

# Standards for Criminal Procedure and Standards for Criminal Law: The Need for Balance

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## 1 Introduction

This paper analyses standards for criminal procedure and for criminal law from a comparative perspective. I hope to show that standards for criminal procedure need to be balanced by standards for criminal law because, if a balance is not maintained, the consequences can be disastrous for defendants. I will focus on the U.S. criminal justice system to show what can happen when there is not a balance between standards for criminal procedure and standards for criminal law.

Let me start by explaining that, like most American law professors in the criminal area, I teach both criminal procedure and criminal law. But, as I switch from courses in one area to the other over the last few decades, I feel like I am moving between two worlds that are inconsistent and contradictory in the way they treat citizens.

In the world of criminal procedure, the rights of defendants in the United States are many, and they are almost always more powerful than the same rights in common law countries that share the same legal tradition. Our Supreme Court has, for example, fashioned an exclusionary rule that demands the exclusion from use at trial, evidence gathered as the result of police mistakes that are somewhat understandable – a misjudgment on the street as to whether the legal standard for a lawful search or lawful arrest was met.<sup>1</sup> Other common law countries have exclusionary rules, but they typically balance the seriousness of the violation by the police against other factors such as the seriousness of the crime, the nature of the evidence obtained, etc.<sup>2</sup> The U.S. rule is intended to be a powerful

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<sup>1</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>2</sup> See e.g., *R. v. Shaheed*, [2002] NZLR 377 (CA) (New Zealand opinion adopting an exclusionary rule that balances the seriousness of the violation against factors such as the state of mind of those committing the breach of rights, the importance of the evidence, and the nature of the crime). Canada also employs a similar balancing test in deciding whether to exclude evidence as the result of a police error. See also *R. v. Harrison*, 2009 Supreme Court 34, [2009] 2 S.C.R. 494.

deterrent against police illegality, so our exclusionary rule does not permit any balancing in the decision to exclude evidence where the police have erred.

Similarly, under the system of warnings given to arrestees before questioning, as a result of the famous Supreme Court decision in *Miranda v. Arizona*,<sup>3</sup> an arrestee has the power to stop all questioning from taking place if he asks for an attorney. In most other common law countries, a lawyer will be provided if requested, but questioning will then take place. Sometimes putting pressure on a suspect to respond to questions is the fact that a suspect's refusal to answer may be introduced at trial against the defendant.<sup>4</sup> But, in the United States, sophisticated criminals reflexively cut off any questioning by asking for an attorney when they are arrested, because a refusal to be questioned has no adverse consequences and any attorney will tell the suspect not to cooperate in answering questions.

A third example concerns the right to a jury. Like many common law countries, we believe that juries of laypeople should decide important criminal cases. But jury trials are expensive, so the right to a jury trial is limited in other common law countries to rather serious crimes;<sup>5</sup> in the United States a defendant has the right to a jury trial even for minor crimes where no imprisonment will take place even if there is a conviction.<sup>6</sup>

One final example concerns the giving of testimony at trial. In some common law countries, if a defendant wishes to testify at trial, he must testify at the start of the defense presentation before his other fact witnesses.<sup>7</sup> Such a rule was declared unconstitutional by the Supreme Court,<sup>8</sup> so, for strategic reasons, defendants always testify at the end of the defense case, which provides defendants a chance to tailor their testimony to better fit what other witnesses have said.

I could go on and discuss other defendants' rights that are by degrees more powerful in the United States than in other common law countries, but the general idea is clear. Criminal procedure in the United States declares itself, over and over, to be nervous

<sup>3</sup> 384 U.S. 436 (1966).

<sup>4</sup> In the United Kingdom, inferences from silence are governed by Sections 34-39 of the Criminal Justice and Public Order Act 1994.

<sup>5</sup> In Canada, a defendant has the right to a jury trial only for felonies punishable by five years or more. See Section 11(f) of the Canadian Charter of Rights and Freedoms. In Australia, even rather serious felonies carrying a punishment of up to ten years may, in certain circumstances, be tried in front of a judge rather than a jury. See Michael Chesterman, *Criminal Trial Juries in Australia: from Penal Colonies to a Federal Democracy*, 62 J. of Law and Contemporary Problems 69 (2009).

