

## Index

- abolitionism
  - alternatives to prison, 206–7
  - criticism of, 203–7
  - minimalism, as an alternative to, 207–8
  - police and, 4, 27–28, 214–15
  - prisons and, 211–13
  - purposes of punishment, relation to, 212–13
  - scope, 202
- Adams v. Williams*, 16
- adversarial adjudication
  - compared to inquisitorial adjudication, 153–55
  - criticisms of, 191–92, 116
  - experts, treatment of, 117, 191–92
  - plea bargaining and, 63–68, 125–27
  - Supreme Court preference for, 42–44
- algorithms. *See* risk assessment instruments
- Alito, Samuel, 29, 31, 147–49
- Allen, Francis, 157
- American Bar Association
  - clemency, 96
  - Death Penalty Moratorium Project, 12
  - defense counsel, compensation of, 92
  - defense counsel, need for, 90
  - defense counsel, qualifications, 84–86, 92
  - Florida Death Penalty Task Force, 83–84
  - mental disability and the death penalty, 100–1
- Anstead, Harry, 91
- appeals. *See also* courts; National Court of Criminal Appeals
  - breadth of jurisdiction, 198–99
  - conflicts, ability to resolve, 192–93
  - courts of, 190–91
  - en banc*, 192, 196
  - European systems, 195
  - harmless error, 194
  - oral arguments, 193
  - rate of reversal of lower courts, 193
  - state systems, 89–90, 92–93, 195–96
  - time to resolve disputes, 191–92
  - unpublished opinions, 193–94
  - use of staff attorneys, 194
  - waivers of, 128, 133, 135
- Arizona v. Gant*, 19
- Arizona v. Youngblood*, 46
- arrest. *See also* pretrial detention; search and seizure
  - alternatives to, 66, 206
  - attempt crimes, 14–18
  - pretextual, 9–10, 20
  - quotas, 54, 60–61
  - rates of, among people of color, 3–5, 79
  - searches incident to, 8–9, 18–20
  - stops, after, 53
  - technological searches, compared to, 12
  - traffic, 8–9, 19–20, 28–29
- Atkins v. Virginia*, 100, 248
- Austin, James, 80
- bail. *See* pretrial detention
- Baldus, David, 98
- Barefoot v. Estelle*, 152
- Barkett, Rosemary, 93, 95
- Barkow, Rachel, 205, 207
- Beck v. Ohio*, 18
- Bibas, Stephanos, 115, 122
- Bittner, Egon, 28
- Bivens* action, 57
- Blakely v. Washington*, 112
- Blankenship, Donald, 210
- Borchard, Edwin, 119
- Bordenkircher v. Hayes*, 125, 127, 135
- Brady* rule, 86–87, 127, 134
- Brigham City v. Stuart*, 32
- Bright, Stephen, 94, 97
- Brinkley-Rubinstein, Lauren, 162
- Broken Windows research, 4
- Buck v. Davis*, 81, 147
- Burger v. New York*, 37
- Bush, Jeb, 99

- Cady v. Dombrowski, 24–25, 33–35  
 Cahill, Michael, 126  
 CAHOOTS, 27–28  
 California v. Trombetta, 46  
 Camara v. Municipal Court, 13  
 Caniglia v. Strom  
   facts, 23  
   holding, 23–25  
 Cantero, Raoul, 91  
 capital punishment. *See* death penalty cases  
 Cardozo, Benjamin, 50  
 Chauvin, Derek, 26  
 Cheng, Edward, 197  
 City of Los Angeles v. Patel, 36  
 civil liability  
   government, 63–68  
   police, 58–63  
 clemency, 96–98  
   Colorado v. Connelly, 42  
 confessions, 39–44, 47–48, 50, 67, 119, 133, 230–33, 271  
   expert testimony about, 116  
   interrogation techniques, 41–44  
   rates of, 39  
   restorative justice, 206  
   taping, arguments in favor of, 46–47  
   voluntariness test, 39, 42–44  
 confrontation, right of  
   adversarialism, importance to, 113  
   inquisitorial adjudication, application in, 115, 133  
   right to tape interrogations, basis of, 47  
 consequential retributivism, 125–27  
 counsel. *See* defense counsel  
 courts. *See also* appeals; specialized criminal  
   courts, Supreme Court  
   caseloads, 190–91  
   conflicts between, 192–93  
   efficiency, 191–92  
   judges, number of, 191  
   quality of opinions, 193–94  
 Crawford v. Washington, 113  
 crisis intervention teams, 26–27  
 Cullen, Frances, 159, 166  
  
