.nytimes.com](http://www.nytimes.com)>.

131. H.R. 3355, 103d Cong., 2d Sess. (1994) (cited in Abner J. Mikva, *Fifty-Eighth Cleveland-Marshall Fund Lecture: “The Treadmill of Criminal Justice Reform,”* 43 CLEV. ST. L. REV. 5, 9 (1995)).

132. Bright & Keenan, *supra* note 12, at 770-76.

133. *Witherspoon v. Illinois*, 391 U.S. 510, 515 (1968); *Lockhart v. McCree*, 476 U.S. 162, 174 (1986).

134. While approximately 77% of Americans favor death the penalty, this figure drops to 44% if a person could be sentenced to life imprisonment without possibility of parole. *The Death Penalty: One in Seven Wasn’t Guilty*, ECONOMIST, Nov. 11, 1998, at 29.

135. Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and A Constitutional Analysis*, 81 MICH. L. REV. 1, 40 (1982).



challenges.<sup>136</sup> But the Court has now placed the same restriction on the defense.<sup>137</sup> This has not eliminated discriminatory use of peremptory challenges and in many death penalty cases after *Batson v. Kentucky*, the prosecutor has been able to justify striking all prospective black jurors on “non-racial” grounds.<sup>138</sup>

The Supreme Court has also ruled that victims may present evidence about the impact of a murder on their lives to arouse the passions of the jury against the defendant and lead it to impose a death sentence.<sup>139</sup> Despite the fact that the death sentence is disproportionately sought and imposed against murderers (both black and white) who kill white persons, the Supreme Court has claimed this does not constitute unequal enforcement of the law.<sup>140</sup>

Though writs of *habeas corpus* proved an effective vehicle to challenge convictions and overturn unjust convictions, legislation<sup>141</sup> and decisions of the Supreme Court have sought to limit the post-conviction rights of capital defendants, especially through preventing repeated writs of *habeas corpus* to challenge final judgments.<sup>142</sup>

#### VII. DRACONIAN SENTENCES AND THE COERCION OF GUILTY PLEAS

Besides the death penalty, many United States jurisdictions provide for life imprisonments for drug offenses and the repeated commission of non-violent property crimes.<sup>143</sup> “Three strikes” laws,<sup>144</sup> draconian mandatory minimum sentences for drugs,<sup>145</sup> and other crimes, along with oppressive “sentencing guidelines,” effectively prevent trial judges from exercising humane discretion

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136. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

137. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

138. This has even included cases where all 26 peremptory challenges were directed against black jurors. Bright, *supra* note 19, at 447-49.

139. *Payne v. Tennessee*, 501 U.S. 808, 821 (1991).

140. *McCleskey v. Kemp*, 481 U.S. 279, 318-19 (1987).

141. 28 U.S.C. § 2244(b)(1) (1994).

142. *McCleskey v. Zant*, 499 U.S. 467, 496 (1991).

143. See *U.S. v. Farmer*, 73 F.3d 836 (8th Cir. 1996) (holding that life imprisonment is not cruel and unusual punishment under “three strikes” law); *Henderson v. State*, 910 S.W.2d 656, 657, 660-61 (Ark. 1995) (holding that life imprisonment for first offense of sale of three rocks of cocaine is not cruel and unusual punishment).

144. Fox Butterfield, *Tough Law on Sentences is Criticized*, N.Y. TIMES, March, 8, 1996, at A14.

145. U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 33-34 (1991).

in meting out sentences.<sup>146</sup> This has produced one of the largest prison populations in the world,<sup>147</sup> despite the recent drop in the crime rate.<sup>148</sup>

The level of punishment is a symptom of a culture that throws away lawbreakers in much the manner it throws away razors, cameras, and soda pop bottles. But it is also a huge bargaining chip in the hands of prosecutors to get an accused to negotiate a guilty plea and avoid a trial. A jury trial is a time-consuming, costly procedure. Furthermore, the outcome, despite the strength of the evidence, is always in some doubt. Much has been written about jury nullification in cases where the elements of a crime were undoubtedly proven.<sup>149</sup> Such results are often the product of sympathy for the defendant, antipathy towards the police, and disagreement with the law.<sup>150</sup>

