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Do Jury Trials Encourage Harsh Punishments in the United States?

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DO JURY TRIALS ENCOURAGE HARSH PUNISHMENTS IN THE UNITED STATES?

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A. Introduction: The Right to Trial by Jury in the United States

Because we have a very strong federal system in the United States, many aspects of our criminal justice system vary considerably from state to state. Most states have a death penalty, but a few have done away with the death penalty and a few have never had one. Some states have centralized state-wide public defender systems to handle the cases of indigent defendants, while other states rely heavily on the appointment of private attorneys to handle such cases. In some jurisdictions trial judges are appointed for life, while in other jurisdictions judges are elected to their office and must seek reelection every few years.

But when it comes to the importance of the jury in our trial system, there can be no uncertainty about the role of the jury. Our trial system is heavily tied to trial by jury. While other western countries, such as England, Denmark and Norway, use juries, they do so only when the crime is very serious, such as when the crime is murder, rape or kidnapping. For the vast majority of criminal cases, the defendant has no right to trial by jury.

But the United States has gone down a different path by requiring juries in all but the most minor criminal cases. The two most important decisions demanding that our trial system be centered on juries are *Duncan v. Louisiana*[1] and *Baldwin v. New York*.[2]

In 1968, in *Duncan v. Louisiana*, the Supreme Court was faced with a state jurisdiction—Louisiana—which did not provide defendants with a broad right to a jury trial. Jury trials in Louisiana were restricted to those on trial for the most serious offenses. The Court in *Duncan* ruled that due process demands that states afford defendants the right to a jury trial in all cases in which there is the possibility of a sentence in excess of a year in prison, what we call felony offenses in the United States. Parts of *Duncan* read like a paean to the jury system:

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1. 391 U.S. 145 (1968).
2. 399 U.S. 66 (1970).

> Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge . . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.[3]

Two years after *Duncan*, in 1970, the Court decided another important case involving the right to a jury trial, *Baldwin v. New York*. *Baldwin* raised the issue of whether a defendant charged with a rather minor offense which authorized punishment up to a year in jail must be extended the right to have the case tried in front of a jury. This is a very important issue in large cities because the number of such minor cases, which we refer to as misdemeanors, entering the system each day is tremendous. But the Supreme Court had no hesitancy in ruling that our Constitution demands that even defendants charged with a misdemeanor must be guaranteed the right to a jury trial.

What these cases mean for our criminal justice system is that states must guarantee defendants the right to a jury trial in many cases where there is no chance that the defendant would actually be sentenced to any prison time if convicted. For example, first time offenders rarely get any prison time unless the crime is serious. But the mere possibility of a prison sentence in excess of six months requires that a defendant be provided the right to a jury trial.[4]

Whether or not the Court made the right decision in requiring juries in all state prosecutions when the crime involved is rather minor can certainly be questioned. While our crime rates have come down in recent years, the United States criminal justice system still must handle an enormous volume of cases. In urban areas, any thought that juries could be provided to a substantial percentage of the minor criminal cases that enter the system each day is completely unrealistic.

Because jury trials are very expensive, it is easy to imagine forms of trials that would be less expensive, yet retain the use of citizens in some form. Among the possibilities would be the use of mixed panels of professional judges and lay judges such as one sees often on the continent, or perhaps a system using panels of lay magistrates for minor cases, such as one finds deciding the vast majority of criminal cases in England. But constitutional adjudication did not permit the Supreme Court to select among several possible

3. 391 U.S. at 156.

4. Interestingly, the right to counsel has never been extended as far as the right to a jury trial. *See* Scott v. Illinois, 440 U.S. 367, 369 (1979). This means that many indigents charged with a misdemeanor will have the right to a jury trial, but will not have counsel to assist them at the trial.

options. Faced with the choice between a trial to a single judge with no lay participation and trial to a jury, the Court required juries.[5]

The result is a system that theoretically guarantees defendants a jury trial for every criminal charge except the most minor, but actually provides jury trials to very few defendants. Statistics from the Department of Justice for 1996 show that only four percent of those defendants convicted of *felonies* in state courts were convicted after a jury trial.[6] Instead the overwhelming majority of those convicted in our criminal justice system have pled guilty as the result of a plea bargain.