 dangerousness. *See also* risk assessment  
   instruments  
   ability to assess, 152–53  
   death penalty, 96, 153  
   definition, 153–55, 208–10  
   lay understanding of, 96, 102  
   mental disability and, 102  
   policing, as a basis for, 14–19, 214  
   pretrial detention, 75–76  
   sentencing, as a basis for, 147, 159–60, 163, 199  
 Darley, John, 160  
  
 Daubert v. Merrell Dow Pharmaceuticals,  
   152–153, 155  
 Davies, Thomas, 52  
 death penalty cases, 89, 92, 251, 255  
   attitudes toward, 167  
   clemency, use of, 96–98  
   dangerousness and, 147, 153–54  
   defense counsel incompetence in, 91–92  
   defense counsel remuneration in, 89–90  
   DNA, use in, 84–86  
   exonerations, number of, 83–84  
   judicial bias in, 92–95  
   judicial override of jury decisions in, 93–96  
   jury understanding of instructions in, 95–96  
   mental disability and, 100–2  
   noncapital sentences, effect on, 167–69  
   prosecutorial charging in, 88  
   prosecutorial misconduct in, 86–88  
   race of victim research, 98–99  
   retribution and, 147  
 defense counsel, 89, 92, 251  
   caseloads, 90  
   incompetence of, 90–92, 194  
   payment of, 90  
 Delaware v. Prouse, 69  
 Desmarais, Sarah, 79–80  
 Dieter, Richard, 94  
 DNA laboratories  
   cause of wrongful conviction, 84–86  
   reforms, 85–86  
 Dorf, Richard, 158  
 Dreeben, Michael, 12  
 Due Process Clause, as a basis for  
   exclusion of illegally seized evidence, 71–72  
   expert assistance, for the defense, 118  
   preventive detention, 147–49, 209  
   regulation of interrogation, 39–42  
   regulation of plea bargaining, 127–28  
   taping interrogations, 46–47  
   vagueness doctrine, 8  
 Durkheim, Emile, 212  
  
 Edwards v. Arizona, 42  
 empirical desert  
   compliance hypothesis, 161, 169–74, 180  
   consensus hypothesis, 161–69, 180  
   crime control hypothesis, 162, 174–81  
   definition, 160  
 equal protection  
   risk assessment, 147–48  
   stops, 12–13  
 European practices. *See also* inquisitorial  
   adjudication  
   conduct of trials, 114–19

