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Comparative Reflections on *Duncan v. Louisiana* and *Baldwin v. New York*

WILLIAM PIZZI*

In 1968, the Supreme Court handed down one of the most famous cases of the Warren Court era, *Duncan v. Louisiana*,¹ which extended the Sixth Amendment right to a jury trial to the states. Writing for the majority, Justice White declared that “trial by jury in criminal cases is fundamental to the American scheme of justice”² and, thus, Louisiana had violated the Constitution in trying Duncan without a jury for simple battery, which was then punishable by up to two years in prison.³

While the Court in *Duncan* made it clear that there was a category of minor crimes, “petty” offenses that could be tried without a jury without infringing the Sixth Amendment.⁴ The Court refused to draw the line between petty offenses and serious crimes in *Duncan* because it felt that a crime threatening a sentence of two years in prison clearly fell within the category of crimes requiring a jury trial.⁵

Given the enormous volume of cases that flow through lower courts with jurisdiction over misdemeanors and petty offenses, the Court was soon pressed to draw the precise jury trial line. Two years after *Duncan*, in *Baldwin v. New York*, the Court announced more clearly the sweep of the Sixth Amendment when it reversed a misdemeanor conviction punishable by up to one year because no jury had been provided.⁶ The Court in *Baldwin* explained that “no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for

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1. *Duncan v. Louisiana*, 391 U.S. 145 (1968).
2. *Id.* at 149.
3. *Id.* at 161-162.
4. *Id.* at 159.
5. *Id.* at 161.
6. *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970).

more than six months is authorized.”⁷

This Article takes another look at the line drawn in *Duncan* and *Baldwin* to ask whether the sweeping extension of the right to jury trial even to minor felonies and misdemeanors might have been a mistake in retrospect and whether we ought to think about going in a different direction today.

This may seem disrespectful, especially to *Duncan*, which is an iconic decision not just for criminal procedure but also because of the civil rights implications. However, as we have known since the time of John Locke in 1691, well-intentioned government actions can backfire with the result being the opposite of what was intended.⁸ At that time, the English economy was stagnant, so a bill was put forward in Parliament that would have lowered the permissible interest rate that could be charged on loans from the market rate of 6% to a maximum rate of 4%.⁹ The theory was that lowering the cost of borrowing would stimulate the economy by making more loans available to those who wished, for example, to buy property and expand their businesses.¹⁰ The legal philosopher, John Locke, argued, however, that it would have the opposite effect: those with money would find other investments or they would find ways around the law to get their 6% and those schemes would make things worse for borrowers, not better.¹¹

Locke's warning issued more than 300 years ago was an early instance of what economists call “the law of unintended consequences,” meaning that any government action may have consequences that overwhelm or even undercut the benefits that the action was intended to achieve.¹² Our trial system and the requirement of juries for all misdemeanors and felonies is an instance of this “law.” We have fewer criminal trials taking place today in our courts, not more, and the pressure that is being put on defendants to plead guilty and waive their right to trial is enormous. If the right to a jury trial was intended to protect defendants from the tyrannical power of the state, there are reasons for thinking it has failed its task.

This Article will look at the *Duncan* and *Baldwin* line comparatively by examining the trial models in two other common law coun-

7. *Id.* at 69.

8. See ROGER WOOLHOUSE, *LOCKE: A BIOGRAPHY*, 290 (2007).

9. *Id.*

10. *Id.* at 290-291.

11. *Id.* at 290.

12. Morgen Witzel, *From The Editor*, *CORPORATE FINANCE REVIEW*, 2014 1, (Jan./Feb. 2014).

tries, England and Canada. Each of these countries has two criminal courts, one that handles full jury trials but also another court that can try misdemeanors and less serious felonies without a jury.¹³ The essay intends to show that the two trial models are built in such a way that it is almost always advantageous to the prosecution and the defense to have the case tried in the court that hears cases without a jury. With two trial models and the bulk of criminal cases being tried without a jury, the sort of plea bargaining pressures one sees routinely put on defendants in the United States is not necessary and generally is not available or permitted in England and Canada.

This Article has three sections with Section I discussing briefly *Duncan* and *Baldwin* and offering a critique of those opinions. It will also show just how few criminal trials take place today and how much pressure prosecutors are able to put on defendants to convince them to waive all their trial rights and plead guilty. These pressures often involve a threat of punishment much greater than anyone in the courtroom would deem appropriate for the crime in question.

Next, Section II will turn to the English criminal justice system and explain the differences between the two trial courts for criminal cases: magistrates' courts and Crown Courts. It will show that most criminal trials in that country will take place in magistrates' courts where there are no juries. Having a more efficient and less expensive trial procedure for the vast majority of cases, plea bargaining is more limited in England where defendants receive a fixed discount from the sentences they would otherwise receive after trial in exchange for pleading guilty.

Then, Section III will turn to Canada and show that, like England, most criminal trials, even for felonies, will take place in provincial courts where there are no juries rather than in superior courts where jury trials take place. As in England, the charging pressure is strongly reduced because both prosecutors and defendants benefiting if a case can be tried in provincial court.

Finally, the Article will conclude with some thoughts on options for reform if we truly want more defendants to have an opportunity to contest the charges against them.

13. *Criminal Courts*, GOV.UK, <https://www.gov.uk/courts/magistrates-courts> (last updated Aug. 12, 2015).

