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### The Failure of the Criminal Procedure Revolution

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# The Failure of the Criminal Procedure Revolution<sup>1</sup>

William T. Pizzi\*

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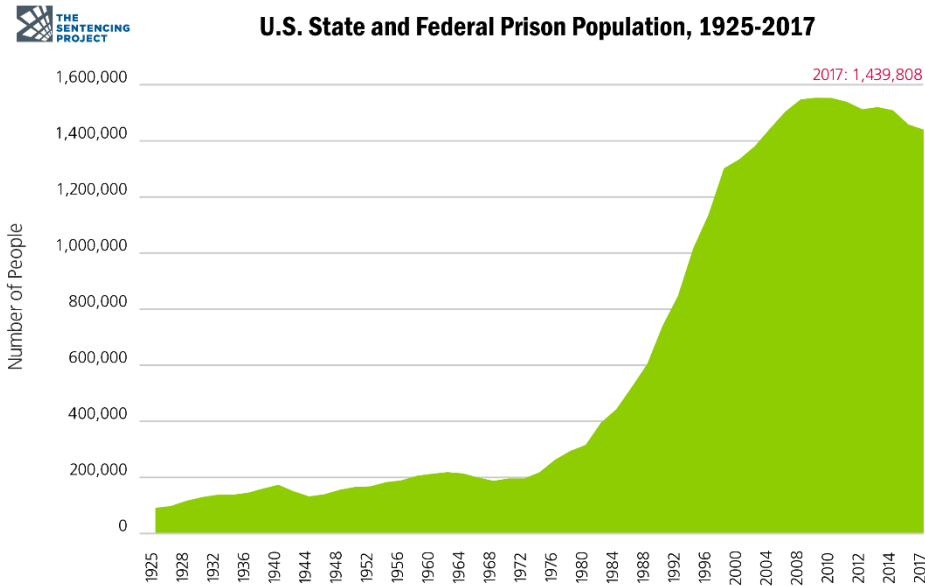
Today, fifty years after the end of the Warren Court and the start of the criminal procedure revolution, the United States criminal justice system is in crisis. Our incarceration rate over the ensuing years has risen dramatically as the following chart from the Sentencing Project<sup>2</sup> makes clear:

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1. This article is a shortened version of Chapter 2 of *The Supreme Court's Role in Mass Incarceration* (forthcoming Routledge).

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2. *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Apr. 3, 2020) (on file with *The University of the Pacific Law Review*).



The chart shows our prison population historically starting in 1925 and continuing until 2017. What is, of course, shocking is the steep increase in the U.S. prison population that begins in the mid-1970s and continues sharply upward for the next few decades until 2009 when the number levelled off and there is a slight decline in the last several years.

In 2017, U.S. prisons held 1,439,808 citizens. But this understates our incarceration problem because we have many more citizens incarcerated because the chart does not include those being held in jails in the United States. In 2019, there were an additional 612,000 citizens in our jails. Adding together those in prison and those in our jails, the total is more than two million citizens incarcerated.

It would be easier to understand the sharp and sustained rise in our incarceration rate over the last forty years if it were a common phenomenon among other western countries. But other western countries have incarceration rates that have held rather steady over the period when our rate rose sharply. The press has given quite a bit of attention to this contrast between the U.S. incarceration rate and the rates in other countries. *The New York Times*, for example, published a front-page article in 2008 on the topic complete with an interactive chart that allowed readers to click on different countries around the world and compare incarceration rates.<sup>3</sup> When a reader did so, it was clear why

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3. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), <https://www.nytimes.com/2008/04/23/us/23prison.html> (on file with *The University of the Pacific Law*

the headline of the article intoned that *Inmate Count in U.S. Dwarfs Other Nations*'.

The article noted—what is clear from the above chart—that from 1925 to 1970, the rate was stable at roughly 110 people in prison per 100,000 people. After 1970, the incarceration rate began to significantly increase.<sup>4</sup>

Similarly, in 2010, the Economist featured a cover story on the extreme U.S. incarceration rate, featuring a drawing of Lady Liberty looking balefully out from behind the bars of a cell.<sup>5</sup> The article stated that “[n]o other rich country is nearly as punitive as the Land of the Free,” and as proof of that fact, the article noted that the United States incarceration rate was five times greater than Britain’s, nine times greater than Germany’s and twelve times greater than in Japan’s.<sup>6</sup>

The typical response to the disparity in incarceration rates blame this terrible situation on one or two of several factors: “It was the war on drugs” or “It was harsh sentencing laws.” What you will never hear is: “Unfortunately, our criminal procedure revolution stemming from the Warren Court years failed.” This article asserts precisely the last point: an important factor in our escalating incarceration rate was the failure of the criminal procedure revolution.

Now let me quickly put my argument in perspective. I am not absolving our drug laws or our harsh sentencing laws of any blame in our present crisis. Nor am I saying the criminal procedure revolution “caused” our incarceration rate to rise. There were many factors in the rise. What I am saying is that for too long we have preferred to avoid a topic that is painful to many who grew up in the Warren Court era—that not everything the Court did turned out well. I include myself in this group. As a law student, then a prosecutor, and then a “baby” professor, I could see little wrong with many of the Court’s decisions. But as I evolved into an elderly comparatist who has spent many hours in courtrooms all around the world, I now have a different perspective on what the Court did.