In plea negotiations, the threat of going to trial is the best bargaining chip of the defense. Conversely, the threat of draconian punishments is the prosecution's best bargaining chip. It is, moreover, no secret that judges punish more severely following a jury trial than if the defendant had entered a

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146. See generally Albert A. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

147. America had a prison population of 1.8 million in 1998. The incarceration rate rose to 668 inmates per 100,000 residents in 1998 from 313 per 100,000 in 1985. In 1972, the inmate population was only 330,000. According to the 1998 Justice Department report, there were 1,277,866 inmates in state and federal prisons and 592,462 people in jails. Louisiana leads state incarceration rates with 709 inmates per 100,000 residents, and is followed by Texas, Oklahoma, Mississippi, and South Carolina. Minnesota has lowest incarceration rate at 117 per 100,000 residents. Blacks made up 41.2% of inmates in 1998, whereas 41.3% were white. The report also found that blacks are six times more likely to be held in jail. Fox Butterfield, *Number of Inmates Reaches Record 1.8 Million*, N.Y. TIMES, March 15, 1999, at A12.

148. Crime decreased by seven percent in 1998. New York City only had 633 homicides in 1998. This number was down from 770 in 1997. Fox Butterfield, *Crime Fell 7 Percent in '98 Continuing a 7-Year Trend*, N.Y. TIMES, May 17, 1999, at A12. New York had as many as 2,245 murders in 1990, 1,946 in 1993, 1,561 in 1994, and 1,183 in 1995. Clifford Krauss, *Reported Crimes Continue to Show Decline*, N.Y. TIMES, Oct. 2, 1996, at B3. In 1998, the nation's murder rate was at its lowest in 30 years at 18,209, which is seven percent lower than in 1996 and 26% lower than the 1993 figure. The rate of 6.8 murders per 100,000 residents is the lowest since 1967. The violent crime rate was down four percent to its lowest level since 1987. *Crime Drops in '97; Murders Are at 30-Year Low*, N.Y. TIMES, Nov. 23, 1998, at A16.

149. Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 168-77 (1972).

150. See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1171-96 (1997) (discussing nullification in four types of situations: (1) uncorrected rule violations, (2) norm violations, (3) biased or unjust law application, and (4) upholding of illegal and immoral community norms).

guilty plea.<sup>151</sup> The result is that innocent people sometimes enter guilty pleas in order to avoid the possibility of a more severe punishment.<sup>152</sup>

When a person elects to go to trial and risk a harsher punishment, the jury, in non-capital cases, is usually not told about the parameters of punishment.<sup>153</sup> One television program featured an interview with a juror who had voted to convict an eighteen-year old of aiding and abetting a narcotics deal.<sup>154</sup> The defendant had no criminal record.<sup>155</sup> When asked what he thought the defendant received as a sentence, the juror replied, "It was a serious case, probably five years."<sup>156</sup> In reality, the young man was sentenced to life imprisonment.<sup>157</sup> This type of system functions only when the jury does not know the severity of the punishments.<sup>158</sup> This is because in all jurisdictions where jury trial has been introduced, knowledge of the punishment traditionally led to "sanction nullification" when the populace thought sentences were too severe.<sup>159</sup> Today, juries have begun to ask whether cases involve "three strikes." Judges usually tell them that issue is none of their concern.<sup>160</sup>

Legislators have also begun to redefine crimes so that elements of fact that can lead to substantially increased sentences have been redefined as "sentencing issues." These issues are decided by the judge based on a "preponderance of the evidence" standard, rather than by the jury based on proof "beyond a reasonable doubt."<sup>161</sup> This approach has been accepted with regard to both, the visible possession of a firearm<sup>162</sup> and prior convictions.<sup>163</sup>

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151. For a discussion of the reasons for this, see LAFAVE & ISRAEL, *supra* note 39, at 900-01.