I. DUNCAN AND BALDWIN

A. *Duncan v. Louisiana*

The story of *Duncan v. Louisiana*¹⁴ is a tribute to the courage of Duncan and his family, who chose to fight instead of plead, as well as the courage of his lawyers who went into a staunchly segregationist parish located fifty miles south of New Orleans to fight for Duncan.¹⁵ Gary Duncan was a nineteen-year-old black man in Plaquemines Parish when criminal charges were filed against him in retaliation because his two twelve-year-old cousins had dared to attend a school previously reserved for white students only.¹⁶ The two boys had been assaulted, threatened, and harassed at their new school.¹⁷ The battery charge stemmed from an incident in which Duncan and his two cousins were involved in a confrontation with four white teenage boys.¹⁸ Duncan had stopped his car and was trying to defuse the situation by getting his cousins into his car and away from the white teenagers.¹⁹ In the process, Duncan “touched” or “slapped” (depending on whose account one believed) one of the white teenagers on the elbow leading to the battery charge.²⁰

Worried that no local attorney would be willing to defend him, Duncan’s family turned to the Lawyers Constitutional Defense Committee, which litigated civil rights cases in Mississippi, Alabama, and Louisiana.²¹ Richard Sobol, a lawyer on leave from a Washington, D.C. law firm, and Robert F. Collins, later to become the first African-American U.S. District Judge, agreed to take the case.²²

At trial, Duncan’s lawyers demanded a jury trial based on the Sixth and Fourteenth Amendment, which was denied and the trial went ahead in front of the local judge, who was a pawn of the political machine. Despite sharply differing accounts of what had happened between the black and white witnesses, the judge found Duncan guilty of simple bat-

14. See Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of Juries*, in CRIMINAL PROCEDURE STORIES 261 (Carol Streiker, ed., 2006). This story is beautifully recounted by Nancy King, in a chapter of a book devoted to detailing the background of famous Supreme Court cases of the criminal procedure revolution.

15. *Id.* at 266-68.

16. *Id.* at 265.

17. *Id.*

18. *Id.*

19. *Id.* at 265-66.

20. *Id.* at 266.

21. *Id.* at 265.

22. *Id.* at 267-68.

tery and sentenced him to 60 days, a harsh sentence for simple battery.²³

Much of Justice White's opinion for the majority in *Duncan* deals with the centrality of jury trial in English legal history. Justice White explained that "by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta."²⁴ Jury trials, he went on to note, "came to America with English colonists, and received strong support from them" such that infringement of that right was one of colonists' complaints against the Crown.²⁵

Against this historical support for jury trials, the opinion noted the strong support for jury trial not just in the federal constitution but in state constitutions as well.

The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime.²⁶

The guarantee of a jury trial, the opinion continued, was intended to provide an accused with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."²⁷

The real issue in the case was, of course, whether simple battery was a sufficiently serious crime to require a trial by jury. Here the Court noted that in 49 of the 50 states, nonjury trials are permitted only for crimes punishable by a year or less.²⁸ While agreeing that some crimes are sufficiently minor or "petty" to be triable without a jury, the Court left the drawing of the exact line open because the Court concluded that a crime punishable by up to two years, as was simple battery in Louisiana, clearly fell within the category of crimes requiring trial by jury.²⁹

The aftermath of *Duncan* is a sobering reminder about the limits of trial by jury as a protection against "overzealous" prosecutors and

23. *Id.* at 269.

24. *Duncan*, 391 U.S. at 151.

25. *Id.* at 152.

26. *Id.* at 154.

27. *Id.* at 156.

28. *Id.* at 161.

29. *Id.* at 161-62.

“compliant” and “biased” judges.³⁰ After *Duncan* came down, Louisiana quickly amended its simple battery statute to make the crime punishable by no more than six months imprisonment and the state prepared to prosecute Duncan again.³¹ One suspects he would have ended up with the same result: 60 days in jail. The prosecution was only halted when a federal court permanently enjoined the prosecution of Duncan on the ground that the case never would have been prosecuted or re-prosecuted but for the civil rights context out of which the case arose and the desire to punish Duncan for his exercise of constitutional rights.³² The federal injunction helped Duncan avoid conviction, but for other black defendants charged in the following years in Plaquemines Parish with simple battery, *Duncan* would not apply.³³

As for defendants charged with minor felonies in the years after *Duncan*, a jury trial may prevent injustice, but a compliant and biased judge can influence a trial outcome even with a jury. And for those defendants who are convicted by a jury, the biased and compliant judge will impose sentence; a decision typically unreviewable in most American jurisdictions.³⁴ In short, *Duncan* was a very imperfect protection against a biased and compliant judge.

B. *Baldwin v. New York*

Having come down very strongly in *Duncan* in favor of jury trials as an essential part of due process but refusing to draw the line indicating which crimes required jury trial, the Court was then asked, in *Baldwin v. New York*, to draw that line. New York City did not provide jury trials to defendants charged with misdemeanors (crimes punishable by up to a year in jail) and Robert Baldwin, who was charged with “jostling” – a pickpocketing offense – was convicted without a jury and sentenced to a year in prison.³⁵

The plurality opinion, again by Justice White, emphasized that New York City was very much an outlier in denying jury trials to those

30. *Id.* at 165.

31. King, *supra* note 14, at 289.

32. *Id.*

33. *Id.* at 288-90.

34. A major treatise on sentencing in the United States, ARTHUR W. CAMPBELL, LAW OF SENTENCING § 14:4 (3d ed. 2004), bluntly explains the limited nature of appellate review of sentences: Despite significant sentencing reform in the late 20th Century, the dominant principle of appellate sentence review remains unchanged: Unless trial court discretion was abused, sentences within constitutional and statutory boundaries are not reviewable.

35. *Baldwin*, 399 U.S. at 67.

charged with misdemeanors.³⁶ Justice White noted that since *Duncan*, the other two states, Louisiana and New Jersey, that allowed convictions for misdemeanors without jury trial – had fallen in line with other states and now required jury trials for such offenses.³⁷ Even in the state of New York, jurisdictions outside New York City provided jury trials in misdemeanor cases.³⁸ 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.³⁹

White’s opinion is a bit unfair to New York City. In the first place, New York City was definitely not Plaquemines Parish, Louisiana. The district attorney’s office for New York County in the late 1960s had long been considered one of the finest prosecutorial offices in the country.⁴⁰ The Legal Aid Society in the city, one of the oldest legal institutions representing indigent clients in the country,⁴¹ was equally respected for the quality of its work in both civil and criminal cases. Second, 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.⁴²

New York City was made to seem grudging and unfair for not following the rest of the state and other big cities in granting jury trials in misdemeanor cases, but New York City is in a very different situation from other cities in New York, and may well be in a very different position from 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.⁴³

The Court was clearly in a hurry to draw a line and, in the process,

36. *Id.* at 71-72.