- conviction review boards, 103
- discovery, 120
- plea bargaining, 132–35
- prisons, 211–12
- selection of judges, 94–95
- sentencing, 144
- specialized courts, 195
- excessive force
  - police use of, 25–26, 214
  - sanction for, 65, 70–72
- exclusionary rule
  - alternatives to, 51–52, 56–70
  - deterrent efficacy of, 8, 21, 52–55
  - impact on convictions, 50
  - impact on Fourth Amendment law, 55–56
  - noninstrumental justifications, 71–72
  - pretext searches, as deterrent of, 32–33
- experts
  - adversarial v. inquisitorial use of, 108–9, 111–12, 116–18
  - coaching of, 87, 114, 117
  - forensic, 84–86
  - judges as, 195–98
  - right to, 118
  - risk assessment, 149, 153, 155, 199, 211
- eyewitness identification
  - expert testimony, 117–18
  - lineups, 46
- Federal Rule of Evidence 706, 116–17
- Federal Speedy Trial Act, 196
- Ferguson v. City of Charleston, 37
- Fifth Amendment
  - defendant testimony and, 118–20
  - exclusion of illegally obtained evidence, 71–72
  - inquisitorialism and, 110
  - taping interrogations, basis for, 49
- First Step Act, 156, 201
- Fisher, George, 130–31
- Floyd, George, 4, 26–28
- Fondacaro, Mark, 158
- forensic laboratories, 84–86
- Fourth Amendment. *See* search and seizure
- Frampton, Thomas, xiv, 203, 207–13
- Frank, Jerome, 107–9, 114
- Frankel, Marvin E., 108
- Frase, Richard, 105
- frisks. *See also* search and seizure; stops
  - abuse, 7–10, 69
  - criteria, 6–7, 18–20, 214–15
  - hit rates, 4, 8, 21–22, 66
  - searches, compared to, 118–20
- Garner, Eric, 4
- Gershman, Bennett, 108
- Ginsburg, Ruth Bader, 26
- Glen, Kristin Booth, 188
- Goodwin, Geoffrey, 170
- Grano, Joseph, 68
- Griffin v. California, 118–20
- guilty pleas. *See also* plea bargaining
  - abolition of, 129, 133
  - adversarialism and, 122, 128
  - Alford* pleas, 128, 133
  - European approach, 133, 135
  - factual basis for, 122, 128, 133–35
  - fictional pleas, 121, 135
  - hearings, length of, 135–36
  - innocent defendants and, 121
  - minor charges, 123
  - retributivism and, 125–27
  - sentencing differential needed for, 124
  - waivers and, 127–28, 134
- Hamilton, Melissa, 77, 79
- Harlan, John, 17, 40, 44
- harmless error
  - death penalty cases, 88
  - prevalence of, 194
- Harris, David, 7–8
- Hart, Henry, 151
- Henderson v. State, 118
- Heriot, Gail, 205
- Herring v. United States, 51
- hot-tubbing, 118
- Hudson v. Michigan, 70
- Illinois v. Gates, 16
- inquisitorial adjudication
  - compared to adversarial adjudication, 110–12
  - constitutional provisions and, 112–13, 115
  - defendant testimony, 118–20
  - experts, treatment of, 116–18
  - judicial role in, 114–16
  - plea bargaining and, 132–36
- interrogation. *See* confessions
- Jackson v. Indiana, 102, 148–49
- Jardines v. Florida, 11
- Johnston, Lea, 102
- Jones v. United States, 10–13
- judges. *See also* magistrates
  - administrative penalty regime, role in, 58–60
  - attitude toward change, 198, 201
  - effect of elections on, 92–95
  - exclusionary rule, effect on, 55–56, 68–69
  - inquisitorial system, role in, 114–16, 132–36
  - interrogations, conducted by, 49
  - managerial, 137

