



economicthinking  
Understanding and Creating Prosperity

# ***The Economics of Privacy and Criminal Procedure***

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“Resolved: Criminal procedure should  
value truth-seeking over individual  
privacy.”

## ***Values, Incentives, and Economics***

“Resolved: Criminal procedure should  
value truth-seeking over individual  
privacy.”

- What are the values involved?  
*Truth-seeking? Individual privacy?*
- Better values: *justice, freedom or  
liberty, safety & security.*
- What’s the goal of criminal  
procedures? (justice and safety)

## Notes on Privacy in Bill of Rights

[economicthinking.org/NIHD/](http://economicthinking.org/NIHD/)

- Consider the relevant constitutional provisions: the **Fourth Amendment** protects the right of the people to be free from unreasonable searches and seizures; the **Fifth Amendment** protects persons from compelled self-incrimination; the **Sixth Amendment** promises the assistance of counsel to individuals facing criminal prosecution.
- Each of these provisions is concerned with coercive state conduct against people or persons, but none identifies any particular coercer.
- No government police before 1840s, no formal state prosecutors before early 1900s.

Boston University Law Review, 2015

REGULATION OR RESISTANCE?

A COUNTER-NARRATIVE OF CONSTITUTIONAL CRIMINAL  
PROCEDURE

ALICE RISTROPH\*

## Economics is about Incentives

- ★ Economics is about incentives, information, markets, and coordination.
- ★ Economics helps us understand companies producing, trading, competing, and earning profits (or having losses).
- ★ Economic principles apply to crime and privacy...
- ★ Biblical justice: restitution rather than retribution.
- ★ Public Choice economics is the study of politics, government, and policy. Government incentives?
- ★ What incentives does government have for criminal justice procedures? Or to engage in pervasive surveillance (reducing privacy)?

# Debates over Jurisprudence

ju•ris•pru•dence |jəˈɹɪsˌprɔːdn̩s|  
noun  
the theory or philosophy of law.  
• a legal system : *American jurisprudence.*

- Theories of criminal justice law (and procedure): *jurisprudence.*
  - Role of Retribution (punishment)? **Rehabilitation?** Crime Reduction (a utilitarian goal)? **Restitution?**
  - Some combination of these?
  - Private legal system (civil and arbitration) vs. state justice systems.
- 
- Justice in: retribution? crime reduction? rehabilitation? or **restitution?**

PAGE 146

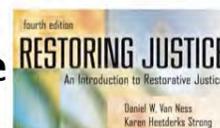
*From Liberalism, Values and LD Debate*

## The rise of state-centered justice

by Daniel W. Van Ness

Two men met at the river where each had come to fish. Each had a grievance with the other, a feud that had been simmering for weeks. Perhaps that is why, when their lines tangled, and words were exchanged. Words changed to blows. And then one stooped down, picked up a rock and clubbed the other one on the head.

The injured man did not die, but he required extensive medical care and a long recuperation. Eventually he was able to move around, supported by a cane.



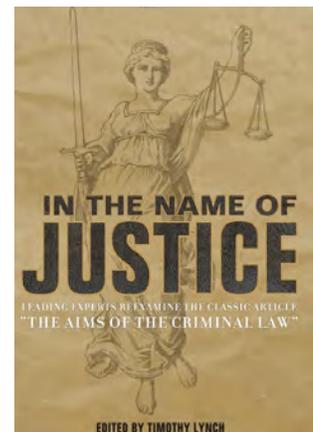
# Crime Labs and Searches

- **Criminal procedure: forensic medicine. What procedure should apply is analyzing. Should police and prosecutors run their own crime labs?**
- **Why not end the exclusionary rule and just hold police and other state agents liable for their actions. (So they can be sued for illegal searches.)**

## ***Criminal justice theory:***

### ***The Three “R’s”***

- **First, what are the goals? Justice? Justice for whom (society? the victim?). Reducing crime?**
- **Retribution, Rehabilitation, Restitution**
- **T. Lynch: “criminal law field generally divided between two positions: *utilitarians* and *retributionists*.”**



# The Federal Court System

## • Federal Courts: Criminal Justice

### Overcriminalization

Way too many imprisoned.  
Often the “wrong people”  
Unjust and expensive.