37. *Id.* at 71.

38. *Id.*

39. *Id.* at 72.

40. 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> (noting that Frank Hogan, the District Attorney in New York City for more than 30 years, was known as “Mr. Integrity”)

41. The Legal Aid Society traces its roots back to 1876. See *The History of the Legal Aid Society*, THE LEGAL AID SOCIETY, <http://www.legal-aid.org/en/las/aboutus/ourhistory.aspx>

42. On the history of the New York City Bar Association, see *generally About the New York City Bar Association*, NEW YORK CITY BAR, <http://www.nycbar.org/about-us/overview-about-us>.

43. *Baldwin*, 399 U.S. at 135 (Harlan, J. dissenting).

to force New York City to do what other American cities apparently did and extend the right to a jury trial to misdemeanor defendants. One would have liked to have seen the Court examine the misdemeanor caseloads in 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.

Another distinction between New York City and other large cities was the right of misdemeanor defendants in New York City to ask for a trial in front of a panel of three judges. Justice Harlan noted in dissent 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.⁴⁴

In many western countries with strong legal systems, a panel of judges is commonplace at criminal trials. But the Court tossed this protection aside quickly stating only that it is necessary to interpose "between the accused and his accuser of the common-sense judgment of a group of laymen[. . .who. . .are less likely to function or appear to function as but another arm of the Government that has proceeded against him]." ⁴⁵ But Justice Harlan's dissent cites to a speech by the President of the Legal Aid Society in New York stating that "49% of the society's clients who were tried in the New York Criminal Court in 1967 (without a jury) were acquitted[.]" ⁴⁶ This would seem to suggest that the judges in hearing misdemeanor cases were not acting as "an arm of the Government." Of course, also not discussed in the Court's opinion was the issue of resources. It was estimated at the time of the *Baldwin* decision that a judge in New York's criminal courts could handle two jury trials a week, but could handle between fifteen and twenty-five nonjury trials.⁴⁷ Did the Court really expect that there would be an increase in misdemeanor trials in the years after *Baldwin*? And did the Court consider that charging might be affected once there was no advantage to a

44. *Baldwin*, 399 U.S. at 136.

45. *Id.* at 126.

46. *Id.* at 136, n.16.

47. *Jury Trials for Misdemeanants: The Effects of Baldwin*, 7 COLUM. J. L. AND SOC. PROBS, 173, 183 (1971) (testimony of Judge John H. Ryan, President of the Association of Judges of the Criminal Court of the City of New York).

prosecutor in keeping a case at the misdemeanor level?

The next subsection will suggest that defendants pay a hefty price for a trial system that is locked into the jury trial model for all misdemeanors and felonies.

C. *Duncan and Baldwin in Retrospect*

In 2004, the ABA Section on Litigation put together a research project entitled, of course, *The Vanishing Trial*, which studied the phenomenon from many different angles.⁴⁸ More than 400 pages of articles were published in the *Journal of Empirical Legal Studies*.⁴⁹ What is shocking about the data is that not only has there been a startling decrease in the percentage of cases that go to trial, but in many jurisdictions a decrease in the absolute number of trials shows that more trials took place in courtrooms in the 1960s and 1970s than take place in courtrooms today.⁵⁰

The Court in *Duncan* paid homage to the long history of jury trials, but the jury trials that took place at common law – where the same jury heard multiple cases over just a couple of days⁵¹ – are not the jury trials that took place in the 1960s and the jury trials of the 1960s are not the jury trials of today.⁵² For example, a study in 1984 in New York found that jury selection in that state was then averaging 12.7 hours of trial time and consumed 40% of the trial itself.⁵³

At some point, when a trial model is too complicated and too expensive, the system will find ways to work around trials and that is what is happening. The federal system, once a model for the states in the way things should be done, is a sad example of the decline in trials. Though the number of judges has doubled since 1962, the absolute

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

49. *Id.*

50. *Id.* at 459.

51. See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 115 (1983). John Langbein describes a session at Old Bailey in October 1754 where a judge presided over sixteen trials with two juries in three days and other judges tried thirty-three other cases with the same two juries during the same sessions. He states that such case dispositions were common at the time.

52. Evidence law has been heavily constitutionalized, see, e.g., *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), as has been jury selection, see, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986).

53. See Marcia Chambers, *Issue and Debate: Who Should Pick Jurors, Attorneys or the Judge?*, N.Y. TIMES (June 13, 1983) <http://www.nytimes.com/1983/06/13/nyregion/issue-and-debate-who-should-pick-jurors-attorneys-or-the-judge.html>.

number of criminal trials declined 30% between 1962 and 2002.⁵⁴ This is a trial system with talented prosecutors and defense attorneys, and excellent judges. It also is supported with tremendous resources. It could afford many more trials than take place today,⁵⁵ but its courtrooms are usually dark.

Of course, state systems have many more criminal cases to worry about – lots of burglaries, assaults, rapes, thefts, and other common crimes that the federal system does not need to concern itself with. It could not possibly provide full jury trials on the federal model for even a quarter of these cases, so plea bargaining is king. While plea bargaining has a long history in the United States, especially for high volume crimes, today everything is plea bargained.⁵⁶ In 1974, 80% of our convictions came from plea bargaining;⁵⁷ now the percentage is much higher – close to 96 or 97%.⁵⁸ It has been reported that the plea bargaining rate in Arizona is 99.3%.⁵⁹

To make plea bargaining work most effectively, defendants need to be threatened with considerably higher sentences, and we have seen states follow exactly that pattern – sentences for all crimes have risen.⁶⁰ Longer sentences enable the criminal justice system to run with brutal efficiency.⁶¹ There are very few trials because defendants cannot risk trials. In turn, this means that many more defendants can be processed through the system.