This article will discuss one way in which we differ from other common law countries—the Court’s expansion of the right to jury trial to misdemeanors in *Baldwin v. New York*<sup>7</sup> in 1970.

But before I talk about that case and the issues involved, I want to explain why the criminal procedure revolution was always going to be very risky. Section I of this article will discuss the risks of constitutional rulemaking. Section II will discuss the importance of trials for keeping incarceration rates in

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Review).

4. *Id.*

5. *Rough Justice*, THE ECONOMIST (July 22, 2010), <https://www.economist.com/leaders/2010/07/22/rough-justice> (on file with *The University of the Pacific Law Review*).

6. *Id.*

7. 399 U.S. 66 (1970).

check. Section III will then turn to *Baldwin* and explain how the insistence that misdemeanors be tried to a jury was a serious mistake.

## I. THE RISKS OF CONSTITUTIONAL RULEMAKING

### A. *The Limits of a Constitutional Case*

When criminal cases go to the Supreme Court, the Court knows what happened to this particular defendant, the issues that were raised, and what the lower court rulings were. Litigation is meant to sort out the facts of the case and determine who did what to whom and why. But when the Court is making constitutional rulings that will apply across the country, the narrow focus of traditional litigation is a problem.

The case before the Court may be dramatic but the Court will often not know with precision (a) how often this problem comes up; (b) how serious it usually is (compared to the case up for review); and (c) whether the problem occurs only in a few states or many.

The Court will, of course, have two argumentative briefs in front of it and may have some amicus briefs from others—but they are usually written from a partisan perspective. These briefs will vary in quality and they are not written with the goal of painting a complete picture of the issue. Indeed, the lawyers writing the briefs may have no idea exactly how often the problem before the Court arises.

Obviously, there will be cases where the Court is simply deciding whether the ruling in the case below was correct, e.g., was the confession voluntary or was the officer justified in stopping the suspect. But, when the Court is making a more sweeping ruling, especially one that requires additional hearings, the limits of the case are a risk. The Court may be adding significant expense for a problem that may often not be serious.

### B. *The Court's Lack of Expertise*

When a legislative body (or an administrative agency) is considering adopting a certain rule, it can commission neutral studies of the issue or hold public hearings where experts of all stripes can give their opinions and be questioned about those opinions. It can gather the neutral expertise that individual legislators don't possess.

The Court itself also possesses very limited expertise on many of criminal procedure issues it faces. Some justices have typically been chosen from one of the federal appellate benches or they may even have been a federal trial judge. But how many have been state court judges or spent any time in misdemeanor courtrooms? How many have been public defenders or prosecutors? How many have trial experience? Or are familiar with how the private defense makes a living?

Supreme Court justices, of course, have a bevy of smart young law clerks at their disposal that can research any legal issue to find cases going back to the start of the republic. But they typically have no experience in the field.

The Court's lack of expertise is fine when it is making major moral decisions on important issues or interpreting a federal statute (which Congress can easily amend). But, when the Court is making rules about the questioning of suspects and where such questioning should take place, it lacks expertise.

Sometimes the lack of expertise, or even a certain naivete, shows itself in their opinions. In *Miranda v. Arizona*,<sup>8</sup> where the Court announced that the Fifth Amendment requires a right to counsel for arrestees prior to questioning at a police station, the opinion states; "If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness . . . . The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police . . . ."<sup>9</sup>

This image of a lawyer called to an interrogation room and then helping the arrestee to make a statement to the police is completely unrealistic. If you are a public defender and are called to the police station to assist someone arrested for murder and the arrestee says, "I want to confess. I did it." You haven't looked at any police reports because they haven't been written. You don't know the evidence, you don't know the arrestee, but according to the Court, you are going to help the arrestee make a fully accurate statement to the police? The lawyer will always say, "Don't say anything. Let me study the evidence in the case and we can decide together what to do. A full confession may be appropriate, but not at this time. It won't hurt to wait until I see the evidence and talk to the prosecutor."

### *C. The Inability to Obtain Feedback on Proposed Rules, Requirements, or Standards*

One of the most serious problems the Court faces when deciding on a rule intended to solve a problem is the inability to obtain feedback on a possible rule. By contrast, an administrative agency or a legislative body can always seek feedback on possible rules.

Perhaps, the rule the Court is contemplating will solve the problem, but perhaps it is too narrow or too broad for the particular problem. Or, the rule may impact courts or police officers in rural counties in a way that differs markedly from the way it would impact courts and police forces in large cities.

Making a draft statute or a proposed regulation available for public comment often improves the proposal and makes passage or adoption more likely if possible negative impacts are brought to the attention of the drafters and the proposed draft is amended to avoid or lesson such impacts.

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8. 384 U.S. 436 (1966.)

9. *Id.* at 470.

The Supreme Court cannot get the same feedback, which increases the risks of rules not working out as intended.

*D. The Language of Constitutional Decisions*

When the Court announces a decision imposing a rule that must be followed by police, prosecutors, or judges in every police station or courthouse in the country, the Court has to be strong and sweeping in the language it uses to announce the rule. The Court has to find the procedure to be demanded by the Constitution and to be obvious. The Court cannot say things like “This was the best proposal on which we were able to get a majority to agree on” or “We think this decision is supported by common law history but there is some evidence that raises a doubt.” Instead, it must insist that the particular constitutional provision on which it is basing its ruling “demands no less.”