<sup>6</sup> In *Baldwin v. New York*, 399 U.S. 66 (1970) the United States Supreme Court declared the constitutional right to trial by jury extended even to misdemeanor offenses punishable by up to one year in jail.

<sup>7</sup> This is a statutory rule in England. See Section 79, Police and Criminal Evidence Act 1984 (stating that if the defense intends to present two or more fact witnesses, one of which is the accused, the accused shall be called before the other witnesses).

<sup>8</sup> See *Brooks v. Tennessee*, 406 U.S. 605 (1972).

about state power, and defendants must be given many powerful procedural protections during the investigation and at trial.

But, when it comes to criminal law, our criminal justice system changes. When defendants are convicted in the United States, they face punishments that are much harsher than they would receive for the same crime in other common law countries or certainly in Western Europe. One often hears of punishments that seem even to deny the laws of science as defendants get sentenced to 90, 200 or even 1,000 years in prison. “Life sentences” once allowed a possibility of parole at a distant point – perhaps after having served 15 or 20 years. But many states have changed their laws so that life sentences mean one’s natural life.

The result of the harshness of American sentencing laws is an incarceration rate that is much, much higher than the rate in countries with which the U.S. would normally compare itself. For many urban communities in the U.S., prison is not the exception, but a rite of passage for young men.

This is hardly a secret. The Economist ran a story in 2010 on the topic featuring a dramatic cover illustration of Lady Liberty herself peering out from behind the bars of a prison cell.<sup>9</sup> The article intoned that “[n]o other rich country is nearly as punitive as the Land of the Free.”

The most complete of the popular articles on the topic of the U.S. incarceration rate was a front-page article in the New York Times in 2008 that appeared with an interactive online chart that allowed readers to click on different countries around the world and compare incarceration rates.<sup>10</sup> When one clicked on the United States and then on other countries, one saw quickly the reason the article was entitled, *Inmate Count in U.S. Dwarfs Other Nations*.<sup>2</sup> England’s incarceration rate was only 151 per 100,000, Germany’s was 88, Norway’s 75, and so on; while the U.S. rate had climbed to 751 incarcerated citizens per 100,000 – put more bluntly, our incarceration rate was five times that of England, ten times that of Norway.

The obvious question is: what has caused prison sentences in the U.S. to become so harsh? A standard response is to blame politicians. Thus, The Economist, after noting that the U.S. incarceration rate has quadrupled since 1970, explains that, since then:

“... the voters, alarmed at a surge in violent crime, have demanded fiercer sentences. Politicians have obliged. New laws have removed from judges much of their discretion to set a sentence that takes full account of the circumstances of the offence. Since no politician wants to be soft

<sup>9</sup> *Rough Justice*, The Economist, July 22, 2010, available at: [http://www.economist.com/node/16640389?story\\_id=16640389](http://www.economist.com/node/16640389?story_id=16640389).

<sup>10</sup> See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, New York Times, April 23, 2008, available at: [http://www.nytimes.com/2008/04/23/us/23prison.html?\\_r=1&fta=y](http://www.nytimes.com/2008/04/23/us/23prison.html?_r=1&fta=y).

on crime, such laws, mandating minimum sentences, are seldom softened. On the contrary, they tend to get harder.”<sup>11</sup>

Although this is true, it is incomplete and unsatisfying as an explanation. We had politicians in the 1940s, 1950s, and 1960s, and crime was often high in those decades as well – so why did sentencing laws start to become so harsh only in the late 1970s? Also, it is not just sentences for violent crimes that have escalated, but for all crimes. As the New York Times article points out, if lists were compiled based on annual admissions to prisons per capita, some European countries would be higher on the list than the United States. The U.S. incarceration rate stems from the fact that those sentenced to prison for almost all crimes receive much longer sentences than they would receive in other countries. The Times article included a chart matching the incarceration rate over time with the crime rate and what it showed was that whether the crime rate went up or down in the period between 1970 and 2008 (and it went down sharply after 1990), the incarceration rate continued its steep climb nonetheless.