Two cases show dramatically how the system works today. The first is a well-known Supreme Court case, *Bordenkircher v. Hayes*.⁶² In that case the prosecutor offered to recommend a five-year sentence if Hayes pled guilty to uttering a forged instrument in the amount of \$88.30, but threatened to indict him as a habitual criminal if he refused

54. Galanter, *supra*, note 48 at 493, 500.

55. 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. 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).

56. *Id.* at 84, 154.

57. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 299 (2011).

58. Galanter, *supra* note 48, at 512.

59. See Tom Gleeson, *The Case of the Vanishing Jury*, CRIM. L. & JUST. WEEKLY (June 12, 2009), <http://www.criminalawandjustice.co.uk/features/Case-Vanishing-Jury>.

60. Our murder rate has declined over the last two decades and we have a lower rate of burglaries and robberies than many other countries, including England and Canada, but we punish all crimes more severely. See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html?_r=1&fta=y.

61. Galanter, *supra* note 48, at 494–95.

62. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

to “save the court the inconvenience and necessity of a trial.”⁶³ Hayes refused the offer, the prosecutor brought the habitual offender count, and Hayes received a life sentence.⁶⁴

This happens all the time in our criminal justice system where mandatory sentences are used as weapons to force plea bargains,⁶⁵ but what was interesting in *Hayes* was the naked admission of the prosecutor that a five-year sentence would have been appropriate for the crime and the offender, but he would receive a sentence one suspects three or four times greater if he refused to “save the court the inconvenience and necessity of a trial.”⁶⁶

The Court upheld this sentence, reasoning that this was simply plea bargaining. This was at least an honest opinion because trial penalties of 300% or 400% are not unusual in the United States.⁶⁷ It has been reported that, on average, sentences after trial are close to 300% more severe than after a plea bargain.⁶⁸

The second case that shows the brutal power the prosecution holds over defendants is a 2013 district court case, *United States v. Kupa*.⁶⁹ In that case, the defendant, Lulzim Kupa, who had two prior felony convictions for conspiring to distribute marijuana, was charged, along with other defendants, with distributing more than five kilograms of cocaine. The offense with this amount stipulated as an element carried a mandatory minimum sentence of 10 years in prison and a maximum of life in prison, often referred to as a “10-life count” in the vernacular of federal drug laws.⁷⁰

The government offered Kupa the following plea agreement: if Kupa pled guilty to distributing cocaine, the government would withdraw the count charging the amount that would trigger the 10-life sentence and recommend a sentence of 110-137 months in prison, which would allow Kupa to be released after serving seven years and ten months in prison.⁷¹ But it told Kupa that if he did not accept the plea, as a result of his prior criminal history, it would file against him what is

63. *Id.* at 358.

64. *Id.* at 358–59.

65. Gleeson, *supra* note 59.

66. *Bordenkircher*, 434 U.S. at 360.

67. See Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in in USA 23, 27* in *THE JURY TRIAL IN CRIMINAL JUSTICE* (Douglas D. Koski, ed. 2003).

68. *Id.*

69. *United States v. Kupa*, 976 F. Supp. 2d 417 (E.D.N.Y. 2013).

70. *Id.* at 432.

71. *Id.*

known as “a prior felony information,” as set out in 21 U.S.C. § 851, and he would then get a mandatory life sentence without the possibility of parole.⁷² Kupa was given a day to accept the plea offer.⁷³

When Kupa did not accept the offer, the government duly filed the § 851 information, which mandated life in prison upon conviction.⁷⁴ However, it gave Kupa another chance to plead guilty; if Kupa pled guilty, the government would withdraw the § 851 information and recommend a sentence in the range of 130-162 months.⁷⁵ Thus, for not accepting the early plea agreement, Kupa now was being offered a sentence that would allow his release in nine years and four months. He was again given a day to think it over.⁷⁶

When he did not accept the plea agreement quickly enough, the government forwarded another proposed agreement, this time ratcheting up the Guidelines range (taking away a discount for “acceptance of responsibility”) so that Kupa would now serve ten years in prison if he pled as opposed to a mandatory life sentence if he were convicted at trial.⁷⁷ Kupa finally agreed to the proposal and told the sentencing judge he wanted to plead guilty, “. . . before things got worse.”⁷⁸

Many cases like Kupa’s go under the radar because they are hidden behind a guilty plea. The reason we know so much about Kupa’s plea of guilty is that the judge who accepted Kupa’s guilty plea, Judge John Gleeson, a former prosecutor of some note,⁷⁹ wrote a scathing sixty-page opinion describing how the threat of a §851 prior felony information was used in this case and how it is used in “countless others” to coerce guilty pleas from defendants.⁸⁰ For those defendants who insist on exercising their right to trial, “prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.”⁸¹

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 432-33

76. *Id.* at 433.

77. *Id.* at 433-34.

78. *Id.* at 434.

79. Judge Gleeson was at one time Chief of Special Prosecutions in the U.S. Attorney’s Office for the Eastern District of New York and he was the lead prosecutor in the prosecution of John Gotti, the head of the notorious Gambino crime family. His background is set out at: *Hon. John Gleeson*, PLI, http://www.pli.edu/Content/Faculty/Hon_John_Gleeson/_/N-4oZ1z13fmr?ID=PE464699 (last visited Sept. 2, 2015).

80. *Kupa*, 976 F. Supp. 2d at 419.

81. *Id.* at 420.

In his opinion, Judge Gleeson describes the threatened use of prior felony information as the sentencing equivalent of “a two-by-four to the forehead.”⁸² Judge Gleeson went on to say that the government’s threatened use of prior felony information “coerces guilty pleas and produces sentences so excessively severe they take your breath away.”⁸³

Plea bargaining has been around a long time in the United States, but plea bargaining was usually conceived of as offering defendants discounts from the sentences they otherwise deserve after conviction.⁸⁴ What is different today is the prosecutor’s ability to threaten and deliver punishments after a trial that no one considers appropriate for what the defendant did.⁸⁵

Harsh sentences are one way in which the government “persuades” defendants to waive all of their trial rights, including the right to a jury. But there are other ways such as the drafting of statutes that do not permit a defense.