What this means is that the Court tends to oversell its ruling and strongly commits to a rule or a standard that may not work out. At the same time, the Court will often tend to denigrate the rule it is striking down and replacing. There may be sound practical reasons why a state or a city adopted the rule being struck, but they will be summarily dismissed as clearly insufficient to justify the state procedure.

*E. The Court’s Limited Options for Reform*

The Supreme Court has only a very limited arsenal for solving a particular problem. The Court doesn’t have the broad range of options that a legislature possesses that might be used to avoid or limit the particular problem. The Court cannot, for example, draft statutes or rules of procedure that might prevent abuses or trial problems from occurring. It can’t command by constitutional fiat, for example, that police officers wear body cameras and require that they be turned on in certain situations.

Another area demonstrating the Court’s struggles because its reform options are limited is that of police lineups.<sup>10</sup> Preventing the contamination of witness identifications due to suggestive lineups remains a very serious problem in the United States and it is a source of many false convictions.

Suggestive lineups might be severely limited if there were rules in place that required: a certain minimum number of the people in the lineup, an administrator with no prior knowledge of who the suspect might be, restrictions on what should and should not be said to the witness before the lineup, mandated

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10. Compare *United States v. Wade*, 388 U.S. 218 (1967) (seemingly requiring the presence of counsel at lineups to prevent suggestive lineups leading to false convictions), with *Kirby v. Illinois*, 406 U.S. 682 (1972) (noting that the Court narrowed the previous decision by limiting counsel to post-indictment lineups which are rare occurrences). See Michael Vitiello, *The Warren Court’s Eyewitness Identification Case Law: What if?*, 51 U. PAC. L. REV. 867 (2020).

use of video equipment, rules restricting the way statements should be taken from a witness after the lineup, and so on. Such a set of rules would likely require exceptions in certain situations such as the delicate health of a witness.

Good lineup procedures could foreclose many later problems, but the Court can't enact such legislation within the confines of a constitutional ruling. The Court has only a broad brush with which to draw constitutional lines and it would be hard to see how due process demands this precise set of sensible lineup precautions.

Another area where the Court struggles because of its limited options for preventing problems is jury selection. For example, prosecutors often try to remove as many black prospective jurors as they can using peremptory challenges. (Peremptory challenges are, of course, those challenges for which a prosecutor or a defense attorney need not give an explanation.)

One way to limit the use of peremptory challenges to remove all black jurors would be to limit sharply the number of peremptory challenges available. What if the number were reduced to three or two in routine felony cases? Peremptory challenges could still serve their function as a backup to challenges for cause, but it would be much harder to remove systematically all the jurors of a certain race or gender. A reduced number of peremptory challenges would also help ensure a broader cross-section of citizens on juries even apart from race or gender and it might also speed up laborious jury selection processes.

As sensible as a rule limiting peremptories might be, the Court simply can't dictate rules like this. Instead, when the Court addressed issues relating to the abuse of peremptory challenges in *Batson v. Kentucky*,<sup>11</sup> the Court's options were: (a) whether to make peremptories less "peremptory" or (b) whether to abolish by constitutional fiat all peremptory challenges or (c) whether to do nothing about the abuse of peremptories?

The Court chose option (a) which requires a delicate hearing to determine whether a lawyer improperly used a challenge to remove a juror *solely* on the basis of race. This is not an easy task where challenges are labelled "peremptory" and lawyers can remove jurors for any reason except *solely* on the basis of race. *Batson* is generally considered very ineffective in achieving its purpose.<sup>12</sup>

#### *F. Tackling Issues in Isolation from Other Issues*

The narrow focus of Supreme Court decisions presents problems for criminal procedure reform because the Court cannot tie together issues the way a legislature can. Returning to the jury selection problem, one way to solve the problem of the abuse of peremptory challenges on the basis of race might be to

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11. 476 U.S. 79 (1986).

12. Viewing *Batson* as ineffective, Justice Breyer has urged the Court to reconsider *Batson* and the peremptory challenge system in its entirety. See *Rice v. Collins*, 546 U.S. 333 (2006) (Breyer, J., concurring).



tie reform with another issue, such as nonunanimous jury verdicts. One legislative compromise might be to abolish peremptory challenges but to permit nonunanimous verdicts. For example, England abolished peremptory challenges, but judges may accept a nonunanimous verdict of 10-2 after two hours of deliberation.

There are many reasons to object to this proposal: will it lead to false convictions? Why the number 10 and 2? Why not 9 and 3, or 8 and 4? Scotland has juries of 15 and accepts verdicts of 8-7.<sup>13</sup>

But the point here is not the merits of this specific proposal but the way in which issues can be tied together to reach something of a compromise. If this were a legislative proposal, a state might set up a pilot project in a certain county to see how the proposal works limiting it perhaps to less serious crimes where no imprisonment will result. A pilot project would consider questions like: How much time does it save? What percentage of cases end in unanimous versus nonunanimous verdicts? What do judges who are handling the cases think? What is the effect on the representativeness of juries? Etc.

Unfortunately, the Court doesn't have the ability to tie issues together in this way.

### *G. The Supreme Court and the Law of Unintended Consequences*

Legislation, no matter how well intended, may turn out to be ineffective in solving the problem it was intended to solve or it may have serious side effects that were not anticipated.