- judges (cont.)
  - number of, 189, 191
  - overrides of jury recommendations, 93–95
  - risk, ability to assess, 79–80
  - risk assessment instruments, use of, 76–79
  - rotation of, 199
  - sentencing, role in, 145, 157–58, 199–200
  - specialized criminal court, role in, 196–97, 199–200
- juries
  - death penalty cases, 95–96
  - defendant silence, reaction to, 119–20
  - judicial overrides of, 93–95
  - mental states, ability to assess, 150
  - questioning by, 115
  - right to, 71, 112–13
  - role in hybrid inquisitorial system, 115
  - understanding of instructions, 96
  - waiver of, 123, 134–35
- Just Algorithms* (book), 76, 152
- juveniles
  - death penalty and, 100
  - jury trial right, 113
  - sentencing of, 145, 158, 174–75, 178–79
- Kagan, Robert, 108–9
- Kahan, Dan, 65
- Kansas v. Hendricks, 147, 149
- Katz v. United States, 10
- Kavanaugh, Brett, 24, 31–32
- Keenan, Patrick, 93–94, 97
- Kevorkian, Jack, 209–10
- King, Nancy, 127, 137
- Kisela v. Hughes, 26
- Knowles v. Iowa, 20
- Kramer, Larry, 63–64
- Kurzban, Robert, 161–66, 168, 181
- Kyllo v. United States, 10–11
- Lafleur v. Cooper, 121, 124, 136
- Langer, Maximo, 203
- Leo, Richard, 44
- Lippke, Richard, xv
- Lipsey, Mark, 157
- Logan, Wayne, 193
- loitering statutes, 8–9, 66
- Lowencamp, Christopher, 75
- magistrates, 193, 197
- Malloy v. Hogan, 113
- Mapp v. Ohio. *See also* exclusionary rule
  - holding, 50
  - impact, 50–54
  - “majestic conception” of exclusion, 72
- Marcus, Michael, 158
- Marcus, Paul, 40
- mass incarceration
  - causes, 144–46
  - impact on courts, 190–91
  - reducing, means of, 76, 80, 146
- McLeod, Allegra, 202, 206
- Meares, Tracey, 65
- Menell, Peter, 188–92, 200
- Menninger, Karl, 142–43, 205–7
- mental disability
  - aggravator at sentencing, as a, 102
  - bar to execution, 100–20
  - incompetency to be executed, 100–2
  - incompetency to waive appeals, 100–2
  - mitigator at sentencing, as a, 102
  - prevalence in prison, 102
  - red flag laws, 31
- Mezzanatto v. United States, 127–28
- minimalism. *see* abolitionism
- Miranda v. Arizona. *See also* confessions
  - criticism of, 41–42
  - holding, 39–40
- Model Penal Code
  - attempt provisions, 14–16
  - lay disagreement with, 159–60
  - sentencing provisions, 130, 143
- Monahan, John, 80, 157
- Monell v. Department of Social Services, 64
- Morris, Norval, 150, 160
- Movement for Black Lives, 4
- Multi-Systemic Therapy, 174–75
- Nadler, Janice, 170–74, 181
- National Court Of Criminal Appeals
  - capacity to hear claims, 197
  - conflicts, ability to resolve, 196
  - creation and composition of, 195
- National Registry Of Exonerations, 84, 87
- National Research Council
  - forensic experts, prescriptions for, 85, 116–17
  - forensic science, criticism of, 85, 116–17
- Navarette v. California, 16
- New Jersey v. T.L.O., 35
- Nichols, Tyre, 4
- Nixon, Richard, 204
- North Carolina v. Alford, 128
- O'Connor, Sandra Day, 83
- Opperman v. South Dakota, 34
- Panetti v. Quarterman, 100–1
- parole boards. *See* sentencing
- Peters v. New York, 17