The Wall Street Journal had a series of front page articles in 2011 and 2012 showing the dramatic increase in federal crimes over the last few decades and it showed how these laws are being used to convict people who are not deserving of a criminal conviction.⁸⁶ The theme of these articles, one of which was entitled *As Criminal Laws Proliferate, More Are Ensnared*, was that the number of federal crimes has proliferated over the last few decades and many people are being prosecuted and convicted for acts under laws of which they were unaware and which they never intended to violate.⁸⁷

82. *Id.*

83. *Id.*

84. Wright, *supra* note 55, at 108-110.

85. *Id.* at 112.

86. See Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), <http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654>; Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <http://online.wsj.com/news/articles/SB10001424052702304319804576389601079728920>; Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar As Bargains Trump Trials*, WALL ST. J. (Sept. 23, 2012), <http://online.wsj.com/news/articles/SB10000872396390443589304577637610097206808>; Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J. (Sept. 27, 2011), <http://online.wsj.com/news/articles/SB10001424053111904060604576570801651620000>; Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J. (Dec. 12, 2011), <http://online.wsj.com/news/articles/SB10001424052970204903804577082770135339442>.

87. See Fields & Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, *supra* note

These cases are often hidden behind plea bargains because a high percentage of the crimes passed by Congress over the law few decades (or put in place under federal regulations) are strict liability crimes or permit conviction upon proof of a low level of criminal intent. Hence, another of the articles in the series was entitled, *As Federal Crime List Grows, Threshold of Guilt Declines*.⁸⁸

One of the articles dealt with the predicament faced by a senior employee of a military retirement home in the District of Columbia who, with other staff, diverted a backed up sewage line from the retirement home to an outside storm drain which they believed to be connected to the city's sewage treatment plant. Instead it drained into a creek and then into the Potomac.⁸⁹ (Thirty percent of the city's storm drains run to the city's sewage treatment plant.⁹⁰) Though even the Justice Department acknowledged the employee did not realize the waste was going into a creek and though the employee's supervisor explained it had been standard practice to divert overflow to the storm drain as the employee had done, the government prosecuted the employee for violating the federal Clean Water Act.⁹¹

This is a classic case that should go to trial. Trial judges say that most criminal trials are not "whodunits" with defendants claiming no involvement, but rather they are about the moral guilt of the offender.⁹² In this case, the defendant thought he was doing the right thing to handle the situation and followed what had been the past practice for a sewage line blockage. He would have had testimony from his supervisor to this effect and the jury would have seen that he was a good employee who never intended to violate the law. But he never would have had a chance to offer an excuse or explanation at trial because the statute had no mens rea element.⁹³

Again, one may respond that this has little to do with *Duncan* and *Baldwin*. But when you have a trial system where it will usually take a week for even the simplest trial, it makes sense that government agen-

88. See Fields & Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, *supra* note 86.

89. See Fields & Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, *supra* note 86.

90. *Id.*

91. *Id.*

92. See, e.g., Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHIC.-KENT. L. REV. 663, 676-77 (2007).

93. See Fields and Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, *supra* note 86.

cies are likely to propose legislation that helps them conserve their resources by avoiding trials.

Finally, note has to be taken of the high incarceration rate in the United States, as well as the growing percentage of our citizens who have criminal records, foreclosing many employment opportunities.⁹⁴

Our incarceration rate has been the subject of many articles in the popular press. For example, *The Economist* ran a story in 2010 on the topic featuring a dramatic cover illustration of Lady Liberty herself peering out balefully from behind the bars of a prison cell.⁹⁵ The article intoned that “[n]o other rich country is nearly as punitive as the Land of the Free” and as proof of that fact it noted that the United States incarceration rate is five times greater than Britain’s, nine times greater than Germany’s and twelve times greater than in Japan’s.⁹⁶

Less well-known is the statistic showing the growing percentage of citizens with criminal records. Between the early 1990s and 2012, that percentage increased from roughly 18% to 32%.⁹⁷ One of the reasons for this surge in convictions, despite a falling crime rate, is the fact that misdemeanor courts have become mills that churn out convictions by the hundreds each day as judges dispose quickly of case after case in a few minutes through guilty pleas.⁹⁸

Our brutal incarceration rate and the alarming rate at which our citizens are marked with criminal records are not *caused* by *Duncan* and *Baldwin*. But there can be no doubt that those cases have contributed to the problem. A trial system with only one model, and that one a very expensive one, gives legislatures no incentive to not raise sentences. It also gives prosecutors every incentive to go after the low hanging fruit – those who are poor and less sophisticated – rather than reach for those far more deserving of prosecution but better able to exploit the system’s many complexities.⁹⁹

94. *Rough Justice*, THE ECONOMIST (July 22, 2010), http://www.economist.com/node/16640389?story_id=16640389.

95. *Id.*

96. *Id.*

97. See John R. Emshwiller and Gary Fields, *Justice Dispensed in Minutes As Petty Crimes Clog Courts*, WALL ST. J. (Dec. 1, 2014) <http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782?KEYWORDS=justice+dispensed+in+minutes>.

98. *Id.*

99. In a recent book, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* (2014), Matt Taibbi contrasts the viciousness with which street crime is prosecuted while wealthy defendants who cause far more financial harm are not prosecuted and get away with their crimes.

II. MAGISTRATES' COURTS AND CROWN COURTS IN ENGLAND

In *Duncan*, the Supreme Court traced jury trials back to the Magna Carta and quoted Blackstone for the proposition that a defendant's criminal conviction must be by "the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion."¹⁰⁰ But while jury trials have a long history in England going back to early common law, the Court was overlooking the fact that England has long had two criminal courts, only one of which hears jury trials.

The two trial courts in England are magistrates' court and Crown Court.¹⁰¹ Crown Court is the one Americans are likely to know from television and movies because it is quite dramatic with judges and barristers wearing white wigs, dickey collars, and robes appropriate to their position and seniority. It is a setting that is quite theatrical.