An historical chart of the U.S. incarceration rate shows how dramatically the rise in the U.S. incarceration rate has been. In the period between 1925 and 1975 the incarceration rate was roughly 150 to 175 citizens incarcerated per 100,000. But starting in the late 1970s, the rate began to climb sharply and consistently year after year for the next four decades until it arrived at its present lofty level.

This historical trend line is somewhat baffling. In those decades of the early and middle twentieth century, when racial discrimination was widespread and when constitutional protections for criminal suspects were comparatively weak, the U.S. incarceration rate was steady and even perhaps lenient. I realize an incarceration rate of 175 per 100,000 may still seem high compared to Europe, but when you take into account the availability of guns in the U.S., the lack of a strong social services safety net, and other features that separate the U.S. from Europe, the rate of 175 per 100,000 seems understandable. Yet, in the period since the 1970s, when our criminal justice system seemed much improved and we had made considerable strides against racial discrimination, the United States began incarcerating more and more of its citizens for longer and longer periods of time.

So why did our incarceration rate escalate so dramatically over the last thirty years?

This is a complicated question. The best book on the subject is Whitman’s, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*.<sup>12</sup>

This is a beautiful book that compares the United States and its criminal punishments with the continental systems of Germany and France. Whitman paints in broad philosophical and historical strokes as he discusses the differences between the two traditions.

<sup>11</sup> *Too Many Laws, Too Many Prisoners*, The Economist, July 22, 2010, available at: [http://www.economist.com/node/16636027?story\\_id=16636027](http://www.economist.com/node/16636027?story_id=16636027).

<sup>12</sup> James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford 2003).

Thus, for example, he argues that the U.S. egalitarian tradition allows it to show less respect for offenders as persons and thus to impose more degrading punishments than would be permitted on the continent where traditions of social hierarchy are strong.

My purpose here is not to dispute what Whitman says, but to supplement what he says a bit by focusing on more immediate causes of the escalation in the U.S. incarceration rate in the period from 1978 – 2008. What I hope to show is that there were some things happening the 1970s and beyond that caused or, at least, helped to cause the quintupling of the U.S. incarceration rate.

Let me start with the caveat that one has to speak in generalities when discussing the criminal law in the United States, because criminal law is mainly the responsibility of each of the fifty states with the federal system handling only those crimes that have special ties to our federal system. Thus, murder, robbery and theft are state crimes with federal courts responsible only for a much smaller set of crimes such as the murder of a federal agent or a federal official, robbery of bank that is federally insured, and theft of U.S. government property.

There are thus 51 jurisdictions, and statutes can vary considerably from one jurisdiction to another, so that one has to generalize to speak about sentencing in the United States. With that background and the caveat, let me say a few things about our history of sentencing. Like many countries, we have struggled to find the correct theoretical foundation on which to punish offenders and, over time, we have seen the foundation shift. At times, punishments were extremely harsh, but at other times, they were moderate. Let me give two examples.

In colonial times, punishments were harsh. For less serious offenses there was a system of fines and those who could not pay were sometimes put in stocks, branded, whipped, or even banished from the colony. For repeat offenders, there was often the death penalty.<sup>13</sup>

Yet, shortly after the American Revolution, some states, influenced by Beccaria, enacted criminal sentencing laws based on the view that the certainty of punishment is more important than its severity and that punishment should always be proportionate to the harm of the offense. Most of the harsh colonial punishments were abandoned and even the death penalty was drastically limited. In place of harshness, punishment was sought that it was hoped would have a rehabilitative effect on offenders. During this period, prisons began to be established to aid in the rehabilitation of offenders.

This ebb and flow between harshness and moderation continued even into the early 20<sup>th</sup> century where the reformative idea of punishment held sway and criminal sentences usually were partly “indeterminate”, meaning that the offender could shorten the time spent in prison by showing progress toward rehabilitation. Thus, a judge might sentence an offender to three years in prison, but the offender might be able to obtain release in

<sup>13</sup> On the history of sentencing, see Alan M. Dershowitz, *Background Paper in Twentieth Century Fund, Fair and Certain Punishment* pp. 83-91 (1976).

half of that time if the offender had shown progress in prison and if prison experts felt that the offender was ready to return to society.