It is the thesis of this article that *Duncan* and *Baldwin*, for all the lofty language about the important role that juries play in protecting citizens from overzealous prosecutors and compliant judges, have exactly the opposite effect; they encourage legislatures to place more power than ever in the hands of prosecutors.

B. Our Emphasis on Selecting the "Right" Jurors

When confronted with the relative paucity of criminal trials in the United States, the traditional response of many lawyers and judges is to hide behind the claim that the system's overwhelming preference for plea bargaining is simply a reflection of fiscal realities.

I think this is only part of the reason the system avoids trials. The more serious problem is that we lack confidence in juries. This lack of confidence shows itself in many ways. One such way is the elaborate system we have evolved for selecting the jury. We are very nervous about who gets to sit on the jury. While it would be comforting to believe that any group of fair-minded citizens would reach the same result on the same evidence, I do not think we believe that in practice. To make this clear, let me give a brief overview of the jury selection procedure in the United States.

5. In a footnote in *Duncan*, Justice White acknowledged that a criminal justice system that was fair and equitable but which did not rely on juries was easy to imagine. 391 U.S. at 150 n.14. Such a system, he observed, would be consistent with due process because it would "make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems." *Id.* But White noted that no American state had yet undertaken to construct such a system. *Id.*

This footnote leaves open the possibility that a state might construct a criminal justice system, perhaps on the continental model, which would use mixed panels of professional judges and lay people, and that such a system would satisfy due process. But it is hard to see how any state could afford the risk that would be involved in constructing such a system in order to test the Court's dicta.

6. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 454, table 5.51 (Ann L. Pastore & Kathleen Maguire eds., 1999). Obviously, if those charged with misdemeanors and entitled to jury trial were added to those charged with felonies, one suspects that the percentage of those convicted after a jury trial would be miniscule.

While some common-law countries limit jury selection to a few questions about the nature of the case and the likely witnesses, and provide very little opportunity to the lawyers to ask questions of the potential jurors, our system has evolved quite differently. While procedures vary from jurisdiction to jurisdiction, lawyers typically play a central role in deciding who will sit on the jury that will decide the case. The reason has to do with the fact that each of the lawyers at a criminal trial has the right to remove certain prospective jurors from the jury panel through what are called "peremptory challenges." The challenges are called "peremptory" challenges because the tradition is that they can be exercised peremptorily, meaning that there is no need to explain or justify these challenges. This is changing a bit as I will explain.

The number of challenges that are allotted to the prosecutor and the defense attorney varies from jurisdiction to jurisdiction and will often depend on the importance of the case. It is not unusual in a burglary or theft case for each of the lawyers to have five or six challenges which each may use to remove jurors they would rather not have on the jury.

It is important to point out that these jurors who are being removed from the jury are not those who have been shown to be too opinionated or biased in their point of view to be able to view the evidence in a fair and impartial way. Those jurors are also subject to removal through what we call "challenges for cause" and there is no limit on such challenges.

Because lawyers are permitted to influence the shape of the jury by exercising a number of peremptory challenges, they like to have information on which to base these challenges and they are usually permitted to ask prospective jurors questions during the jury selection process. Sometimes, to speed up the process, the prospective jurors will have filled out questionnaires prior to trial that gives information about each of them. The questionnaires may ask them for information about matters such as their employment, their family status, what newspapers and magazines they read, their religion, and their political affiliation.[7] If a defendant happens to be wealthy, which is rarely the case, there are jury consultants, often trained in social science research, who can be hired to help select the best jurors, "best" meaning from the point of view of the defense. These consultants might check the background of potential jurors or they might do a survey of the community to try to give the defense a statistical picture by gender, race, age, religion, etc., of those persons likely to be the favorable or unfavorable jurors. Sometimes a jury consultant with a background in psychology may also sit in the courtroom in order to

7. It has been reported that a woman who refused to give this sort of information in a murder case was put in jail for three days for contempt of court. *See Questions From the Jury Pool on Privacy*, N.Y. TIMES, May 13, 1994, at B18.

study the body language and manner of speech of a potential juror and thereby help the trial lawyer determine which jurors should be removed from the panel.