- Pizzi, William, 108
- plea bargaining
- Alford* pleas, 128, 133
  - fictional pleas, 121, 134–35
  - German practice, 133
  - history, 130–32
  - inquisitorial approach to, 132–36
  - minor crimes, 123
  - retributive principles, conflict with, 124–27
  - substantial assistance discounts, 127, 132
  - trial penalty, 121, 124
  - waivers of appeal and *Brady* rights, 127–28, 132–34
- police. *See also* confessions; exclusionary rule; search and seizure
- administrative penalty, for illegal searches, 56–70
  - alternatives to, 25–29, 44–215
  - caretakers, as, 25–28
  - excessive force, 25–36, 56–57, 70, 72, 214
  - necessity of, 214
  - profiling, 17–18
- Posner, Richard, 60, 62
- post-Warren Court
- exclusionary rule, 50
  - Miranda v. Arizona*, 40–42
  - Terry v. Ohio*, 4
- pretrial detention, xi, xv, 75–78, 80–81, 99, 132, 188, 202–3, 215, 244, 248. *See also* Public Safety Assessment (PSA)
- algorithms, use of to implement, 76–82
  - bail system, impact of, 75
  - constitutionality of, 76
- preventive justice
- appeals of sentences, reduction in, 200
  - constitutionality, 147–48
  - definition, 142–43
  - deterrent effect, 151
  - limitations on, 148–49
  - parole boards, role of, 129, 136–37, 145–46, 149, 154
  - plea bargaining and, 128–32
  - procedural protections, 149
  - rationale for, 144–46
  - retribution, relation to, 149–51, 159–60, 174–79, 181
  - profiling, 17–18
- proportionality reasoning
- search and seizure, 13–20
  - Supreme Court adoption of, 13–14
- prosecutors
- charging practices, 88
  - conduct in capital cases, 86–88
  - discipline against, 87–88
  - failure to disclose exculpatory evidence, 86–87
  - plea bargaining, 121–22
  - role in inquisitorial system, 115–16
- Prude, Daniel, 26
- Public Safety Assessment (PSA)
- crime rates, effect on, 77–78
  - detention rates, effect on, 77
  - factors, 76
  - racial impact, 79–80
- race
- algorithms and, 17, 147
  - death penalty cases, 98–99
  - pretrial detention, 79–82
  - sentencing, 144, 202, 205–7, 211–12
  - street policing and, 3–5, 13, 20–21
- Radelet, Michael, 98–99
- Rakoff, Jed, 125–26
- red flag laws, 31
- Reisig, Michael, 170
- restorative justice, 148–49, 206–7, 212–13
- retributivism. *See* sentencing
- Reynolds, William, 193
- Richman, William, 193
- Risinger, Michael, 103
- risk assessment instruments, 246–48, 277, 281.
- See also* dangerousness; Public Safety Assessment (PSA)
  - fit requirements, 153–55
- PATTERN, 156
- pretrial detention and, 76–82
- racial impact, 79–80
- sentencing and, 152–57, 210–11
- static risk factors, use of, 80–82, 147
- validity requirements, 155–57
- risk management
- desert, relation to, 150
  - efficacy, 157–58
  - plea bargaining option, 122–23, 131
- Roberts, John, 12, 24, 29–30, 51
- Robinson, Paul, 160–81, 212–13
- Roper v. Simmons*, 100
- Rudovsky, David, 8
- Ryan v. Gonzalez*, 102
- Sabel, Charles, 158
- Schuck, Peter, 60–62
- search and seizure, x, 54, 62, 64, 66, 68, 71–72, 238, 242. *See also* exclusionary rule
- emergency aid exception, 30
  - inventory searches, 34–36, 70
  - pretexts, 5, 9–10, 19–20, 25, 32–36
  - search incident to arrest, 9–10, 19–20
  - special needs searches, 14, 25, 35–37
  - traffic stops, 3–4, 8–10, 19–20, 28, 69
  - vehicle exception to warrant requirement, 34
- Second Amendment, 31