152. A study conducted in the mid-1980s found that there were at least 16 instances where an innocent person pleaded guilty to murder. Bedau & Radelet, *supra* note 129, at 21. See also John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

153. See FRONTLINE, "Snitch" available at <<http://www.pbs.org/wgbh/pages/frontline/shows/snitch/>>.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. See *Shannon v. United States*, 512 U.S. 573, 579-588 (1994) (explaining that the jury's function is to find the facts and decide whether the defendant is guilty of the crime charged, while the judge imposes the sentence after the jury has arrived at a guilty verdict). This is the rule in most criminal cases, with the exception of capital cases.

159. For English history, see Thomas A. Green, *The English Criminal Trial and the Law-Finding Tradition on the Eve of the French Revolution in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900* 41, 49-52 (Antonio Padoa Schioppa ed. 1987).

160. *People v. Nichols*, 62 Cal. Rptr. 2d 433, 434 (Cal. Ct. App. 1997); *State v. Taylor*, 943 S.W.2d 675, 680 (Mo. App. 1997); *State v. Stevens*, 949 S.W.2d 257, 257-58 (Mo. App. 1997). Some judges have gone against the prevailing law and informed the jury of the sentencing parameters. See *United States v. Datcher*, 830 F. Supp. 411, 417 (M.D. Tenn. 1993).

161. See LAFAVE & ISRAEL, *supra* note 39, at 1121.

162. *McMillan v. United States*, 477 U.S. 79, 91-93 (1986).

However, a recent decision by the United States Supreme Court may have partially put a stop to this practice.<sup>164</sup>

#### VIII. INEFFECTIVE ASSISTANCE OF COUNSEL AND PUBLIC DEFENDERS

Theoretically, the assistance of counsel is well-protected by the Sixth Amendment. According to the Supreme Court's interpretation of the Sixth Amendment, criminal defendants have a right to appointed counsel if they are subject to imprisonment and are indigent.<sup>165</sup>

Several different systems exist to supply counsel for indigent defendants. Public Defender Offices exist in many states and counties to represent indigent criminal defendants. Several models exist. In California, for instance, it is up to the forty-eight counties to determine the type of appointed counsel program they wish to implement.<sup>166</sup> In larger metropolitan counties, the county itself runs a large law office, which is entrusted with the defense of the indigent.<sup>167</sup> Typically, the Chief Public Defender is a civil servant hired by the governing body of the county.<sup>168</sup> In San Francisco City and County, however, the public defender is an elected official.<sup>169</sup> In Alameda County, California, where I worked as a Public Defender for eleven and a half years, branch offices of the public defender exist in all of the municipal courts, and in the Superior Court, where felonies are tried. Representation is handled with a combination of bulk assignments of cases at the preliminary stages. One or two attorneys will handle all arraignments in misdemeanor and felony cases in the municipal court, as well as the plea negotiations and pre-trial motion settings. But an individual lawyer will be assigned the case if it proceeds to trial. In the felony court, cases will be assigned vertically and will be handled by an individual attorney from arraignment through to trial or plea. An exception is made for murder cases, and especially capital cases. In these cases, the lawyer is appointed vertically immediately after arrest, to handle the case through all of its stages.<sup>170</sup> A Public Defender office can represent a large number of

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163. *Almendariz-Torres v. United States*, 523 U.S. 224, 243-47 (1998).

164. *Jones v. United States*, 119 S. Ct. 1215, 1226-28 (1999).

165. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

166. Robert Sangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995).

167. For instance, Los Angeles County, where the first Public Defender Office in the nation was opened in 1914 and Alameda County, which opened an office in 1927. Anthony Platt & Randi Pollock, *Channeling Lawyers: The Careers of Public Defenders*, 9 ISSUES IN CRIMINOLOGY 1, 3-5 (1974).