What peremptory challenges mean for our system is that it will often be the case through the careful use of such challenges that a defense attorney or a prosecutor can succeed in removing all citizens with a certain background from the jury if the group of such citizens is small. For example, in a complicated criminal fraud case, the defense attorney may be able to remove from the jury any citizen who has graduated from a university or any citizen who is familiar with business documents. Or in a case involving drugs, the prosecutor may be able to remove all of the young people from the jury.

When peremptory challenges have been exercised on the basis of race, this has caused enormous problems in the United States. We have had civil unrest in cities where the defense attorneys used peremptory challenges to remove all or almost all black prospective jurors where the victim of a police beating was black and the police officers were white.[8]

Perhaps a more typical situation is the use of peremptory challenges by prosecutors where the defendant is black to remove all black citizens in the pool of possible jurors. Such a case was *Batson v. Kentucky*,[9] decided by the Supreme Court in 1986, where the Court tried to limit the use of peremptory challenges to remove prospective jurors on the basis of race.[10] But it is not easy to enforce this prohibition in practice. Where attorneys can remove prospective jurors for almost any reason—except solely for the reason of race—how can a trial judge know whether a particular juror was being removed on the basis of race?[11] Lawyers can always put forward reasons to remove such jurors that mask the underlying racial motivation.

Given all the problems that jury selection entails in the United States as well as the tremendous amount of trial time that is devoted to jury selection, one obvious reform would be to do away with peremptory challenges. It is not unthinkable—England has done away with peremptories and Justice Marshall in *Batson* argued that peremptories should be struck down as unconstitutional. But this would be a difficult reform to achieve legislatively in the United States

8. *See* James R. Jorgenson, *Back to the Laboratory with Peremptory Challenges: A Florida Response*, 12 FLA. ST. U. L. REV. 558, 579-80 (1984). *See also* Irene Wielawski, *Riot Aftermath*, L.A. TIMES, May 6, 1992, at A3.

9. 476 U.S. 79 (1986).

10. The Court has subsequently extended the decision in *Batson* to bar peremptory challenges solely on the basis of gender. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

11. For a case illustrating the difficulties in enforcing the prohibition against using peremptory challenges solely on the basis of race, see Purkett v. Elem, 514 U.S. 765 (1995).

because the belief is so strong among trial lawyers that the composition of the jury is crucial to the outcome of the case.[12]

Moreover, jury selection in the United States has to be understood against our tradition of requiring a unanimous verdict in criminal cases. While this is not a constitutional requirement, it is a strong part of our tradition and only two states permit nonunanimous jury verdicts in criminal cases.[13] Thus there is always the worry in the United States about a juror who pretends to be fair and impartial during jury selection but who has other objectives in getting on the jury. In my home state, Colorado, to give an example, an employee at my own university sat on a jury in a drug case and voted to acquit because it was her view that criminalization of drug use was the wrong way to solve our nation's drug problem.[14] The jury ended up hung, 11-1, and the case had to be retried. While the percentage of such cases has never been high, usually the norm has been about five per cent, it has been reported that this percentage is doubling and even quadrupling in some locations.[15] Some view this as a good thing and there is even an organization—the Fully Informed Jury Association—that has been trying to get courts to instruct jurors about their power to nullify the law.[16]

C. The Appellate Emphasis on Jury Selection

The emphasis on jury selection in our trial system carries through to our appellate system as well. Errors in the jury selection process are considered very serious errors in our legal system and when they occur they often require a new trial no matter how strong the evidence of guilt was at trial or how fair

12. There have been some efforts to reform the way jurors are treated in state systems. The state that took the lead in this task was Arizona, which now permits jurors to take notes during trial and also allows jurors to ask questions of witnesses. *See* ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, SUMMARY OF RECOMMENDATIONS, ¶¶ 29, 31, 34 *at* http://www.supreme.state.az.us/jury/Jury/jury1g2.htm (last updated Jan. 8, 2002). But one area the reformers did not touch was peremptory challenges. *Id.* at ¶ 23, *at* http://www.supreme.state.az.us/jury/Jury/jury1g1.htm.

13. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (ruling that Oregon law, which permits conviction by a verdict of 10-2, is not unconstitutional).