Some jurisdictions went even further and made almost all sentences completely indeterminate, believing that only experts at the prison could judge how well the offender had been reformed so that he might be released if ready to reenter society. Judges in such a jurisdiction did not really impose a sentence, but simply sent the person to prison to be evaluated and periodically assessed as to his readiness for release.

In the U.S., the indeterminate approach to sentencing came under attack and was largely abandoned in those jurisdictions where it had flourished. Part of the reasons was skepticism over the ability of prisons to rehabilitate and the ability of experts to assess an inmate's likelihood to continue on the path of crime. Sentencing was once again the responsibility of the trial judge who had broad discretion in deciding the sentence the offender would receive.

## **2 The erosion of judicial control over sentencing**

What happened starting in the 1970s was a movement to make sentencing more predictable. This is best exemplified by the federal sentencing guidelines that aimed to make sentencing more scientific by delineating what factors were important and what factors were to be ignored by the judge at the time of sentencing. Looking back, perhaps it was hubris to think that we could enumerate the factors surrounding the crime and the offender, and give them each a certain weight so as to permit a more precise approach to sentencing, but that was certainly the aim of the guidelines.

Whitman sees the guidelines

“...as symptomatic of a larger shift away from the judicial and toward the legislative in American criminal law. The guidelines belong to a culture that aims to take criminal justice out of the hand of judges and return it to “the people” – which means that the guidelines inevitably lend themselves to the worst excesses of American democracy.”<sup>14</sup>

I don't disagree with Whitman, but his summary is a bit stark – the legislatures are bad and judges are good. I think what happened is that a structural problem in the foundation of our criminal justice system emerged, leading to a collapse of judicial sentencing.

Sentencing is a strange phenomenon in the United States. Judges have traditionally had tremendous power over the fate of defendants at sentencing. It was not unusual, and is still not unusual in some states, for a defendant at the time of sentencing to face a single judge with the power to sentence a defendant, for most crimes, anywhere in a range from zero to 10, or zero to 20, or even zero to 60 years in prison. Moreover, this power is almost

<sup>14</sup> See Whitman, *supra* note 12 at 55.

completely unlimited: as long as the sentence is within the legal range, there is usually no appellate review.<sup>15</sup>

Sentencing is unique in our heavily proceduralized system. Every ruling a judge makes is typically subject to appellate review, except the one that is often of greatest importance to the defendant – the length of time he will serve as punishment for his crime.

Not surprisingly, this sort of absolute sentencing power led to terrible inconsistencies in sentencing from judge to judge and it began to be attacked in the late 1970s. It was not hard to find studies of judges, who were given the same file and asked to state the sentence they would impose, that showed wild inconsistencies. There were also judges themselves who attacked what judges were doing at sentencing.<sup>16</sup>

But the problem was not so much the judges or the fact that they were sentencing, but a system that gave them no guidance and provided no meaningful review of sentencing decisions.

There is more to this structural problem. We have a Supreme Court that has imposed a burden on states of jury trials even for relatively minor offenses where no prison would be warranted even if the offender is convicted. One reason for requiring a jury, said the Court in *Duncan v. Louisiana*, is to protect citizens against “the compliant, biased or eccentric judge.”<sup>17</sup> Yet, at sentencing, an offender may face a “compliant, biased or eccentric judge” with no appellate review of the particular sentence as long as it is somewhere within the broad sentencing range in the statute.

We are not the only country where judicial sentencing has been under attack – Canada and England have had their share of problems with sentencing. But judges in those countries have rich jurisprudence of sentencing with which to defend what they did. The result is that sentencing remains very much in control of judges in those countries. If there are to be guidelines or specific standards for sentencing, they play a central role in drafting such guidelines.

### 3 Returning criminal justice to “the people”

Whitman describes the movement toward more legislative control over sentencing through the enactment of determinate sentences that limit judicial sentencing as exhibiting one of the “worst excesses of American democracy”. I agree with that statement to a certain point, but I hope to show that the criminal justice system did some things to stir up public anger.