- Section 1983, 57, 62, 64–65  
 sentencing. *See also* death penalty cases;  
     empirical desert; plea bargaining;  
     preventive justice  
   determinate v. indeterminate sentencing,  
     174–75, 177–79, 181  
   hearings, 123, 134  
   mandatory minima, 145–46  
   parole boards, role of, 122–23, 129–32, 146, 157,  
     199–200, 209  
   retributivism, 124–27, 143–45, 149–51, 159–61,  
     179–81, 212–13  
   right to jury and, 148  
   risk, requisite proof at, 148–49, 153–55, 208–11  
   sentencing circles, 206  
   sentencing guidelines, 191–92  
   specialized criminal courts, 197, 199–200  
   three strikes laws, 145  
   trial penalty, 121, 124  
   truth-in-sentencing, 145  
   utilitarianism, 130–32, 143, 151–57  
   wrongful punishment, 107  
 Seventh Amendment, 71  
 Shaw, Leander, 93, 95  
 Shepherd, Joanna, 151  
 Sibron v. New York, 18  
 Simon, Dan, 96, 109, 111–12  
 Simon, William, 108  
 Sixth Amendment  
   expert assistance, right to, 89, 118  
   indeterminate sentences and, 148, 208–9  
   inquisitorialism and, 112–13, 115  
   taping interrogations, as a basis for, 47  
 Skeem, Jennifer, 157  
 Sklansky, David, 107  
 Skolnick, Jerome, 54  
 Sotomayor, Sonia, 199  
 Southerland, Vincent, 81  
 specialized criminal courts  
   advantages, 196–98  
   criticisms of, 198–99  
   European models, 195  
   personnel, 199  
   preventive justice, function in, 200  
   problem-solving courts (drug courts),  
     131–32, 158, 201  
   proposed structure, 194–95  
   state court models, 195–96  
 State v. Poole, 94–95  
 Stephan v. State, 45  
 Stevenson, Megan, 78  
 stops. *See also* frisks; search and seizure  
   attempt jurisprudence, application to, 14–18  
   efficacy, 21–22  
   New York City program, 4  
   probable cause requirement, applied to, 6,  
     11–12, 14–19  
   reasonable suspicion requirement, 6–8  
   technological searches, comparison to, 5, 11–13  
 Strickland v. Washington, 91  
 Stuntz, William, 9, 65–67  
 Supreme Court  
   conflicts in circuit courts, resolution of, 188–89,  
     192–93, 196  
   counsel, right to, 91  
   damages against police, 64–65, 68, 70  
   dangerousness, 80–81, 147  
   death penalty, 82, 98–102, 147, 154  
   defendant testimony, 118–19  
   destruction of evidence, 46, 86  
   discovery, 86, 134  
   exclusionary rule, 50–51, 71–72  
   expert assistance, 118  
   expert evidence, 153  
   identification procedures, 47  
   inquisitorialism, 110, 112–13  
   interrogations, 39–44, 47–48  
   jury, right to, 71, 95–96  
   mental disability, 98–102  
   plea bargaining, 124–25, 127–28, 135  
   policing, technological, 10–13  
   policing on the street, 3–10, 14, 16–20, 24–26,  
     33, 214  
   proportionality reasoning, 5  
   race, 147  
   sentencing, 16–18  
   special needs, 14, 24–25  
 surveillance, 5, 10–13  
 Sykes, Alan, 63  
  
 Terry v. Ohio. *See also* frisks; stops  
   criticism of, 5  
   facts, 16–18  
   holding, 5  
 Thomas, Clarence, 24, 29, 34, 37–38  
 Thornton v. United States, 19  
 Tyler, Tom, 161, 169–70  
  
 utilitarianism. *See* sentencing  
 United States v. Booker, 148  
 United States v. Carpenter, 5, 11  
 United States v. Ruiz, 134  
 United States v. Wade, 47  
 Utah v. Strieff, 8  
  
 Vacca, Ryan, 188–92, 200  
 Van Kessel, Gordon, 115  
 Vollmer, August, 205

Warren Court. <i>See also</i> post-Warren Court	Wechsler, Herbert, 130
exclusionary rule, 50	Weinreb, Lloyd, 108
expansion of rights, 190–91	White, Welsh, 42–43
Miranda v. Arizona, 39, 41	Wood, Diane, 198–99
stops, 3–5	Woods, Mario, 26
Terry v. Ohio, 17	wrongful verdicts
Warren, Earl, 4, 17, 41	causes, 84–95, 106–10
Wasby, Stephen, 55	exonerations, 84, 103
Wasserstrom, Silas, 54, 69	innocence commissions, 103