14. The case eventually received national attention when the trial judge decided to punish the juror with contempt after the trial for failing to disclose during jury selection her strong views on drug laws. *See* David E. Rovella, *Judge: Juror Didn't Nullify, She Lied*, NAT'L L.J., Feb. 24, 1997, at A8; David E. Rovella, *A Judge Mulls: Did Juror Lie, or Did She Nullify?*, 19 NAT'L L.J. Oct. 14, 1996; at A9.

15. A recent newspaper article reported that the percentage of juries unable to reach a unanimous verdict was only five percent thirty years ago but that this rate has doubled and even quadrupled in some locations. *See* Joan Biskupic, *Activist Jurors Judge the Law: Movement Uses Jury Box to Work for Social Change*, DENV. POST, May 1, 1999, at A25.

16. *Id.*

the trial was that the defendant received. For example, consider a Vermont case, *State v. Doleszny*.[17] In *Doleszny*, the defendant had been convicted at trial of a serious crime—sexually assaulting a victim under the age of sixteen. What troubled the Vermont Supreme Court was an error that occurred even before the start of trial during jury selection. One of the prospective jurors had stated that he was acquainted with one of the prosecution witnesses who would be testifying, a doctor who had examined the victim after the rape. When asked if he could still be impartial in evaluating the testimony of this witness, the prospective juror had replied, "I could certainly try to be impartial but I'm not saying that I could." Not satisfied with this answer, the defense attorney had asked to have this juror removed by the trial judge through a challenge for cause because the juror could not be impartial. But the trial judge had refused to do so.

In hindsight, this was a mistake and the judge should have been cautious and removed this juror and the Vermont Supreme Court reversed in a summary two-page opinion. But what makes the case remarkable is the problem juror never sat on the jury that convicted Doleszny of sexual assault on a minor. When the judge had refused the challenge for cause, the defense had removed the juror using a peremptory challenge. Thus the only effect of the judge's error was that the defense ended up with one less peremptory challenge—in Vermont this meant that the defense had five peremptory challenges instead of six. Although peremptory challenges are not constitutionally required, it was clear to the court that the conviction had to be reversed because of the loss of even a single peremptory challenge.

This is not an odd or isolated case. While not all courts treat the loss of a peremptory challenge as automatic reversible error,[18] courts in states in all regions of the country, including Florida,[19] New York,[20] Colorado,[21] and Arizona,[22] would automatically reverse convictions in the same situation, no matter how strong the evidence and how reliable the verdict at trial seems to be.

I mentioned earlier the difficult task that the Supreme Court imposed on trial judges in its decision in *Batson v. Kentucky* which tries to place limits on

17. State v. Doleszny, 508 A.2d 693 (Vt. 1986).

18. *See, e.g.*, State v. Ramos, 808 P.2d 1313 (Idaho 1991). The Supreme Court seems almost unique among courts confronting this issue as it has reasoned that the loss of a peremptory challenge due to the trial judge's failure to remove a juror for cause is not error. *See* United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000). *See also* William T. Pizzi & Morris Hoffman, *Jury Selection Errors on Appeal*, 39 AM. CRIM. L. REV. 1391 (2002).

19. Moore v. State, 525 So. 2d 870, 872-73 (Fla. 1988).

20. People v. Scott, 566 N.Y.S.2d 399, 400 (N.Y. App. Div. 1991).

21. People v. Macrander, 828 P.2d 234, 244 (Colo. 1992).

22. State v. Sexton, 787 P.2d 1097, 1099 (Ariz. Ct. App. 1989).

peremptory challenges so that they cannot be used to remove prospective jurors on the basis of race. But enforcing a rule which says that lawyers can remove jurors for any reason—poor eye contact with the lawyer, political affiliation, age, education level, manner of dress, or even the tone of the juror's responses—as long as it is not done on the basis of race, is not easy for a trial judge. But what makes the task especially difficult is that errors in enforcing the *Batson* decision can require a new trial.

One example is *United States v. Annigoni*,[23] decided by the United States Court of Appeals for the Ninth Circuit, which hears appeals from federal trial courts in the western part of the United States. This case involved a bank fraud in California by Annigoni and some associates in which, in the court's words, the bank was "duped by false documents" into granting a $2.85 million real estate loan to Annigoni and his associates. The borrowers promptly defaulted, leaving the bank to discover that the collateral for the loan did not exist.