First, maybe it is an excess of democracy, but populism has deep roots in the United States. Most of the judges in our state judicial systems (as well as many police officials

<sup>15</sup> See Arthur W. Campbell, *Law of Sentencing*, sec. 14.4, 579 (Eagan, Thomson/West, 2004).

<sup>16</sup> See Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1973).

<sup>17</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1969).

and prosecutors) are elected. Even justices of our state supreme courts are often elected. There have been attempts over the years to change this, at least as to supreme courts, but they always fail.

There is no doubt that American populism as applied to judges makes it very difficult for judges to speak out as forcefully on the merits of proposed legislation as they might. While the “unelecting” of a judge is a rare event, it does occasionally happen that a group of citizens mounts a successful campaign against a judge or even a set of judges.<sup>18</sup> There is thus a chilling effect on speaking out too strongly about proposed laws that would increase sentences.

Moreover, the United States lacks a national criminal code, so that the pressure on legislatures is local. In the wake of terrible crimes, there is often considerable pressure on legislatures in that state to respond by raising criminal sentences or by enacting statutes that make it more difficult for offenders to get out of prison. We have a number of laws passed in the wake of horrible crimes in various states that have come to be referred to by the name of the victim such as Jenna’s Law,<sup>19</sup> Megan’s Law,<sup>20</sup> Jessica’s law,<sup>21</sup> and so on.<sup>22</sup> While no doubt there are many politicians who exploit crime as an election issue, one has to understand how strong the pressures can be even on conscientious legislators “to do something” when horrible crimes occur.

Another aspect of the pressure on legislators in the United States stems from the fact that there is usually in the United States no justice ministry or justice department, as there is in Canada and most other western countries, which might buffer politicians from the sort of direct political pressure that is put on them in the U.S. In Canada, for example, and, I would assume, it is true in most European countries, the chance of a proposed law being enacted without the support of the justice department is very remote. We don’t have such an apolitical ministry with experts on criminal matters that might deflect some

<sup>18</sup> One of the most famous examples of judges being recalled in an election were the recalls of Chief Justice Rose Bird of the California Supreme Court and two other justices in 1987 due to public anger over their votes in cases involving the death penalty. See <http://www.nytimes.com/1999/12/06/us/rose-bird-once-california-s-chief-justice-is-dead-at-63.html>.

<sup>19</sup> See Evelyn Nieves, *Our Towns: Lost Crusader Inspires ‘Jenna’s Law’*, New York Times, May 3, 1998, available at: <http://www.nytimes.com/1998/05/03/nyregion/our-towns-lost-crusader-inspires-jenna-s-law.html>.

<sup>20</sup> “Megan’s Law” stemmed from the savage rape and murder in New Jersey of a seven-year old girl, Megan Kanka. The law, which was passed not just in New Jersey but in many states, did not raise sentences for sex offenders, but requires notification to neighbors when a convicted sex offender moves into the neighborhood. See <http://www.nytimes.com/1997/05/31/nyregion/megan-s-laws-face-court-challenges.html?ref=megankanka>.

<sup>21</sup> See Chris Hawke, *Fla. Gets Tough New Child Sex Law*, CBS News, May 2, 2005, available at: <http://www.cbsnews.com/stories/2005/05/02/national/main692465.shtml>.

<sup>22</sup> The horrific murder of Polly Klaas, a twelve-year old dragged at knifepoint from a slumber party at her mother’s home, paved the way in California for the passage of the so-called “three strikes” law in that state, which mandated a life sentence upon a third conviction.

of the tremendous pressure citizens' groups can place on politicians in the United States. The pressure on our legislators is thus often powerful and direct.

Against that background, there emerged, in the 1970s and beyond, public anger directed to the criminal justice system. One reason was the expansion of criminal procedure protections described above. There was a feeling that the Supreme Court was considering only defendants and tilting things too much in their favor.

The late Stuntz in his book, *The Collapse of American Criminal Justice*,<sup>23</sup> explains that had the Court acted to protect Gary Duncan, the man whose case led the Court to extend the right to a jury trial in *Duncan v. Louisiana*,<sup>24</sup> or Dolree Mapp, the woman linked to the exclusionary rule in *Mapp v. Ohio*,<sup>25</sup> from the trumped up crimes that had been filed against them, public reaction might have been positive. But the proceduralized law the Court announced in their cases, according to Stuntz, "seemed designed to protect the guiltiest suspects and defendants" which was "a pattern not likely to appeal to ordinary voters".<sup>26</sup>

Even though criminal law is much more a state issue in the United States, crime became a national issue in the United States, to the point that even presidential candidates had to express their support for harsh punishments for offenders.