168. *See, e.g., id.* at 5-6.

169. Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199, 205 (1999).

170. The Cook County Public Defender in Chicago has a horizontal system divided into various stages: interview, first appearance, bail and custody hearing, trial and appeal. Kim

defendants much more economically than can individual lawyers, if appointed to represent all defendants in a vertical manner. They can also pool their resources through such practices as the use of common investigators.<sup>171</sup>

In some counties in California, the county government has a system of "private" public defenders. The county asks for the best bid of private lawyers who will assume all of the defense work for the indigent. This system has been implemented in San Diego County.<sup>172</sup> In smaller rural counties, however, the court will appoint lawyers from a list of private lawyers who have expressed their willingness to take criminal appointments. Requirements for such court-appointment regimes vary. In some areas, there are strict rules as to how much experience a lawyer must have to represent a particular gravity of offense. In others, courts appoint lawyers eminently unqualified to try criminal cases. Even civil or tax lawyers have been appointed to try capital cases, despite the fact that they have never tried a criminal case before.<sup>173</sup> On many occasions, the appointment of incompetent or ethically compromised lawyers has arguably led to the imposition of unjust death sentences.<sup>174</sup>

Missouri's approach to the representation of indigent defendants contrasts with that of California. The Missouri Public Defender is a statewide operation, which undertakes the representation of all indigent defendants. Branches of the Public Defender are located in each county, region, or metropolitan area.

The quality of defense counsel is more important in an adversarial system like that of the United States than in a neo-inquisitorial system where the judge has a duty to ascertain the truth. In a neo-inquisitorial system, the judge is responsible for ensuring the case has been fairly and thoroughly investigated and that all of the exculpatory and inculpatory evidence has been presented.<sup>175</sup> Judges in the United States play no such role. Rather, they act as passive arbiters to ensure that the rules of the game are not breached. It is up to the parties to investigate their respective cases. Furthermore, the prosecution always has an advantage because it can use the state and local police (or FBI or

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Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2425 (1996).

171. An exception to the rule of horizontal representation exists in the Public Defender Service of Washington, D.C., where there has been an attempt to limit the caseload of attorneys and to offer vertical representation such as would be provided at a typical law office. *Id.* at 2427-28.

172. In 1993, one Georgia county cut the cost of its indigent-defense budget by awarding the contract to a lawyer who, at \$25,000 a year, bid almost \$20,000 less than the other two bidders. He tried only one felony case in front of a jury while pleading 213 other cases. *The Criminal Law: Too Poor To Be Defended*, THE ECONOMIST, April 11, 1998 at 22.

173. Armstrong & Mills, *supra* note 128, at 8-9.

174. *Id.* For an incisive criticism, see Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783 (1997).

175. § 310 CPP (France); § 244(II) StPO (Germany). PRADEL, *supra* note 103, at 693.

other federal police agencies), their task forces, laboratories, and experts to investigate a case. Many death sentences have been challenged, and some overturned, because defense counsel did not seriously investigate an important excuse or justification.<sup>176</sup> In addition, several challenges have arisen due to defense counsel's failure to present mitigating evidence that could have saved a defendant's life.<sup>177</sup>

Defense investigation is doubly important because the prosecution is often not constitutionally or statutorily bound to disclose its case. Although the Supreme Court has ruled that the prosecution must divulge exculpatory evidence or evidence that could serve to mitigate a sentence,<sup>178</sup> the prosecution still has no duty to look for exculpatory evidence.<sup>179</sup> Furthermore, the Supreme Court has said that failure to divulge exculpatory or mitigating evidence only constitutes a violation of due process if the reviewing court decides that the disclosure and admission of such evidence would have yielded a different verdict.<sup>180</sup> Thus, the appellate court must weigh, with hindsight, the effect the evidence would have had on the jury. The upshot is that the prosecution is forced to make a preliminary decision as to whether a reviewing court will find that the exculpatory evidence would have tilted the scales in the defendant's favor. Such a process invites the prosecutor to take a gamble.