In 2005, Congress passed the Energy Policy Act of 2005 that mandated the production of 7.5 billion gallons of ethanol by 2012. Two years later, Congress upped the mandate to 15 billion gallons of ethanol by 2015.<sup>14</sup> The objectives of this legislation were to reduce our dependence on foreign oil, cut greenhouse emissions, and reduce fuel costs to motorists.

There have been ways in which ethanol has achieved some of its objectives, but the benefits have not been as great as anticipated and there have been serious—or, more accurately, terrible negative consequences for the environment.

Consider some of the unintended consequences of the law. First, the United States accounts for 53% of world corn exports.<sup>15</sup> When large amounts of corn are devoted to ethanol, there is less corn to export and it is more expensive. There is also less corn available to feed livestock or to turn into food products, so

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13. See *The Modern Scottish Jury in Criminal Trials*, SCOTTISH GOV'T, <https://www2.gov.scot/Publications/2008/09/17121921/9> (last updated Sept. 17, 2008) (on file with *The University of the Pacific Law Review*).

14. Energy Independence and Security Act of 2007, 110 Pub. L. No. 110-140, 121 Stat. 1492 (2007).

15. See James M. Griffin & Mauricio Cifuentes Soto, *The Unintended Consequences of America's Ethanol Policy*, HOUSTON CHRONICLE (May 4, 2012), <https://www.chron.com/opinion/outlook/article/The-unintended-consequences-of-America-s-ethanol-3535969.php> (on file with *The University of the Pacific Law Review*).

corn prices rise and food becomes more expensive.<sup>16</sup> In the U.S., we only spend 11.4% of our disposable income on food and we have options if food prices rise—we can substitute cheaper foods.<sup>17</sup> But, in developing countries, food absorbs 40% of a person’s disposable income, and there are often no less expensive substitutes.<sup>18</sup>

Incentivizing the growing of corn has serious negative consequences for the environment. One of the most serious is the effect on our rivers by nitrates from fertilizers needed to raise corn.<sup>19</sup> When there is a lot of rain in the Midwest, the nitrates reach the Mississippi, increasing the algae bloom in the Gulf of Mexico which is now the size of Massachusetts.<sup>20</sup> Rising corn prices around the world also encourages deforestation as countries try to raise their own corn.<sup>21</sup>

In June, 2018, the Environmental Protection Agency issued a long-delayed report entitled *Biofuels and the Environment: The Second Triennial Report to Congress*.<sup>22</sup> The report concluded that ethanol derived from corn and soybeans is harming soil and land use, water quality, and air quality.<sup>23</sup>

The disastrous effect of our ethanol program is one example of what economists term “the law of unintended consequences.” The law of unintended consequences warns that any government action, no matter how well intended, may have consequences that overwhelm the benefits that the law sought to achieve.

The Supreme Court is not immune from the law of unintended consequences and—for the reasons mentioned above, such as the Court’s limited data on issues before it—the risks of something turning out wrong are greater than they are for legislation. This is where we are today. The Warren Court took major risks in issuing sweeping rulings intended to improve our criminal justice system. In retrospect, such reforms were always going to be a high-risk endeavor and the criminal procedure revolution contributed to our present incarceration problem.

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16. *Id.*

17. *Id.*

18. *Id.*

19. See Renee Choo, *Ethanol’s Impacts on Our Water Resources*, COLUMBIA UNIV. (Mar. 21, 2011), <https://blogs.ei.columbia.edu/2011/03/21/ethanol-s-impacts-on-our-water-resources> (on file with *The University of the Pacific Law Review*).

20. *Id.*

21. See *Biofuels Menace Rainforests*, THE GUARDIAN (Aug. 17, 2007), <https://www.theguardian.com/science/blog/2007/aug/17/biofuelsmenacerainforests> (on file with *The University of the Pacific Law Review*).

22. See *Biofuels and the Environment: The Second Triennial Report to Congress*, EPA (June 29, 2018), [https://cfpub.epa.gov/si/si\\_public\\_record\\_report.cfm?Lab=IO&dirEntryId=341491](https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=IO&dirEntryId=341491) (on file with *The University of the Pacific Law Review*).

23. Jonathan Lewis, *EPA’s Report on the Environmental Impact of Biofuels*, CLEAN AIR TASK FORCE (Oct. 4, 2019), <https://www.catf.us/2018/07/epa-report-environmental-impacts-biofuels/> (on file with *The University of the Pacific Law Review*).

## II. THE IMPORTANCE OF TRIALS

### A. *The Disappearance of Trials*

In 2004, the American Bar Association (“ABA”) Section on Litigation—alarmed by the decline in trials in U.S. courtrooms—financed a major project appropriately entitled *The Vanishing Trial*. The project studied the alarming decline of trials held in U.S. courts from many different angles.<sup>24</sup> More than 400 pages of articles were published in the *Journal of Empirical Legal Studies*.<sup>25</sup> The data highlighted not only a startling decrease in the percentage of cases that go to trial, but also a decrease in the absolute number of trials. The study noted more trials took place in U.S. courtrooms in the 1960s and 1970s than take place in courtrooms today despite increased numbers of trial judges in most jurisdictions.<sup>26</sup>

The phenomenon affects both civil and criminal trials. But in the civil area, several ways are available to resolve cases short of trial that allow the parties to present their side of the issues but spare them the enormous strains and costs of trial.