[rightoncrime.com](http://rightoncrime.com)

- *Reduce/reform pre-trial detention.*
- *Jury trials rather than plea-bargaining.*
- *End mandatory minimum sentences.*
- *Reform prisons.*
- *Too many economic and regulatory crimes.*

# The Federal Court System

## • Federal Courts: Criminal Justice

The Heritage Foundation

Heritage Action More

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LEGAL ISSUES

### Overcriminalization

See the Map of Americans' Liberties Threatened

Factsheet on Overcriminalization

The Government vs. YOU

What Criminal Law Reforms Has Congress Proposed?

Principles for Revising the Criminal Code

See the Map of Americans' Liberties Threatened

Heritage has documented dozens of overcriminalization stories, now compiled in one easy-to-use map [Read More](#).



INSTITUTE for JUSTICE

CASES OFFICE

"[T]he Institute for Justice and the rights of entrepreneurs"

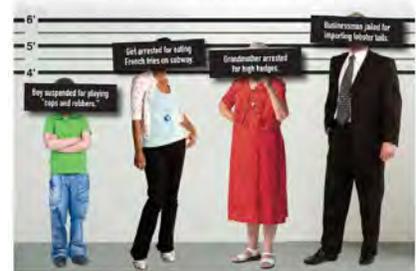
# Criminalization of Everyday Life

- Expanded federal power in all aspects of American life – including police power.
- The Constitution defines what Federal crimes?
- Did Founders intended this to be a federal crime: *Violating Honduran law by importing shrimp packaged in plastic bags rather than cardboard boxes?*

## ONE NATION UNDER ARREST

How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty

Edited by Paul Rosenzweig & Brian W. Walsh  
With an Introduction by Edwin Meese III



ONE NATION UNDER ARREST

ONE NATION UNDER ARREST

How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty

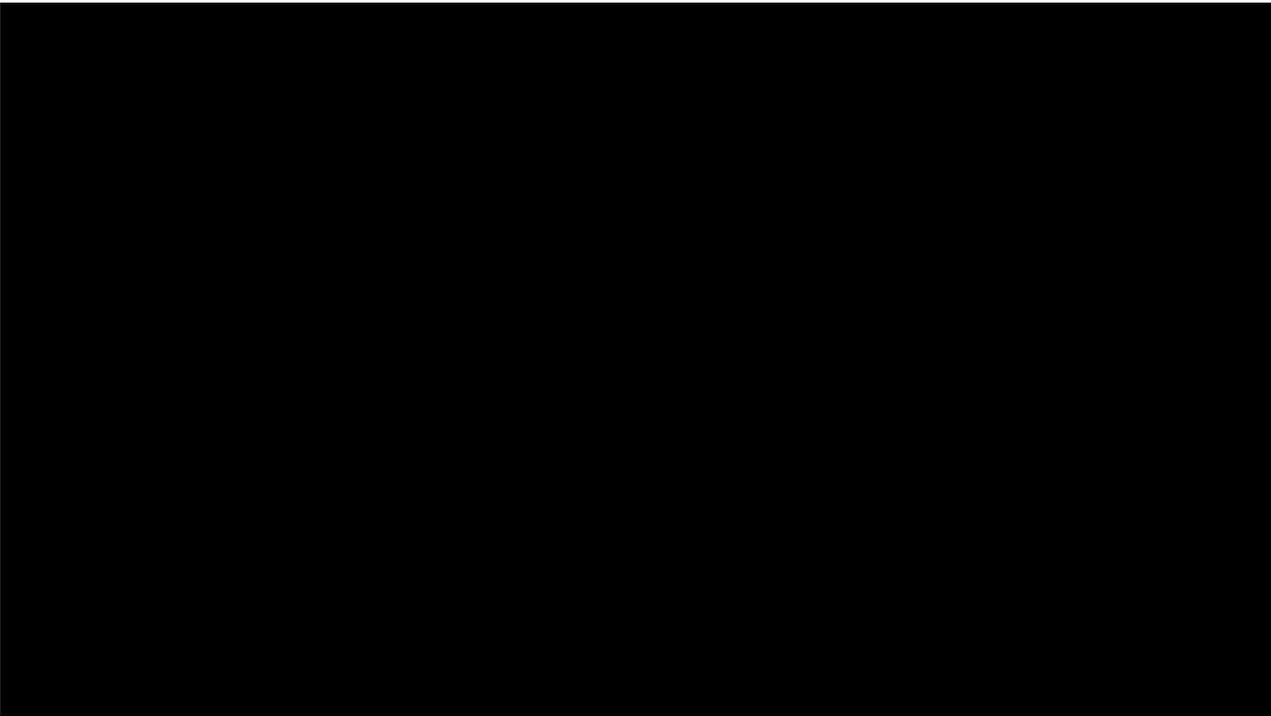
Edited by Paul Rosenzweig & Brian W. Walsh  
With an Introduction by Edwin Meese III