The evidence often concealed by prosecutors consists of deals made with informants or other prosecution witnesses to gather evidence.<sup>181</sup> These deals may consist of the dismissal of pending criminal cases, refusing to charge cases, the offer of attractive plea-bargains, admission into witness protection programs, or even monetary payments, often on a piecework basis.<sup>182</sup> The concealed information might also be the mere evidence that the witness is a

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176. Cf. *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967) (insanity defense); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991) (others with motive to commit crime).

177. See generally *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides the standard for addressing a claim of "ineffectiveness of counsel." *Id.* at 683. The Court determined that the proper standard for attorney performance is that of "reasonably effective assistance." *Id.* at 687. In *Strickland*, the defendant alleged that his attorney had failed to investigate and present mitigating evidence. *Id.* at 675. Despite the fact that the counsel's performance was woefully inadequate, the Supreme Court determined that a case will not be reversed if the error had no effect on the judgment. *Id.* at 691. The Court therefore found that the defendant had suffered insufficient prejudice to warrant setting aside his death sentence. *Id.* at 691. For cases applying *Strickland* and setting aside death sentences due to ineffective assistance of counsel, see *Glenn v. Tate*, 71 F.3d 1204, 1208-11 (6th Cir. 1995) and *Smith v. Stewart*, 140 F.3d 1263, 1274 (9th Cir. 1998). But see the recent decision of *Williams v. Taylor*, 120 S.Ct. 1495 (2000).

178. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

179. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868-74 (1982).

180. *United States v. Bagley*, 473 U.S. 667 (1985).

181. In *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995), for instance, police let Chicago gang members have sex with female visitors and use drugs in the U.S. Attorney's Office. In addition, the prosecution did not disclose perjured testimony. *Id.* at 243.

182. See *United States v. Arnold*, 117 F.3d 1308, 1398-1417 (11th Cir. 1997).

government informant.<sup>183</sup> Because informant testimony is so dangerous, and because courts are willing to find that the prosecution's errors are harmless, there is a great incentive for prosecutors to bolster witness credibility. The prosecution does this by withholding information or not revealing the perjury of their witnesses when they falsely answer questions by the defense.<sup>184</sup>

The quality of the defense provided by Public Defender Offices and by appointed counsel varies, as does the quality of privately retained counsel. One factor that affects the quality of the service provided is the salary the attorney is paid. In Alameda County, California, for example, the public defenders finally won parity in salary with the county District Attorney's Office. Such parity does not exist in St. Louis. Even in offices with low pay scales, however, many young lawyers become Public Defenders because of an idealistic desire to defend the poor, especially in view of how unfair the system functions in practice. But even the most idealistic lawyers have difficulty providing a quality defense due to the heavy caseload they must shoulder.

In some states, most notably in the South, public defender offices, if they exist, are woefully understaffed, underpaid, and overworked.<sup>185</sup> Where private counsel come in, they are often friends of the judge or prosecutor and only provide a lukewarm or lackluster defense so as to "keep the system working."<sup>186</sup> The hourly wage of court-appointed lawyers is often ridiculously

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183. *People v. Wright*, 658 N.E.2d 1009 (N.Y. 1995).

184. Since 1963, at least 381 homicide convictions nationwide have been overturned because prosecutors concealed evidence of innocence or presented evidence they knew to be false. Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1, 1999, at 74.