But in the criminal area, it is plea bargaining that resolves all but a small handful of criminal cases. Today the plea-bargaining rate is 97% or 98% in most jurisdictions.

Our federal system, once a model for the states in the way things should be done, is a sad example of the decline in criminal trials. The ABA’s report on the vanishing trial found that although the number of judges doubled between 1962 and 2002, the absolute number of criminal trials declined 30% between 1962 and 2002.<sup>27</sup>

State systems are no better. The plea-bargaining rates also hover close to 98% in most states and trials have become rare. Concerns also exist regarding the types of cases that actually go to trial. There is the worry that we are not trying the cases that should go to trial: the close cases where defendants have a colorable defense. Instead, cases are tried because no plea bargain is possible because the defendant will receive a mandatory life sentence no matter what or because there are other reasons why the defendant simply can’t afford a conviction.

The dearth of trials is hardly a secret. In 2016, *The New York Times* detailed the absence of trials in an article entitled, *Trial by Jury, a Hallowed American Right, Is Vanishing*.<sup>28</sup> The article focused on the Southern District of

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24. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIR. LEGAL STUD. 459, 459–60 (2004).

25. *Id.*

26. *Id.* at 500, 516.

27. *Id.* at 493, 500.

28. Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed->

New York, which is often considered the most prestigious of the federal district court benches in the country.<sup>29</sup>

The article stated that in 2015 a bench with forty district court judges heard only fifty criminal trials that year.<sup>30</sup> The article mentioned one judge who had presided over only four criminal trials in six years on the bench and another judge who has not had a criminal trial for eighteen months. The article states that the plea-bargaining rate in federal courts in 1970 was roughly 80% meaning that 80% of convictions came from plea bargains.<sup>31</sup> That plea-bargaining rate today is 97%.<sup>32</sup> Trials have indeed vanished.

The federal court system has few cases compared to state court systems, with talented prosecutors and defense attorneys, and with excellent judges who have lifetime appointments. The federal system is also supported with tremendous resources and could afford many more trials than occur today,<sup>33</sup> but its courtrooms are usually dark.

### *B. The Effects of Trials on Charging*

In criminal cases, we tend to think of the investigating officers and the prosecutor as working together and “on the same side,” which is probably a fair assessment when a case is at the trial stage. But, in every country with a strong trial system, there is considerable tension between the police and the prosecuting authority when it comes to deciding which cases to pursue. This is true whether the person filing the charges is referred to as “the Crown” (Canada), the “state’s attorney” (Norway), the “Crown prosecutor” (England), or the “procurator fiscal” (Scotland).

There is tension over the filing of charges because the police and prosecutors have different perspectives on charging. The police want the cases they have worked on and solved—cleared cases—prosecuted. They know who committed the crime and want to see their work rewarded: the perpetrator tried, convicted, and punished.

But, prosecutors only want to prosecute strong cases—those where they can confidently prove guilt beyond a reasonable doubt, not an easy standard. This will be particularly the case with felonies. It may be that the person the police want prosecuted has done similar things in the past, but the prosecutor may doubt the admissibility of these prior acts. Or in some cases the trial may present the

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doors.html (on file with *The University of the Pacific Law Review*).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See generally Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 117–21 (2005) (highlighting how professor Ronald Wright crunches the numbers on cases in federal courts per district judge and finds that the caseload rise over the last few decades was modest and not sufficient to explain the sharp rise in the guilty plea rate).

jury with two different accounts of the incident—a claimed assault, for example, where the defendant claims self-defense. Even though the prosecutor finds the victim’s testimony completely convincing, she may choose not to prosecute without additional evidence corroborating the victim’s account. Proof beyond a reasonable doubt is a high standard and it should force prosecutors to be selective in choosing those cases they will pursue.

In understanding the messiness of criminal cases and the problems of proof that can occur, it is important to distinguish the different nature of cases in state courts from those in federal courts. In state courts, unlike crimes in federal courts, many cases are interpersonal, meaning that defendants and victims that had a prior relationship of some sort. This is certainly true in domestic violence, child abuse, and sexual assault, but it is also true even of property crimes. What looks like a burglary under the law may look quite different to a jury, especially when the jury understands the victim owed money to the defendant or had taken some of the defendant’s personal effects at a prior time.

Similarly, an assault case may look strong at first glance—the defendant assaulted the victim as the victim exited a bar late at night. But it may turn out to be an unsympathetic case for the prosecutor when she learns that the victim had been taunting the defendant with racial or religious epithets in the bar and had resisted calls to stop from D and other patrons.

One might think that the way to handle problematic cases like these would be to charge the defendant with the crime but offer a lenient plea bargain to dispose of the case. But these are the cases that don’t plea bargain if trial is a realistic option because defense attorneys can see the problems with the case.

This is, of course, a generalization as there are serious crimes, such as homicides, rapes, and serious assaults where prosecutors will be under pressure to file charges even though the case has some problems. But, many routine criminal cases—burglaries, possessions of stolen goods, simple assaults, and thefts—will not be prosecuted if they are not very strong cases. Prosecutors do not want to prepare for and devote a week to a trial only to see the jury return a “not guilty” verdict. There are always plenty of stronger cases to pursue.