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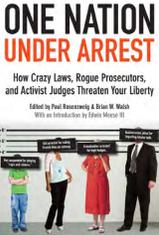
STOSSEL

The image shows a video player interface. The main video frame displays a man with white hair, wearing a dark suit, light blue shirt, and patterned tie, speaking. A large white play button is centered over the video. In the bottom left corner, a progress bar shows '0:00 / 4:27'. In the bottom right corner, the name 'STOSSEL' is visible. A small inset image in the top left corner of the video player shows the book cover from the previous image.

[http://stosselintheclassroom.org/videos/one\\_nation\\_under\\_arrest/](http://stosselintheclassroom.org/videos/one_nation_under_arrest/)



[http://stosselintheclassroom.org/videos/one\\_nation\\_under\\_arrest/](http://stosselintheclassroom.org/videos/one_nation_under_arrest/)



# Three-Minute Justice



Inside Philanthropy  
*Who's Funding What, and Why*

## Is This for Real? The Latest on Koch Giving for Criminal Justice Reform

Mike Santari

<https://www.insidephilanthropy.com/home/2017/3/21/koch-foundation-grants-criminal-justice>

### Three Minute Justice: Haste and Waste in Florida's Misdemeanor Courts



Nearly a half million people, or approximately three percent of Florida's adults, pass through the state's misdemeanor courts each year. Most are found guilty. The average court appearance lasts as little as three minutes.

[Read the report. \(PDF\)](#)

<https://www.nacdl.org/reports/threeminutejustice/>



### Dont Talk to Police - YouTube



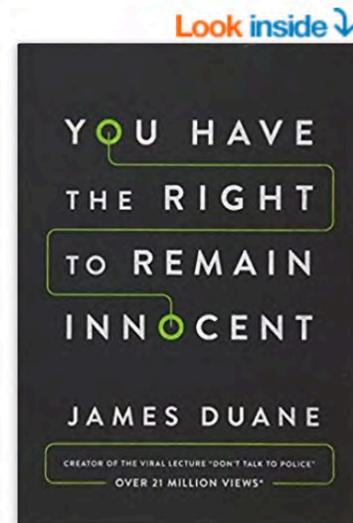
[www.youtube.com/watch?v=6wXkl4t7nuc](http://www.youtube.com/watch?v=6wXkl4t7nuc)  
Jun 21, 2008 - Uploaded by russr  
... tells you why you should **never** agree to be interviewed by the **police**. ... If anyone that I **ever** cared for was arrested, I wish that they would ...



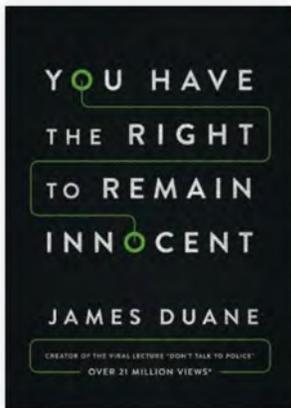
- **Video is a debate, with policeman speaking after law professor.**
- **Video is not critical of police behavior, but of prosecutors and over-criminalization**

## You Have the Right to Remain Innocent

Paperback – September 20, 2016



# You Have the Right to Remain Innocent



Author(s): James Duane

Release Date:  
September 19, 2016

Don't talk to police! What? Why not? Law professor James J. Duane tells you why; and if you do not heed his advice, you do so at your peril. Does that shock you? Well, it should, and in 120 riveting pages Professor Duane explains why with detailed examples.