Criminal trials in Crown Court are always jury trials and all the most serious criminal cases – murders, rapes, etc. – will end up in Crown Court.¹⁰² But only 3% of criminal cases end up in Crown Court.¹⁰³ The real workhorse of the English criminal justice system is the system of magistrates' courts where all criminal cases are initially filed and most are resolved by plea bargaining, dismissal of charges, or trial.

There are two types of judges hearing trials in magistrates' courts, lay magistrates and district judges.¹⁰⁴ Lay magistrates are citizens without formal legal training who go through an appointment process and eventually are appointed by the Lord Chancellor.¹⁰⁵ The lay magistrates receive no pay (other than expenses) and will often have other employment, but they must be available to sit as a magistrate for at least twenty-six half-day sessions a year.¹⁰⁶ They sit in panels of three and are assisted on points of law by a solicitor or barrister.¹⁰⁷

There are approximately 26,000 lay magistrates in England and Wales and they have been called the backbone of the English criminal

100. *Duncan*, 391 U.S. at 151-52.

101. See *Criminal Courts*, GOV.UK, <https://www.gov.uk/courts> (last visited Feb. 20, 2016)

102. *Id.*

103. See Tyler Marshall, *Lay Magistrates Rule in 97% of English, Welsh Criminal Cases*, LA TIMES, (Dec. 20, 1985), http://articles.latimes.com/1985-12-20/news/mn-5008_1_criminal-cases.

104. See Herbert M. Kritzer, *Courts, Justice, and Politics, in England* in COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 81, 103 (Herbert Jacob et al. eds., 1996).

105. *Id.* at 89.

106. *Id.*

107. *Id.*

justice system.¹⁰⁸ One way to think of lay magistrates is to picture them as analogous to citizens appointed to a planning board or a school board in a small American city. They are respected members of the community with the desire and the time to serve the community in which they live. They are appointed for a two-year term, but may be reappointed.

District judges sit in magistrates' courts in the larger cities in England where the volume of cases is very high.¹⁰⁹ District judges are trained in the law, work full time in magistrates' courts, and are paid (hence their former title as "stipendiary magistrates" to distinguish them from lay magistrates). They are comparable to judges in misdemeanor courts in the United States in that they sit alone in hearing cases. Often, in large cities, both lay magistrates and district court judges hear cases, but district judges tend to work more quickly because of their experience and training.

Minor criminal cases – petty offenses and misdemeanors – will always be heard in magistrates' courts. But what is interesting from a comparative perspective is the way felonies are handled. As mentioned above, serious felonies such as rape or murder must be sent to Crown Court if there is to be a trial and it will be, as mentioned above, a jury trial. But there is a category of felonies, often referred to as "hybrid" offenses or "either-way" offenses, such as theft, assault, and burglary, which can be tried in either magistrates' court or Crown Court.¹¹⁰ The defendant can insist on trial by jury in these either-way offenses, but not many make that choice due to the limited sentencing authority possessed by magistrates or district judges which is six months in prison (or one year for more than one charge) for such felonies.¹¹¹

By having two trial models for misdemeanors and most felonies, the pressure in charging or choosing a type of trial is strongly downward. It is much to the advantage of the prosecuting service to charge a crime low enough, if possible, to keep the case in magistrates' court. Instead of a trial that would take a week in Crown Court, the trial can take a couple of hours in magistrates' court.

108. Marshall, *supra* note 103.

109. See A.T.H. Smith, *England and Wales* in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, 73, 77 (Christine Van den Wyngaert ed., 1993).

110. See Kritzer, *supra* note 104, at 103-04.

111. *Id.* at 103. Of course, the defendant's choice does not always control where the case is tried. If the particular burglary is a serious one or the defendant has a substantial criminal record such that a sentence in excess of year would be required if there is a conviction, the magistrates will send the case to Crown Court for trial even if the defendant would prefer trial in magistrates' court.

By contrast, in the United States, there is a single criminal trial model for felonies and misdemeanors; it is always in the interest of prosecutors to charge as high as ethically permitted to force defendants to plead guilty in order to avoid a harsh sentence.

England is also an interesting contrast to the United States because there are guidelines for plea bargaining that would seem to exclude the sorts of extreme pressures put on defendants in the United States to plead guilty. According to the guidelines put forward in 2007 by the Sentencing Guidelines Council, a guilty plea should always result in sentence that is lower than would otherwise be appropriate for the seriousness of the crime in question.¹¹² The Guideline on plea bargaining sets up a sliding scale of a one-third reduction if the defendant pleads guilty at the first reasonable opportunity, a one-quarter reduction for a guilty plea if the case had been set for trial, and a one-tenth reduction if the guilty plea is entered only at the start or during the trial.¹¹³

This summary is not intended to suggest that England's criminal justice system does not have problems or that the U.S. should start appointing lay magistrates. It is simply intended to show (a) that the Court's reliance on English legal history for support in requiring jury trials for all felonies overlooks the long history of Magistrates' Courts in the country and, more importantly, (b) that a country can construct a system with two trial models for less serious felonies that provides benefits for defendants as well as prosecutors if they opt for the simpler, less expensive trial model.

III. PROVINCIAL COURTS AND SUPERIOR COURTS IN CANADA

Canada's Charter of Rights and Freedoms, adopted in 1982, shows a clear debt to the Bill of Rights in the U.S. Constitution in many of its provisions. There is, for example, a right "not to be subjected to any cruel and unusual treatment or punishment"¹¹⁴ as well as a right "to be secure against unreasonable search or seizure."¹¹⁵ But when it comes to trial rights of those charged with crimes, there seems to be a substantial deviation from the Sixth Amendment. Indeed, the Charter gives defendant the right "to the benefit of trial by jury where the maximum punish-

112. See Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea* (2007), http://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf.

113. *Id.* at 5-6.