185. Defenders often must work within the constraints of limited experience and resources in counties with few murders and small budgets. One example of such a case arose in Montgomery County, Illinois. David Grigsby, only two years out of law school, was appointed to represent Tuhra Lear. Lear was charged with the 1988 murder of a gas station manager. Grigsby had never tried a murder case. As the county's public defender he had to juggle 100 other cases. He had no investigator and the court refused his request for expert sentencing help. Similarly, Matthew A. Maloney, the part-time public defender for Bureau County, Illinois, was appointed to represent Jeffrey Rissley in connection with the 1991 kidnapping and murder of a six-year old girl. When refused an investigator, he quit. The court then appointed John Hedrich, a civil lawyer who specialized in probate and real estate. Rissley pleaded guilty and was sentenced to death. Armstrong & Mills, *supra* note 128, at 1, 8-9. See also *The Criminal Law, supra* note 172, at 21 (stating that each public defender in Louisville, Kentucky must handle 750 cases per year).

186. Septuagenarian Texas lawyer Joe Frank Cannon, is well-liked by elected judges because he tries death penalty cases very fast, virtually without any preparation. Eight of his clients have been sentenced to death, one has been executed, and another has been murdered in prison. In one case he slept through crucial portions of the trial and the death sentence was nevertheless upheld. Paul M. Barrett, *On the Defense: Lawyer's Fast Work On Death Cases Raises Doubts About System*, WALL ST. J., Sept. 9, 1994, at A1, A4. See also Bruce Shapiro, *Sleeping Lawyer Syndrome*, THE NATION, April 7, 1997 at 27.

low.<sup>187</sup> It is no surprise that there has virtually never been a wealthy person sentenced to death in the United States.<sup>188</sup>

On the other hand, some public defender offices have specialized teams to try murder cases or even death-penalty cases, such as in Missouri. Special offices have also been established in some states to provide post-conviction support for those who are sentenced to death. Such offices often depend on the whim of politics. The California Appellate Project counseled California lawyers in the handling of capital appeals. This program, like several others throughout the country lost much of its funding when federal aid to capital defense offices was slashed.<sup>189</sup> Congress then passed the Anti-Terrorism and Effective Death Penalty Bill of 1996.<sup>190</sup> This bill was signed by President Clinton, and was designed to speed up executions. Pursuant to this bill, states had to show they were providing well-qualified appellate defense.<sup>191</sup> Thus, the Supreme Court of California recently financed the "Habeas Corpus Center" to more effectively handle collateral attacks on death judgments.<sup>192</sup> This will enable California to opt in under the Anti-Terrorism and Effective Death Penalty Act, and, therefore, speed up executions.

#### IX. THE UNITED STATES AS HUMAN RIGHTS VIOLATOR

It is no surprise that Amnesty International has singled out the United States, of all prosperous industrialized democracies, as a massive violator of human rights the area of the administration of criminal justice. The respected human rights organization declared, "Human rights violations in the United States of America are persistent, wide-spread and appear to disproportionately

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187. Private lawyers in Virginia earn a maximum fee of \$265 for felony cases that carry a sentence of up to 20 years and \$575 if the potential penalty is more than 20 years. In contrast, Alabama pays defense lawyers \$20 per hour, with a \$1,000 maximum to prepare for a death-penalty case. Mississippi's maximum pay is \$1,000 above overhead expenses for work in the courtroom during a death-penalty case. *The Criminal Law*, *supra* note 172, at 21.

188. *See generally* Bright, *supra* note 19, at 433.

189. Lis Wiehl, *A Program for Death-Row Appeals is Facing Elimination*, N.Y. TIMES, Aug. 11, 1995, at B16.

190. Anti-Terrorism and Effective Death Penalty Act of 1996, PUB. L. NO. 104-132, 110 STAT. 1214.

191. Currently, the Missouri Capital Appeals Office cannot afford to pay private attorneys more than \$5,000 to \$10,000 to represent a prisoner. Missouri wants to opt in to the federal Anti-terrorism and Effective Death Penalty Act. In the opinion of Attorney General Jay Nixon, this might enable Missouri to shorten the time on Death Row from ten to six years. Tim Bryant, *Officials Try to Shorten Time Between Sentence, Execution*, ST. LOUIS POST-DISPATCH, April 30, 1997, at 3A.