During jury selection the defense tried to use a peremptory challenge to remove an Asian-American who had stated that he had an interest in a real estate partnership. (Defense lawyers often do not like jurors who have knowledge and experience that might make them more able to understand complicated business transactions.) The trial judge refused to permit the challenge because he felt the challenge was being made on racial grounds. The court was wrong in this conclusion said the Ninth Circuit. The remedy, said the court, must be a completely new trial because even a single incorrect denial of a peremptory challenge in an attempt to enforce *Batson* constitutes automatic reversible error. There was no attempt by the court to determine whether the trial Annigoni received was fair and whether the evidence supported the verdict that the jury had returned against Annigoni.[24]

23. United States v. Annigoni, 96 F.3d 1132, 1134-36 (9th Cir. 1996).

24. An even more extreme case reversing a conviction is *United States v. Huey*, 76 F.3d 638 (5th Cir. 1996), decided by the United States Court of Appeals for the Fifth Circuit, which hears cases from federal courts in states in the south central part of the United States. In this case, Huey's attorney used peremptory challenges to strike five black jurors from the jury that would hear evidence of the drug-related charges against Huey and a co-defendant. Huey's attorney did so because he was worried that undercover tape recordings of Huey and his associates that would be played at trial would show Huey using harsh and offensive racial epithets in referring to blacks. Both the prosecutor and Huey's co-defendant objected to the peremptories, but the judge allowed Huey's attorney to remove the black jurors. *Id.* at 639-41.

On appeal, the appellate court ruled that these challenges on the basis of race were improper and should not have been permitted. The result, the court concluded, had to be a new trial. But not just a new trial for the co-defendant, but a new trial for the defendant Huey as well. Notice that it was Mr. Huey's counsel who violated the rights of the prospective jurors, that the government and counsel for the co-defendant pointed this out to the lawyer and the court, that as a result of the improper challenges Mr. Huey had a jury more favorable to him than that to which

I apologize for going into some detail on some appellate cases having to do with possible errors during jury selection. My point has been to show you that it is not just trial lawyers that place tremendous emphasis on jury selection and selecting the "right jurors," but appellate courts emphasize jury selection as well. What you see is a system that believes that who ends up on the jury can alter the result at trial, no matter how overwhelming the evidence may be.

D. Our Ambivalence About Juries

We have very complicated trial procedures in the United States. Some of the complicated rules that govern our trial system, notably our very complicated rules of evidence, are a reflection of our concern about juries and whether they are capable of performing the task they are supposed to perform. Our attitude toward juries is deeply ambivalent. On the one hand, we profess confidence in the wisdom of juries, yet at other times we treat jurors more like children and keep information away from them because we fear that they cannot properly evaluate it. We often say that American juries are supposed to represent "a cross-section of the community." Yet we select juries in such a way that cross-sectional values are completely undermined. We are at times proud of the power of American juries "to nullify the law" and reach verdicts based on the jurors' own personal sense of justice. Yet at other times we are plainly frightened of this power. Jury nullification of the law is a growing concern in the United States. [25]

Jury reform is very much on our minds in the United States and there have been some steps toward reform.[26] But we have not faced up to many of the hard issues. Our system is premised on the belief that any citizen can perform the job of the juror and qualifications for service on a jury are minimal. But an American courtroom is an intimidating place, even for lawyers. To expect citizens to enter the jury room and perform their task well with minimal training and little experience is optimistic. Most jurors have never served on a jury before and have never done anything like what they are being asked to do. Citizens with important daily responsibilities will often not be able to serve on juries. For example, many people cannot serve on a jury if the trial is going to last a week or two. Some, such as small shopkeepers, hourly workers, or single parents, simply may not be able to afford to serve. While others, such as

he was entitled (and the government had a jury that was less favorable), yet Mr. Huey received a new trial.

25. Whether or not nullification of the law is good thing, there are scholarly articles in prestigious journals advocating jury nullification of the law. *See* Paul Butler, *Racially Based Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). There are also political groups urging that juries be instructed about the power of juries to nullify the law. *See* Reynolds Holding, *Group Tries to Sway Jurors*, S.F. CHRON., Dec. 11, 1995, at B1.