114. Canadian Charter of Rights and Freedoms §12 (1982).

115. *Id.* at §8

ment for the offence is imprisonment for five years or a more severe punishment.”¹¹⁶

This limitation on the right to a jury trial to offenses threatening a sentence in excess of five years seems harsh and one reading that provision might assume that there are many defendants charged with felonies who cannot get jury trials before they are sent to prison for two, three or even five years. That is not the case, however, because Canada, like England, has two different courts for handling criminal trials.

Provincial courts handle all the minor offenses as well as vast majority of the less serious felonies. Offenses tried in the provincial courts are always tried by a judge. Jury trials only take place in superior courts, but, unlike England, defendants charged with serious offenses in a superior court may opt for a nonjury trial. Therefore, both jury trials and nonjury trials take place in superior courts.

The key distinction between provincial courts and superior courts is the limited sentencing authority of judges in the provincial courts compared to superior court judges. Judges in the provincial courts - for most offenses - may only impose a sentence of imprisonment of six months. There is a general statement in the Canadian Criminal Code setting out this limit on sentences after a summary trial - meaning no indictment and no jury trial.¹¹⁷ Many minor crimes - for example, littering, prostitution, and public indecency - are set out by statute as summary offenses and they will be handled in a provincial court. These summary offenses are roughly equivalent to misdemeanors in the United States.¹¹⁸

When it comes to more serious crimes, there are three types of what Canada refers to as “indictable offenses.” The least serious, such a betting or book-making, must be tried in a provincial court, unless for some extraordinary reason the judge decides otherwise.¹¹⁹ At the other end of the spectrum are a tiny number of very serious crimes that must always be tried in a superior court including murder, treason, and piracy.¹²⁰ Finally, there is large category of indictable offenses that may be tried in either a provincial court or a superior court. In some of these,

116. *Id.* at §11(f).

117. Section 787 (1), Criminal Code of Canada states: “Unless otherwise provided by law, everyone who is convicted of an offense punishable by summary conviction is liable to . . . a term of imprisonment not exceeding six months.”

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

119. *Id.* at 35-36.

120. See Martin’s Criminal Code §469 (Edward L. Greenspan et al. eds., 2009).

the choice is up to the prosecutor and many statutes provide quite different penalties if the conviction takes place in superior court as compared to summary conviction for the same offense.¹²¹ Thus, for example, possession of drugs carries a penalty of up to seven years upon conviction after indictment, but only six months for a summary conviction (or up to one year if there was a previous conviction).¹²²

There is also another category of middle level indictable offenses where the choice of the forum for trial belongs to the defendant. These are sometimes referred to as "hybrid" offenses that may be tried in either a provincial court or a superior court at the option of the defendant. One example is theft under \$5,000.¹²³

But these different categories of indictable offenses are not as important in practice in terms of the forum where they will be tried because there are strong incentives for both the prosecutor and the defendant to opt for trial in a provincial court if possible. This is reflected in the fact that only a tiny percentage of criminal cases – approximately 2% – are tried in superior court.¹²⁴ One reason for this is the fact that very serious crimes like murder or treason are not common. But, of more importance, is the fact that both prosecutors and defendants benefit from a trial in a provincial court.

For prosecutors they get a much shorter trial because it is not a jury trial. It is the same evidence as would be presented to a jury, but it goes much more quickly to a professional judge.

Defendants also benefit from trials in provincial courts. Clearly, the big advantage is the limited sentencing authority of provincial court judges. Defendants are assured of a rather lenient sentence after trial in a provincial court compared to what they might receive in a superior court. In addition, the criminal matter will usually be resolved much more quickly in provincial court.

There are other important benefits for defendants when the trial takes place in provincial court. Defendants who have a summary conviction are often spared the collateral consequences as far as deportation, extradition, and immigration that would ensue after conviction in a

121. See *Controlled Drugs and Substances Act*, Martin's Criminal Code §6(b)(i) (Edward L. Greenspan et al. eds., 2009).

122. See *id.* at §4(3).

123. See HAUSEGGER, *supra* note 118 at 36.

124. See Cheryl Marie Webster & Anthony N. Doob, *Superior Courts in the Twenty-first Century: An Historical Anachronism?*, in CANADA'S TRIAL COURTS 57, 62 (Peter H. Russell, ed. 2007).

superior court.¹²⁵

Additionally, those convicted of a summary offense may apply for a suspension of their criminal record after five years if they have not committed another crime in the period after conviction.¹²⁶ This does not expunge the criminal record, but it takes their conviction out of the general database of criminal convictions, which will permit them to apply for employment or other benefits that would be foreclosed with a criminal record.¹²⁷ In contrast, a person convicted of an indictable offense must wait ten years to apply for a suspension of record.¹²⁸

Obviously, the government wants cases handled in provincial courts if possible, and the sentencing authority has been raised for certain crimes to try to keep those crimes in provincial court. Thus, while the sentencing authority of provincial court judges is six months for most offenses, as mentioned above, this limit has been raised to eighteen months for some more serious, high volume crimes, including assault with a weapon, uttering a threat to cause death or bodily harm, causing bodily harm, and sexual assault.¹²⁹ What Canada wanted to accomplish by increasing the sentencing authority of provincial judges for these crimes, many of which would seem to require a sentence in excess of six months, is to convince prosecutors to try those crimes in a provincial court if possible.

The limit on sentences that may be imposed by provincial courts for particular crimes serves as both a reference point and an anchor to keep sentences after jury trials in proportion to those modest sentencing limits.

In that regard, note must be taken of the low incarceration rate in Canada compared to the United States. While Canadian crime rates generally track those in the United States,¹³⁰ Canada incarcerates only

125. See Section 36 (1)(a), Immigration and Refugee Protection Act 2001, <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/>. For example, a permanent resident in Canada will not be required to leave unless convicted of a crime with a possible sentence in excess of ten years or having been given a sentence in excess of six months.

126. See Parole Board of Canada, Record Suspension Guide 1 (2014), <http://pbc-clcc.gc.ca/prdons/pardoninstr-eng.pdf>.

127. *Id.* at 2.

128. *Id.* at 1.