But, when trials are not an option because the prosecutor has ways to force the defendant to accept a plea bargain—such as the availability of charges with high mandatory minimum sentences—this healthy tension between the police and prosecutors over charging disappears. Prosecutors can charge crimes that would be hard to prove beyond a reasonable doubt at trial because the defendant cannot afford the risk of trial. This is the reality of the criminal justice system in the United States, which unfortunately contributes to our high incarceration rate. The realistic possibility of a trial imposes a discipline on the system that is missing when trials vanish.

Not only do strong trial systems keep “weak” cases from being prosecuted, they force prosecutors to make hard choices among the crimes that will be prosecuted and those that will be handled in other ways. With respect to minor crimes, such as misdemeanors, a strong trial system encourages cities to

look at other options for handling anti-social behaviors other than use the criminal justice system.

I have used the term “strong trial systems” so let me explain what this means. A strong trial system needs three attributes: (1) it must have fair procedures; (2) it must produce reliable verdicts in which the public can have confidence; and (3) it must make efficient use of its resources.

Fair procedures seem basic to any system—the system needs to have procedures that allow relevant evidence to be gathered, to be admitted at trial, and to be tested. Thus, if a system does not permit indigent defendants access to scientific experts or if a system allows prosecutors to keep helpful evidence from the defense, we would not consider those procedures fair.

But, fair procedures are insufficient if the factfinders cannot be trusted to understand the evidence and reach verdicts in which we have confidence. Perfection in convicting the guilty and acquitting the innocent is not attainable in any system, but in strong trial systems miscarriages of justice are rare and can be rectified without damaging the wronged individual.

Finally, trial systems need to be efficient to be strong. This is, of course, a relative concept; there will be trials that may turn on complex issues with multiple defendants that may take months to complete. But whatever procedure a country adopts for its trials, one would hope that it makes efficient use of what will always be limited resources.

These issues are obviously related. If you have fair procedures, but they are extremely complicated, that may impact the system’s efficiency. If trials are lengthy that may impact reliability as factfinders may have trouble remembering and putting together information gained over several days or weeks or sometimes months.

The United States lacks a strong trial system. One can see clear evidence of this in the systematic avoidance of trials in the federal system and state systems.

In the New York Times article mentioned above on the dearth of trials in the Southern District of New York, many judges say the “right” things—how it is a shame to be losing trials as they expose the working of the system to the public. But, the reality is that federal judges do not want trials any more than state judges.

Between 2006 and 2016, the number of criminal trials in federal courts declined 47%.<sup>34</sup> In 2015, out of 81,000 federal criminal cases, there were only 1,759 trials.<sup>35</sup> The trial rate was thus 2%. This time period occurred after the Federal Sentencing Guidelines were made advisory,<sup>36</sup> which freed judges

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34. See Robert J. Conrad & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 104 (2018).

35. *Id.*

36. See *United States v. Booker*, 543 U.S. 220 (2005).

Guidelines' sentencing strictures. (Judges depart from the Guidelines' ranges in more than 50% of sentencings.<sup>37</sup>) Some predicted the ability of judges to sentence more freely would lead to a sharp rise in the number of trials. Instead, the trial rate continued to decline. Without trials, there are no brakes on charging decisions.

### III. MANDATING JURY TRIALS FOR MISDEMEANOR CASES

#### A. *Baldwin v. New York*

In *Duncan v. Louisiana*,<sup>38</sup> the Supreme Court extended the right to jury trial to felony cases. *Duncan* was an iconic case of the civil rights era with Gary Duncan and a courageous team of lawyers challenging the staunchly segregationist establishment in Plaquemines Parish, a parish located fifty miles south of New Orleans.<sup>39</sup> In the course of ruling that Duncan's felony conviction for assault was unconstitutional because he had been denied a jury trial, the Court ruled that jury trials were required for "serious crimes," but it left to another day the precise line that would separate "serious crimes" requiring a jury and "petty offenses" where no jury would be required.<sup>40</sup>

In 1970, in *Baldwin v. New York*,<sup>41</sup> the Court set out to resolve the constitutionality of trials without juries in misdemeanor cases. The case arose because New York City did not provide jury trials to defendants charged with misdemeanors, and Robert Baldwin—who had been charged with a pickpocketing offense of "jostling"—had been convicted without a jury and sentenced to a year in jail.<sup>42</sup>

New York City presented a stark contrast to Plaquemines Parish, the venue of Gary Duncan's trial. The New York county District Attorney's Office in the late 1960's had long been considered one of the finest prosecutorial offices in the country.<sup>43</sup> Prosecutors, including Thomas Dewey, Frank Hogan, and later Robert Morgenthau, in that office not only handled the sort of high volume crimes that plague any major city, but they undertook important investigations of political corruption, organized crime, and white collar crime.

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37. See Conrad & Clements, *supra* note 33, at 131.

38. 391 U.S. 145 (1968).

39. See NANCY J. KING, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, in *CRIMINAL PROCEDURE LAW STORIES* (C. Steiker, ed. Foundation Press 2006).

40. *Duncan*, 391 U.S. at 161.

41. 399 U.S. 66 (1970).

42. *Id.* at 67.