26. *See* Purkett v. Elem, 514 U.S. 765 (1995).

teachers, nurses, scientists, and executives may not be able to leave their jobs to serve if the trial lasts more than a few days. Many will be permitted to avoid jury service by the trial judge if they explain the hardship service would impose on them or those around them. (This assumes that they show up for jury service in the first place; today a substantial percentage of those called for jury service ignore the summons.)

For a variety of reasons, including the way peremptory challenges are exercised and the limited numbers of citizens who want or who can afford to serve on a jury, it has been observed that jurors in the United States are very ordinary citizens at a time when the evidence that they are supposed to analyze, such as DNA evidence, is becoming increasingly complicated. On top of that, American juries get less help in performing their job than juries in other common law countries. In the United States, unlike other common law countries, judges usually do not summarize or review the evidence with the jury at the end of the trial.[27] While American judges initially had this power, many jurisdictions under the sway of American populism passed statutes that expressly took this power away from judges.[28] But even where judges are permitted to summarize the evidence, such as our federal courts, judges rarely exercise that power.[29] When one considers that the argumentation in American courtrooms can be extreme and there are fewer restraints on advocacy than exist in other common law systems, I think that there is good reason to question whether the American jury is being given sufficient help.

E. A Warning About the Relationship Between Procedure and Punishment

I want to move from a discussion of juries and jury selection to a more general point about the troubling relationship between our complicated system of procedure and the growing harshness of penal law in the American criminal justice system. Maybe the problem that I am going to describe is only a problem in the United States. I hope that is the case. But I worry that what is happening in the United States may happen in other countries.

As suggested above, we have a very complicated and expensive trial system. Though our crime rate remains far higher than that in most other western countries, we require, in theory, juries in almost all criminal cases. But what happens when reality meets theory and the system cannot begin to

27. *See generally* Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988).

28. Judge Weinstein lists Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington, and West Virginia as all having statutes which forbid judges from summarizing the evidence for jurors. *Id.* at 188 nn. 17-18.

29. *Id.* at 169-70.

provide these rights in all but a small percentage of our criminal cases? Or put another way, what happens in a system when prosecutors and judges do not want many cases going to trial? Put bluntly, the system needs to find ways to work around its trial system and to pressure defendants to give up their constitutional protections. One way to do that is to threaten defendants with increased punishment if they dare to go to trial.

What I am suggesting here is that it is not a coincidence that over the last ten or fifteen years there has been a tremendous increase in the harshness of criminal law in the United States. What we have witnessed in the United States has been criminal laws steadily increasing the punishments that defendants will receive if convicted.[30] These statutes increasing punishments are of different types. Sometimes the range of punishment for a crime is increased so that a defendant may face a very high maximum punishment if the judge feels it is appropriate for the crime.

Another way that sentences have grown harsher is through statutes that restrict the sentencing options of the sentencing judge by requiring that a specific minimum sentence be imposed on anyone convicted of the particular crime. Thus, for example, someone caught in possession of a specified amount of cocaine might face a mandatory minimum punishment of five years or even ten years. This is a very powerful weapon for prosecutors because it does more than threaten a defendant with a harsh punishment should the defendant be convicted; it promises the defendant that such a sentence will be imposed and there is nothing a trial judge can do even if the sentence seems too harsh for the offender or the offense.

Another type of statute promising a defendant a harsh sentencing result if the defendant is convicted under the statute is what we refer to as "habitual offender" statutes or in some jurisdictions, such as California, "three-strikes" statutes. These statutes vary from state to state. Many states have two or three versions of these statutes. A typical habitual offender statute provides that if a defendant is found guilty of the crime with which he has been charged and, in addition, the jury finds that he has been previously convicted of separate crimes on three prior occasions, the defendant must be sentenced to life in prison.

Statutes with high mandatory minimum punishments and habitual offender statutes offer tremendous advantages to prosecutors because they put tremendous pressure on defendants to waive their rights and avoid trial by agreeing to a plea bargain. There is no tradition of mandatory prosecution in the United States as there often is in continental systems and broad

30. The growing harshness of American sentencing laws and the political pressure that have encouraged this development have been the subject of book length studies. *See, e.g.*, KATHARINE BECKETT, MAKING CRIME PAY (1997); MICHAEL TONRY, SENTENCING MATTERS (1996).

prosecutorial discretion in the filing and selection of criminal charges is a central part of our justice system. Thus a defendant need not be charged as an habitual offender even if he has prior convictions that would make him eligible to be so charged. The way it often works in practice is that a prosecutor will often agree not to file an habitual offender charge, if the defendant agrees to plea guilty to his present charged crime and accept a certain sentence.