129. See Section 469, Martin Criminal Code, 2009.

130. Canadian researchers report that Canada has a crime culture that has been similar to the United States over the last forty years and its crime rates track the rise and fall of those rates in the United States over the same period. See Anthony N. Doob & Cheryl Marie Webster, *Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate*, 40 LAW & SOC. REV. 325, 326-28 (2006).

about 120 citizens per 100,000 and has done so for decades.¹³¹ This is a rate roughly one-sixth that of the United States rate. We cannot say that the two-trial model achieves that stability in the incarceration rate, but certainly it contributes to that stability as there is less need for the sorts of plea bargaining cudgels that are used often in the United States to force defendants to waive their right to trial and plead guilty.

While plea bargaining is not subject to the sort of fixed sentence reduction discount one sees in England, it is reported that approximately 80 to 90 percent of cases end in a plea agreement.¹³² This would seem consistent with the plea bargaining rate in the United States thirty or forty years ago, but not today where the plea bargaining rate is much higher.

This brief summary of Canada's trial system is obviously incomplete. There are other factors not discussed here that also contribute to Canada's low incarceration rate when compared to the United States, such as the fact that Canada has a national criminal code, that prosecutors and judges are not elected, and that there is a Department of Justice Ministry that plays a central role in drafting and evaluating legislation.

But the point of this comparison is to show that by having a second simpler trial model in addition to the jury trial model and making it to advantageous for prosecutors and defendants to opt for a nonjury trial, there is not the same need to force plea bargains on defendants as happens in the United States. In turn, the use of the nonjury trial model helps keep sentences lower.

IV. CONCLUSION

The sweeping commitment to jury trials in *Duncan* and *Baldwin* has proven to be a classic instance of the law of unintended consequences. Instead of providing defendants more protection against the power of the government, defendants are less protected today. Lacking a trial model that can be used for a large number of criminal cases, the system avoids trials by putting tremendous pressure to plead guilty. The ease with which cases can be run through our court system, in turn, marks far too many citizens as criminals and turns imprisonment from an occasional deterrent to be imposed selectively into an expectation or a rite of passage for many young men, especially those in minority

131. See Cheryl Marie Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, 36 LAW & SOC. REV. 297, 311 (2007).

132. See HAUSEGGER, *supra* note 118, at 290.

communities.

Duncan and *Baldwin* end up undercutting other constitutional protections. There was a time when the warnings required by *Miranda v. Arizona* were viewed as an important protection as arrestees faced police questioning at the stationhouse.¹³³ But, today, what happens in the stationhouse is often only marginally relevant to what will happen in the courthouse. Whether the defendant made admissions or not in the interrogation room, the real pressure to admit one's crime, as *Kudu* shows, will take place in open court in front of judges and defense lawyers when defendants are threatened with sentences greatly in excess of what they deserve if they do not plead guilty.

There are many who blame the failures and injustices in our system on prosecutors who overcharge, on judges who have ceded sentencing authority to prosecutors, and on legislators who pass brutal mandatory sentences. This article is not meant to absolve actors in the system for blame, but rather to show that our trial system gives them no help in doing the right thing.

Substantial reform requires that we deal with the gorilla in the room – our insistence that jury trials are indispensable in the United States for all those charged with misdemeanors and felonies. We need to accept that there can be fair trials that do not use juries. If we look around, we see countries that do not use juries or use them sparingly.¹³⁴ We also see international tribunals dealing with crimes of the greatest magnitude that do not use juries.

What England and Canada show is that you can build a system that permits many defendants to put forward a defense or an explanation for what they did without adding enormous expenses to the system. At the same time, a simpler, more efficient trial system, if built the right way,

133. *Miranda v. Arizona*, 384 U.S. 436 (1966).

134. See A.H.J. Swart, *The Netherlands* in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 279, 288 (Christine Van Den Wyngaert, ed. 1993). Most European countries do not use juries but may use lay persons sitting along with professional judges, but some countries, such as the Netherlands, do not use lay persons at all in their criminal justice system.

Those who followed the murder trial of South African athlete Oscar Pistorius will have noticed that the trial was not to a jury, but to a judge. See Alyssa Newcomb & Liezl Thom, *Oscar Pistorius Verdict in Hands of One Judge, Not a Jury*, ABC NEWS, (Mar. 4, 2014), <http://abcnews.go.com/International/oscar-pistorius-verdict-hands-one-judge-not-jury/story?id=22769674>. In drafting the South African constitution, adopted in 1996, the document includes educational, environmental, and health care rights, but jury trials were not included in the protections given defendants. South Africa, of course, was emerging from apartheid and it is also a complex country with seven official languages in its constitution.

can push down on charging and sentencing.

One U.S. city has tried to accomplish something similar to what occurs in England or Canada by informally encouraging defendants to opt for nonjury trials. Philadelphia has more trials and less plea bargaining by assigning those judges who tend to sentence leniently to handle nonjury trial dockets and those judges who tend to be severe in sentencing to jury trial dockets.¹³⁵

But it is unlikely other jurisdictions will follow this lead until such time as the Court encourages reform. In *Duncan*, the Court indicated in a footnote that it is certainly conceivable that a state might have “[a] criminal process that was fair and equitable but used no juries.”¹³⁶ Such a process, the Court went on, “would make use of alternative guarantees and protections.”¹³⁷ “Yet,” the Court said, “no American State has undertaken to construct such a system.”¹³⁸

No state will construct such a system until the Court encourages alternatives to the full jury-trial model for less serious crimes. Unfortunately, our present system works extremely well for the institutional players. But it does not work well for defendants. Fewer defendants get a chance to be heard and those that insist on that right sometimes pay a terrible price if they are convicted.

135. See generally, Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984). Professor Stephen Schulhofer offered the Philadelphia practice as a way of limiting the need for plea-bargaining. He evaluated the nonjury trials that took place and found them to be adversarial trials with acquittal rates similar to the jury trial rate.

136. *Duncan*, 391 U.S. at 151 n. 15.

137. *Id.*

138. *Id.*

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