Another force for change in the law at this time was the victims' movement which put tremendous pressure on state legislatures, and even Congress, for changes in the law. The victims' movement was, of course, not confined to the United States. But it had a tremendous impact in the U.S. The claims of victims that they had been forgotten by the system resonated strongly with citizens and, as a result, there were many overdue changes to improve the system as it affected victims outside the courtroom. Statutes required, for example, that victims be kept informed of the general progress of their case, that they be notified of hearings, and they be consulted on possible plea bargains. But as for pretrial and trial procedures inside the courtroom, the Court had spoken and it was hard to see how changes could be made.

But one area where the procedure was open to change was sentencing, and every state, by statute or state constitutional amendment, started to give victims the right to be heard at sentencing. "Victims impact statements," as they came to be called, are often dramatic and compelling statements as victims – or the families of victims - describe how the crime has impacted their lives. But what is the relevance of such statements for purposes of sentencing?

The issue came before the Supreme Court three times in the context of death penalty cases, where the decision to impose the death penalty is a question for the jury. In *Booth*

<sup>23</sup> William J. Stuntz, *The Collapse of American Criminal Justice* (2011).

<sup>24</sup> 391 U.S. 145 (1969).

<sup>25</sup> 367 U.S. 643 (1961).

<sup>26</sup> See William J. Stuntz, *supra* note 23 at 242.

*v. Maryland*<sup>27</sup> in 1987 and in *South Carolina v. Gathers*<sup>28</sup> in 1989, the Court held such information was constitutionally inadmissible because it was so likely to lead jury to impose the death penalty for reasons having nothing to do with the blameworthiness of the crime. But the Court reversed itself, just a few years later, in *Payne v. Tennessee*,<sup>29</sup> allowing such evidence at sentencing.

It seems likely that the growth of victims impact statements pushed sentences higher as sentencing became more adversarial, often pitting the victim against the defendant. Whitman writes quite a bit in *Harsh Justice* about the absence of mercy toward offenders in the United States compared to Europe.<sup>30</sup> It is very hard to show mercy in a courtroom when the victim is also present demanding punishment for the crime that affected the victim and her family deeply.

Whether or not victims' impact statements increased sentences, the victims' movement showed citizens that they could influence the law and one of the most obvious ways to influence the law was to urge harsher sentences. Populist initiatives leading to harsher penal policies have become rather common over the last three decades.<sup>31</sup>

#### 4 Harsh deterrent sentences

Another factor of central importance in pushing sentences higher and higher has been the emergence of harsh laws in the U.S. aimed at deterring crime in question. The United States – at least in its legislation - has come to accept the theory that harsh punishments will discourage criminal behaviors. This is not the classic deterrence theory of Beccaria, the political philosopher of the 18th century, who is thought of as the father of deterrence. Beccaria advocated deterrence through consistent application of *proportional* punishments. Thus in his essay *On Crimes and Punishments*, Beccaria wrote:

“The purpose of punishment, therefore, is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, *in keeping with proportionality*, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.”<sup>32</sup>

<sup>27</sup> 482 U.S. 496 (1987).

<sup>28</sup> 490 U.S. 805 (1989).

<sup>29</sup> 501 U.S. 808 (1991).

<sup>30</sup> See Whitman, *supra* note 12 at 32-39.

<sup>31</sup> For a treatment of the “three-strikes law” in California – a state usually considered among the most progressive states on criminal justice policy, see Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *PUNISHMENT AND DEMOCRACY: THREE-STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001).

<sup>32</sup> See Cesare Beccaria, *On crimes and punishments, and other writings*, at 11, translated by Aaron Thomas and Jeremy Parzan (2008)(Translation of *Dei delitti e delle pena*, published 1764) (emphasis added).