It would work similarly in the case of a statute with a high mandatory minimum sentence. The prosecutor would agree to a plea bargain to a lesser charge that would permit the defendant to avoid a high mandatory minimum—if the defendant agreed not to contest his guilt at trial.

The leading Supreme Court case on plea bargaining, *Bordenkircher v. Hayes*,[31] shows how the system works today and the pressures that these harsh statutes put on defendants. In *Hayes*, the defendant was charged with burglary and the prosecutor offered the defendant a plea bargain. If the defendant pled guilty to the burglary and avoided trial, the prosecution would agree to a sentence of five years in prison. But if the defendant did not accept that plea bargain, the prosecutor warned that he would file an additional charge against the defendant charging him with being a habitual offender. If convicted of the burglary and of being an habitual offender, he would receive a mandatory life sentence.

The defendant chose to exercise his right to a trial. The defendant was convicted of the burglary and of being an habitual offender with the result that he received a life sentence. Notice that the prosecutor would have been willing to limit the defendant's sentence to five years in prison if the defendant had pled guilty to the burglary. But by exercising his constitutional right to have the case proven at trial, the defendant got a life sentence and there was nothing the judge could do to soften the blow.

There are many things that the Court might have said about this harsh result. The most obvious might be to ask how can it be just for a prosecutor to think that a sentence of five years was appropriate for the offender and the offense and then charge the defendant in such a way that he receives a life sentence for exercising his constitutional right to trial? Standard 3-3.9 of the ABA Standards for Criminal Justice states that a prosecutor "should not bring . . . charges greater in number or degree . . . than are necessary to fairly reflect the gravity of the offense."[32] If the prosecutor thought that a sentence of five years would sufficiently reflect the punishment appropriate for the burglary, wouldn't adding a charge mandating a life sentence seem to violate that provision?

31. 434 U.S. 357 (1978).

32. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, § 3-3.9(f) (3rd ed. 1993).

But the Majority did not see the issue as raising difficult issues about the scope of prosecutorial discretion or the possible ethical limits that should control prosecutorial power. The Supreme Court upheld the life sentence in an opinion that basically says: "This is the way plea bargaining works." The opinion can be criticized on many grounds, but not for its honesty.

While harsh sentencing laws have always existed in the United States, what is changing is the number of these statutes. What these statutes do is effectively shift sentencing power, which has traditionally been vested in judges, from the judges and place that power under the control of prosecutors. In our system, prosecutors are not judicial figures and they often see it as being in the public interest to keep cases from going to trial. Habitual offender statutes as well as statutes with high mandatory minimums are attractive to prosecutors because they put pressure, sometimes extreme pressure, on defendants to accept plea bargains and waive their rights to trial.

Now I do not want to appear to be saying in this article that our jury system *causes* harsh punishments, or, even more generally, that our complicated and expensive system of criminal procedure has led to statutes threatening very harsh punishments. Crime and criminal justice are political issues in the United States for many reasons and legislators often like to vote for harsh statutes as a way of showing voters that they are not "soft on crime." But at the same time, I do not think that it is a coincidence that a country with a very expensive and an extremely complicated trial system—and one in which there are doubts about its reliability—would encourage mechanisms that would allow the system to avoid trials. The result is unsettling; at a time when our crime rate for violent crime is decreasing, our prison population continues to grow.[33]

One of the main motivations the Supreme Court offered in *Duncan v. Louisiana* for imposing the requirement of jury trials on the states was the Court's belief that juries serve as an important restraint on "the corrupt or overzealous prosecutor."[34] I suggest that our jury system has ended up a very poor restraint on prosecutorial power and may even have indirectly increased the power of prosecutors.

33. The Bureau of Justice Statistics in the Department of Justice reports that at the end of 1999, there were 1,366,721 inmates in federal and state prisons. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS: SUMMARY FINDINGS, *at* http://www.ojp.usdoj.gov/bjs/correct.htm (last revised Nov. 14, 2001).

34. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).