What he writes is shocking especially so if you are a law and order type of person, and most of us are, at least to some extent.

<https://www.nyjournalofbooks.com/book-review/you-have-right>

## ***The Economics of Privacy and Criminal Procedure***

**“Resolved: Criminal procedure should value truth-seeking over individual privacy.”**

- Better values: *justice, freedom or liberty, safety & security.*
- Goal of criminal procedures? (justice and safety)
- ***What criminal procedure to reduce abuse of state power and over-criminalization?***

### Jury Trials: A Radical Reform for the Federal Court System?

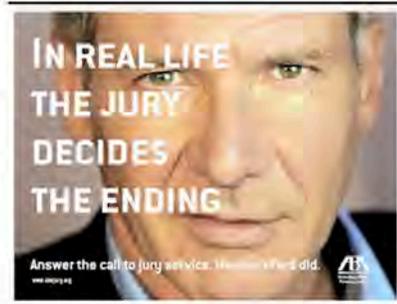
What if... what if... students ran an a radical affirmative case insisting that when charged with a crime, the accused ought to have a right to a trial by a jury of peers? Wild? Impractical? Radical?

Okay, maybe that's too much sarcasm... But it used to be that state and federal criminal court systems did require juries in criminal cases. There are very good legal, political, and historical arguments to require jury trials again in the federal court system. One website explains, in a post titled "How Plea Bargains Are Making Jury Trials Obsolete":

*In today's criminal justice system, convictions come by agreement. The tradition of being tried by one's peers, established centuries ago and affirmed by the Sixth Amendment to the U.S. Constitution has all but disappeared.*

*The plea bargain has made jury trials obsolete.*

*Ninety-seven percent of federal criminal prosecutions are resolved by plea bargain. In state courts the numbers are comparable. The plea bargain may be the grease that keeps the criminal justice system churning, but it may also be a sign of a system in need of repair.*



[http://  
economicthinking.org  
/jury-trials-radical-  
reform-for-federa/](http://economicthinking.org/jury-trials-radical-reform-for-federa/)

### Why Innocent People Plead Guilty

Jed S. Rakoff

NOVEMBER 20,  
2014 ISSUE

The criminal justice system in the United States today bears little relationship to what the Founding Fathers contemplated, what the movies and television portray, or what the average American believes.



Honoré Daumier: A Criminal Case

[www.cato.org/pubs/regulation/  
regv26n3/v26n3-7.pdf](http://www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf)

**The U.S.  
Federal  
Court  
System  
settles 97%  
of cases  
with plea  
bargains  
rather than  
jury trials.**

*Government should not retaliate against individuals who exercise their right to trial by jury.*

## The Case Against Plea Bargaining

By TIMOTHY LYNCH  
Cato Institute

**P**LEA BARGAINING HAS COME TO DOMINATE the administration of justice in America. According to one legal scholar, "Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty plea or nolo contendere plea."

Even though plea bargaining pervades the justice system, I argue that the practice should be abolished because it is unconstitutional.

impartial juries, one would think that the administration of criminal justice in America would be marked by adversarial trials — and yet, the opposite is true. Fewer than 10 percent of the criminal cases brought by the federal government each year are actually tried before juries with all of the accompanying procedural safeguards noted above. More than 90 percent of the criminal cases in America are never tried, much less proven, to juries. The overwhelming majority of individuals who are accused of crime forgo their constitutional rights and plead guilty.

The rarity of jury trials is not the result of criminals who

**THE RISE AND FALL OF ADVERSARIAL TRIALS**

# Is there a *right to privacy*?

- Is a right to privacy listed in the Bill of Rights?
- Is it among the unenumerated rights not listed?
- If so, what would it mean? How much privacy is protected? From whom?
- What is listed in the Bill of Rights, relating to privacy?