43. See Chip Brown, *Cyrus Vance, Jr.'s 'Moneyball' Approach to Crime*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/07/magazine/cyrus-vance-jrs-moneyball-approach-to-crime.html> (on file with *The University of the Pacific Law Review*) (noting that Frank Hogan, the District Attorney in New York City for more than 30 years, was known as "Mr. Integrity").

The Legal Aid Society in New York City, with roots back to 1876, was one of the first legal defense institutions in the country dedicated to representing indigent clients<sup>44</sup> and was equally respected for the quality of its work in both civil and criminal cases.

Finally, the New York City Bar Association had a long history of taking aggressive positions in reports, studies, and amicus briefs against injustice, not just locally but nationally and even internationally.<sup>45</sup>

The plurality opinion of Justice White emphasized that New York City was very much an outlier in denying jury trials to those charged with misdemeanors.<sup>46</sup> Justice White noted that all states provided jury trials for misdemeanors and he noted that even in New York state other cities—and he cited Buffalo and Albany—provided jury trials in misdemeanor cases.<sup>47</sup>

Against this background, White concluded that “this near-uniform judgment of the Nation” required that the line for requiring jury trials be extended to offenses carrying a possible sentence of more than six months.<sup>48</sup>

White’s opinion made New York City seem grudging and unfair for not following the practices of other states and other big cities in granting jury trials in misdemeanor cases, but New York City was in a very different situation from other cities in New York, and was likely in a very different position from other large cities like Chicago or Los Angeles. To understand the special nature of criminal courts in New York City, one only has to reflect on the fact that the New York City Criminal Court which handles misdemeanors had, at the time of *Baldwin*, a case load docket that was 39 times greater than that of Buffalo, New York’s second largest city.<sup>49</sup>

Many of the weaknesses of constitutional rulemaking described in Section I were present in *Baldwin*. There is no statistical analysis comparing New York City to other major American cities. One would have liked to have seen a comparison of misdemeanor caseloads in New York City compared to other large cities, the number of trials in each city, and the plea-bargaining rate to see if those cities were providing anywhere near the number of misdemeanor trials that New York City provided. It might have been the case that New York City gave many more defendants a chance to put on a defense at trial, whereas other cities offered jury trials in theory but not nearly the percentage in practice as New York City.

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44. See *The History of the Legal Aid Society*, THE LEGAL AID SOCIETY, <http://www.legal-aid.org/en/las/aboutus/ourhistory.aspx> (last visited Apr. 3, 2020) (on file with *The University of the Pacific Law Review*) (showing that The Legal Aid Society traces its roots back to 1876).

45. See generally, *About the New York City Bar Association*, NEW YORK CITY BAR, <http://www.nycbar.org/about-us/overview-about-us> (last visited Apr. 3, 2020) (on file with *The University of the Pacific Law Review*) (describing the history of the New York City Bar Association).

46. *Id.* at 71–72.

47. *Id.*

48. *Id.* at 72.

49. *Baldwin v. New York*, 399 U.S. 66, 135 (1970) (Harlan, J., dissenting).



White's analysis in *Baldwin* is also missing any reference to the history and scope of the right to jury trials from England. In *Duncan*, by contrast, White quoted from Blackstone's Commentaries, written in the mid-18th century, on the importance of jury trials as a protection against the Crown.<sup>50</sup> White also noted in *Duncan* the distinguished pedigree of jury trials in England stretching back even to the Magna Carta.<sup>51</sup>

But, the Court never looked beyond our borders in *Baldwin*, likely because you will not find jury trials for misdemeanors in England. Jury trials which take place in Crown Courts<sup>52</sup> have a long history in England but so do magistrates' courts which go back over 250 years and handle misdemeanors and even minor felonies without juries.<sup>53</sup> Canada also does not grant defendants a right to jury trial in misdemeanor case.<sup>54</sup> Both England and Canada have much lower incarceration rates than the United States. Might there be a connection?

But whether or not New York City was exceptional in denying defendants jury trials for misdemeanors, the issue is whether the trials it provided were fair, which plenty of evidence shows they were fair.

First of all, misdemeanor defendants in New York City had the right to ask for a trial in front of a panel of three judges. Thus they had some protection against the "bias and compliant judge" about which the Court worried in *Duncan*. Justice Harlan noted in dissent in *Baldwin* that the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY had suggested this might be a possible compromise where jury trials are not permitted or are waived.<sup>55</sup> But the Court brushed this protection aside, insisting it is necessary to interpose

. . . between the accused and his accuser the judgment of laymen who are less tutored than a judge or a panel of judges, but who, at the same time, are less likely to function or appear to function as but another arm of the Government that has proceeded against him"<sup>56</sup>

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50. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (citing 4 W. Blackstone, Commentaries on the Laws of England 349–50 (Cooley ed. 1899)).

51. *Id.* at 151.

52. See *Criminal Courts*, GOV. UK, <https://www.gov.uk/courts> (last visited Apr. 3, 2020) (on file with *The University of the Pacific Law Review*).

53. See *id.* (noting that one of the most famous magistrates' courts was the Bow Street Magistrates Court in central London which existed for more than 250 years; its work has now been taken over by a set of four Magistrates' Courts).

54. See LORI HAUSEGGER, MATTHEW HENNIGAR, AND TROY RIDDELL, CANADIAN COURTS: LAW, POLITICS, AND PROCESS 35 (2009).

55. *Baldwin v. New York*, 399 U.S. 66, 71 n. 16 (Harlan, J. dissenting).