192. Abraham McLaughlin, *98 Executions in '99 Reignite a Capital Debate: Moratorium Talk Grows on Use of the Death Penalty*, CHRISTIAN SCI. MONITOR, Dec. 27, 1999, at 1.



affect people of racial or ethnic minority backgrounds.”<sup>193</sup> German Foreign Minister Joschka Fischer recently announced that the European Union would submit an anti-death-penalty resolution to the United Nations Human Rights Commission condemning unnamed countries for “the execution of minors, of the mentally ill, enforcement before completion of ongoing procedures, and extradition to countries where the death penalty is in force.”<sup>194</sup> Clearly, the United States was the main target of this resolution. This is evidenced first by the fact that the Supreme Court has interpreted the Eighth Amendment of the Constitution, proscribing cruel and unusual punishment, to allow the execution of juveniles of sixteen and seventeen years of age.<sup>195</sup> The Court has also held that it does not violate the Constitution to execute mentally retarded murderers.<sup>196</sup>

This state of affairs is a serious blemish on a country that is in a period of unequalled prosperity. The economic boom, rather than achieving more equality in the distribution of income, has done the opposite to a large extent: it has increased the quantity of those at the extremes of the income-spectrum, the rich and the poor.<sup>197</sup> Arguments about where to invest the budget surplus focus primarily on whether to use it to save Social Security, or to return it to taxpayers by lowering taxes. What is needed is a Marshall Plan for the “Other America,” the America that does not pay taxes, is unemployed or underemployed, has some of the worst schools in the world, and is a breeding ground for crime—both self-destructive (drug sales and use) and destructive of others (usually also members of these communities).

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193. *Amnesty International Blasts U.S. for its Death Penalty, Police Brutality*. ST. LOUIS POST-DISPATCH, March 23, 1999, at A6.

194. Elizabeth Olson, *Good Friends Join Enemies to Criticize U.S. on Rights*, N.Y. TIMES, Feb. 28, 1999, A1. The resolution, which was accepted by 30 countries and rejected by 11, including the United States and China, read, “The abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.” Barry James, *EU Plans a Resolution at UN Against Capital Punishment*, INT’L HERALD TRIB., Sept. 29, 1999, at 5.

195. *See generally* *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The Court noted that that statutes in 18 states expressly required that a defendant have attained the age of at least 16 at the time of the commission of a crime before a death sentence may be imposed. *Id.* at 826. The Court, nevertheless, concluded that the Eighth and Fourteenth Amendments prohibit the execution of a person under age 16 at the time of the commission of the crime. *Id.* at 838. *See also* Elizabeth Olson, *U.N. Report Criticizes U.S. for ‘Racist’ Use of Death Penalty*, N.Y. TIMES, April 7, 1998, at A17. The U.N. Report stated, “The U.S., Iran, Nigeria, Pakistan, Saudi Arabia and Yemen are the only countries where offenders under age 18 can be executed.” It continued, “Executing mentally handicapped defendants, a practice allowed in 28 of the 38 states, is a clear breach of international standards.” *Id.*

196. *Penry v. Lynaugh*, 492 U.S. 301, 302, 340 (1989) (explaining that the criminal defendant who was sentenced to death had the mental age of a 6 1/2-year-old child).

197. *Income Inequality: Issues and Policy Options*. Symposium sponsored by the Federal Reserve Bank of Kansas City (1998) at XVII.

But in the meantime, the administration of criminal justice is used to eliminate or warehouse the children of America's inequality. The prison industry is itself a booming business that adds to the hypocritical euphoria in which the country now wallows. The ruling economical and political classes forget that the criminals are all our children: born in our hospitals, raised in our families (or lack of them), and educated in our schools. When these institutions do their jobs inadequately, their miserable products are warehoused or annihilated so we don't have to think about them any more. They are internal aliens. A great country must solve these problems. They have not come close to being solved.