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thursday, April 30, 2015

## “Security is a most seductive thing”: A New Wrinkle in Time

*“Security is a most seductive thing,” he tells his daughter. “I’ve come to the conclusion that it’s the greatest evil there is.”*

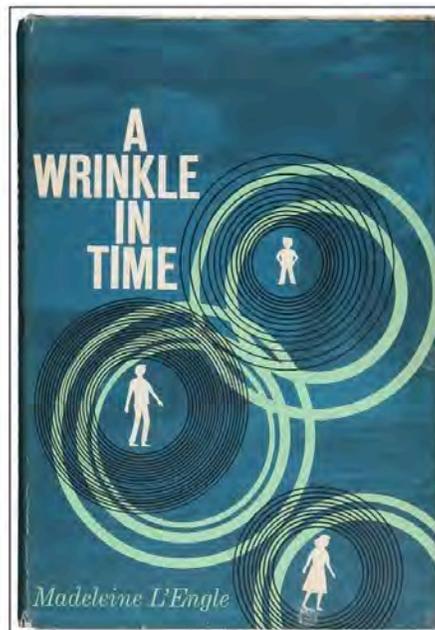
The *Wall Street Journal* article “A New Wrinkle in Time” reports:

*Madeleine L’Engle’s ‘A Wrinkle in Time’ has sold 14 million copies since its publication in 1962. Now, a never-before-seen passage cut from an early draft is shedding surprising light on the author’s political philosophy.*

The passage from an earlier draft connects to this year’s Stoa topic on federal surveillance policy (which is similar to the coming [school year’s National Speech and Debate Association topic](#)):

*Her father proceeds to lay out the political philosophy behind the book in much starker terms than are apparent in the final version.*

*He says that yes, totalitarianism can lead to this kind of evil. (The author calls out examples by name, including Hitler, Mussolini and Khrushchev.) But it can also happen in a democracy that places*



[http://  
economicthinking.org/  
just-in-time-for-nitoc-  
new-wrinkle-in/](http://economicthinking.org/just-in-time-for-nitoc-new-wrinkle-in/)

# Ways to View Privacy...

- Fear of companies gathering more and more data on everyday people: Google, Target, insurance companies.
- Fear of terrorists, so electronic surveillance to uncover terrorists plots before they happen.
- Fear of government, and tendency to

## *National Security Concerns &*

- To locate terrorists and potential terrorists.
- *But who are potential terrorists? Islamic “fundamen-talists” who see faith as higher value than the state...*
- *Tea Party Patriots? Right-wingers? Gun club members? Out-of-control homeschoolers?*
- Think incentives. What are other incentives for federal government officials, in addition to security and national defense?



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## Big Brother and Federal Electronic Surveillance Policy

(BY GREGORY REHMKE | PUBLISHED JULY 16, 2018 | UPDATED OCTOBER 21, 2018)

Stoa debate students have a high-tech resolution for the coming school year: Resolved: The United States federal government should substantially reform its electronic surveillan

And for Stoa debater wanting to include a Yes, Minister episode in their electronic surveillance

research, I suggest the "Big Brother" episode. Hacker enjoys a rare win in this episode, beating back Humphrey's objections to placing safeguards on the National Database and government surveillance of its citizens. Free viewing with Amazon Prime...

<http://economicthinking.org/big-brother-and-federal-electronic/>



**Learn Liberty** Explore the ideas  
A PROJECT OF IHS

[VIDEOS](#) [ACADEMY](#) [OPPORTUNITIES FOR YOU](#) [ABOUT US](#)

## Does the NSA Violate Your Constitutional Rights?



<http://www.learnliberty.org/videos/does-nsa-violate-your-constitutional-rights/>

## **BILL** *of* **RIGHTS**

## **Fourth Amendment**

- *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...*
- *and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

***The Bill of Rights, however, reflects the concern of James Madison and other framers for protecting specific aspects of privacy, such as...***

- *the privacy of beliefs (1st Amendment),*
- *privacy of the home against demands that it be used to house soldiers (3rd Amendment),*
- *privacy of the person and possessions as against unreasonable searches (4th Amendment), and,*
- *the 5th Amendment's privilege against self-incrimination, which provides protection for the privacy of personal information.*
- *In addition, the Ninth Amendment states that the "enumeration of certain rights" in the Bill of Rights "shall not be construed to deny or disparage other rights retained by the people."*