56. *Id.* at 72 (majority opinion).

Secondly, the dissent also noted that the acquittal rate in criminal courts handling misdemeanors in New York City was reported to be 49%.<sup>57</sup> This suggests judges were doing what they should have been doing and were not rubber-stamping prosecutions. White's opinion never dealt with this issue.

Nor did the Court address another important issue: (1) what are the likely consequences of requiring jury trials in terms of the availability of trials? And, (2) what is the tradeoff in the number of trials? In 1967, the year before *Baldwin* was decided, the New York Criminal Court provided more than 5,000 trials resulting in 3,023 convictions and 2,678 acquittals.<sup>58</sup> In 2014, the New York City Criminal Court with 100 judges handled 252,741 misdemeanor cases.<sup>59</sup> Of those, 580 eventually went to trial (175 were jury trials), or less than a quarter of 1 percent.<sup>60</sup> Like most urban misdemeanor courts, New York City's criminal courts are mills churning out conviction after conviction. The courts mark too many citizens with a conviction that will greatly complicate their lives—they may lose employment or a chance for future employment.

How does *Baldwin* affect charging decisions? With no advantage in keeping charges at the misdemeanor level, won't prosecutors charge felonies if that is an option? John Pfaff, an economist at Fordham Law School, who has written extensively on the causes of mass incarceration, concludes that "the primary engine of prison growth has been an increased willingness on the part of prosecutors to file felony charges."<sup>61</sup> *Baldwin* plays a role in those charging decisions. It is time to ask: Did *Baldwin* make defendants better off or far worse off?

#### IV. CONCLUSION

The criminal procedure revolution took almost all Bill of Rights protections intended for the federal system and applied them equally to state systems without taking the differences into account. State systems have more cases, they have more violent crimes, they have more interpersonal crimes, and they have vastly more minor criminal cases. The procedures that apply to federal cases—serious, often highly complex cases—are unworkable for minor criminal cases.

A sad commentary on the state of affairs in misdemeanor courts is a report put together by public defenders in the Bronx (a borough of New York

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57. *Id.* at 136 n. 16 (Harlan, J. dissenting).

58. *Id.*

59. See CRIMINAL COURT OF NEW YORK CITY, ANNUAL REPORT 2014 27 (2014), available at [https://www.nycourts.gov/COURTS/nyc/criminal/cc\\_annl\\_rpt\\_2014.pdf](https://www.nycourts.gov/COURTS/nyc/criminal/cc_annl_rpt_2014.pdf) (on file with *The University of the Pacific Law Review*).

60. *Id.*

61. See John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go From Here*, 26 FED. SENT'G REP. 265, 268 (2014).

City) entitled, *No Day in Court*.<sup>62</sup> The report describes what happened to a cohort of 54 marijuana possession cases in the period between March 2011 and March 2012. The public defenders and their clients wished to take these cases to trial because they thought they were winnable.

The title sums up what unfolded. Even though the defendants wanted to challenge the charges against them not a single suppression hearing was ever completed. Eventually, the majority of the defendants were simply worn down by the process and accepted conditional release agreements or pleas to disorderly conduct charges. Approximately 30% of the cases were eventually dismissed outright. But those defendants paid a price because it took on average five court appearances and 270 days to get the cases dismissed.<sup>63</sup>

The report details the toll the process exacted on defendants as they were required to return to the courthouse again and again to await hearings that rarely took place:

After making it into the courthouse, they must wait, sometimes for hours, in crowded courtrooms, where judges frequently hear in excess of 100 cases a day, before having their cases called. And because prosecutors rarely reveal whether they will state “ready” for hearings and trial until the case is called on the record, the wait is colored by anxiety and uncertainty.

Beyond the physical and psychological toll exacted by these delays, each postponement brings with it the potential for another missed day of work, lost wages, school absence, rescheduled medical appointment, financial hardship, or childcare emergency. Clients must pay for transportation to and from court.

Repeated absences from work strain relationships with current employers, and potential employers are less likely to hire clients when a background check reveals a pending criminal case. Clients working in the public sector or in jobs requiring state-issued licenses—such as security guards, home health aides, or cab drivers—are especially vulnerable, as an open case may lead to an immediate suspension without pay and, ultimately, termination.<sup>64</sup>

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62. *No Day in Court*, THE BRONX DEFENDERS 1 (May 1, 2013), <https://www.bronxdefenders.org/no-day-in-court-a-new-report-by-the-bronx-defenders/> (on file with *The University of the Pacific Law Review*).

63. *Id.* at 3.

64. *Id.* at 12.

It is fair to put a share of the blame for *No Day in Court* on the prosecutors and judges. It is also fair to see what happened as revealing serious problems with the speedy trial statute in New York. But a share of the blame stems from the Court's decision to expand the right to jury trial to minor criminal cases. Complicated and expensive trial procedures can be a weapon that wealthy and sophisticated defendants can sometimes use to wear down prosecutors and judges. But complicated and expensive trial procedures can also be a weapon that prosecutors and judges can use to wear down defendants who are poor and powerless.

If we wish to lower our incarceration rate significantly, we have to start talking critically about some of the major planks of the criminal procedure revolution, no matter how painful the conversation.