But in the United States, a much more aggressive form of deterrence, I call it “harsh deterrence,” has taken hold. Harsh deterrence insists that crime can be limited by imposing, or threatening to impose, harsh punishments that are disproportional to the underlying crime.

To the person on the street, there is a common-sense attractiveness to this theory of harsh deterrence. One might reason, who would experiment with drugs if a mandatory 5-year or 10-year sentence hangs in the balance? But what is the evidence that harsh punishments deter? After more than 40 years of study, we don’t know if harsh punishments deter.

Instead there has been a nearly continuous debate over the deterrent effect of harsh penalties. The most studied example has been the death penalty, which would seem among the easier deterrents to study since we have many states with the death penalty, but some that have never had the death penalty. Also we know – unlike many crimes – how many murders take place each year. But, what we have seen are various economists, starting in 1975 shortly after the development of powerful mathematical tools for analyzing large sets of data, claiming, every decade or so, to have found a deterrent effect from the death penalty.

In 1975, the economist Ehrlich published a paper in which he used data from the period 1963-1969 and found that there was a statistically significant negative correlation between the murder rate and execution rate, meaning that there was a deterrent effect from the death penalty.<sup>33</sup> He estimated that for each execution approximately seven or eight murders were deterred.

Because Ehrlich’s study had caused such an uproar in the academic community, the National Academy of Sciences put together a panel chaired by Nobel Laureate Lawrence Klein to evaluate Ehrlich’s work. The panel concluded that “the available studies provide no useful evidence on the deterrent effect of capital punishment.”<sup>34</sup> The panel then went on to state that “research on the deterrent effects of capital sanctions is not likely to provide results that will or should have much influence on policy makers.”<sup>35</sup> In short, the panel was saying to legislators, “we can’t help you on deterrence”.

This ebb and flow has continued over the years with different economists claiming to have shown the deterrent effect of the death penalty - that it saves 5 lives,<sup>36</sup> or 14 lives,<sup>37</sup>

<sup>33</sup> See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AMER. ECON. REV. 397 (1975).

<sup>34</sup> *Nat’l Academy of Sciences, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* 3, 9, 12 (eds. Alfred Blumstein et al., 1978).

<sup>35</sup> Id.

<sup>36</sup> See H. Naci Mocan & R. Kaj Gitting, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & Econ. 453 (2003).

<sup>37</sup> See Hashem Dezhbakhsh, Paul H. Rubin, and Joanna Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmortem Panel Data*, 5 AMER. L. AND ECON. REV. 344 (2003).

and so on. These studies are then followed by strong attacks from other economists claiming that the variables were not independent, that the data sets were incomplete, that data sets in other states show no similar effect, etc.<sup>38</sup> Notice that this is not a debate between economists who say the death penalty deters and those who say it does not deter. It is a debate between those who say it deters and those who say, in essence, that the world is a messy place for economists.

The deterrence-or-not debate puts tremendous pressure on legislators – the harsh law that is being proposed might deter, but we don't know. For legislators, this is a contemporary version of Pascal's wager – if the law *might* save lives or keep children from being abused or encourage criminals not to use guns, there is pressure to take that bet in the absence of evidence showing such benefits will not occur.

## 5 The lack of protections against harsh laws

It is fair to ask why haven't other countries fallen under the sway of the economists? I think Whitman explains this well. He states that:

“The European systems all subscribe to some version of the principle of proportionality. This principle holds that sentences, though indeterminate, cannot be disproportionate to the gravity of the offense; the legal profession takes it very seriously; and it means that sentences of American severity are effectively impossible.”<sup>39</sup>

Where is similar protection in the United States against harsh sentences? How can the Supreme Court be so protective of defendants before trial and at trial, but be blind to their treatment after conviction?

Here we have a constitutional weakness. The writers of the Bill of Rights chose to regulate procedure heavily and substantive criminal law lightly. There are, for example, no restrictions on the kinds of behavior that can be criminalized. Nor is there any prohibition of punishments that are not “strictly and obviously necessary” or any requirement that punishments be proportional to the crime and the offender. Thus, the Supreme Court is left pretty much with the constitutional protection against cruel and unusual punishments.

As for the protection against cruel and unusual punishments, Whitman states that “[p]roportionality suffered ... a grievous blow in the Supreme Court's 1991 decision of *Harmelin v. Michigan*, in which the court saw no constitutional disproportion in a life sentence imposed for possession of 672 grams of cocaine.”<sup>40</sup>

<sup>38</sup> See generally John J. Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *Stan. L. Rev.* 791 (2005).

<sup>39</sup> Whitman, *supra* note 12 at 57.

<sup>40</sup> *Id.*

I think, if anything, *Whitman* is too easy on the Court. The Court in creating a deterrent exclusionary rule aimed at deterring illegal arrests and searches expressed its own faith in the belief that we can deter our way out of social problems. It would have been hard for the Court to turn around after that and condemn attempts by legislatures to do the same.

## 6 Harshness and the decline of trials

This paper is a warning that criminal justice systems can develop problems when there is not a balance between standards for procedure and standards for fair criminal laws and for punishments that are just. The problem we face in the United States is that our harsh criminal statutes threaten to undercut our system of procedural protections, as defendants are sometimes forced to enter into plea bargains to avoid the harsh sentences that conviction would bring. Going to trial can be dangerous for a defendant, even one with a strong defense. In this regard, it should be noted that juries historically in the US were traditionally a safety valve for defendants who did not have a formal defense under the law. Juries were moral arbiters who could give a defendant a break if they felt it was appropriate.<sup>41</sup> Today, the risk of conviction is just too high for many defendants to go to trial.

Harsh sentences thus feed the incarceration rate by allowing courts to handle many more cases than they once could, due to the fact that fewer and fewer defendants can risk trial. There is today a healthy literature on the “vanishing trial”<sup>42</sup> in the United States as the percentage of convictions that result from trials is increasingly small.

Prosecutors who once had to make some hard decisions about whether to charge defendants with crimes due to a lack of resources can handle much larger numbers of cases, because defendants cannot risk mandatory sentences and will plead guilty to lesser crimes that will allow them to avoid the mandatory sentence.

If they choose to exercise their constitutional right to trial, they will pay a very heavy price. The leading case on plea bargaining in the United States is *Bordenkircher v Hayes*,<sup>43</sup> a case that shows what can happen to a defendant who opts for trial. Hayes was charged with uttering a forged instrument in the amount of \$88.30 and the prosecutor offered to recommend Hayes receive five years in prison if he pled guilty. But the prosecutor warned Hayes that if he did not plead guilty and “save the court the inconvenience and necessity of a trial,” the prosecutor intended to file a habitual offender charge against Hayes as his present felony would then be his third felony and he would receive a life sentence if con-

<sup>41</sup> See William J. Stuntz, *supra* note 23, 83-85.

<sup>42</sup> See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, *J. of Empirical Legal Studies* 459-570 (Nov 2004).

<sup>43</sup> 434 U.S. 357 (1978).

victed. Hayes went to trial, a habitual offender charge was filed against him, and Hayes eventually received a life sentence. The Supreme Court upheld Hayes' sentence.

*Hayes* raises questions about the limits of plea bargaining, about the ethics of charging, and about the amount of pressure that should be allowed to be put on defendants. But the point here is simply that the vast majority of defendants cannot risk trial when mandatory sentences hang in the balance. Thus, we worry not just about the fact that there are very few cases going to trial in criminal courts today, but about whether the wrong cases are going to trial.

## **7 Conclusion**

It is always nice to end on an upbeat note, and I think that one of the few blessings of the Great Recession is that beginning in 2008, our incarceration rate has not increased and it is even beginning to decline by a percentage or two. Some states are starting to struggle to support a large prison system in a period when resources are limited. But whether these economic pressures can cut our incarceration rate by a significant amount - perhaps ten or twenty percent - seems unlikely without more fundamental reforms to protect defendants from harsh laws. The difficulty is not just the fear of public outrage should an inmate who was released early embark on a crime spree, but the fact that the system has come to rely to a great extent on our system of harsh punishments. Courts control large dockets and prosecutors handle large numbers of cases with few "losses". But at least our incarceration rate has stopped climbing; allowing us to hope that the incarceration boom of the last thirty years is at an end.