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Punishment and Procedure: A Different View of the American Criminal Justice System

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PUNISHMENT AND PROCEDURE: A DIFFERENT VIEW OF THE AMERICAN CRIMINAL JUSTICE SYSTEM

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In a recent issue of this journal, Professor Michael Seidman notes that while we have "the most elaborate and detailed constitutional protections for criminal defendants of any country in the world," we also have "the second highest incarceration rate of any country in the world."[1] From these premises, he goes on to argue that our constitutional protections, which he views as "intended to make prosecution more difficult," have been so weakened that instead they "serve [to] make the prosecutor's job easier."[2] He complains that "the Fourth Amendment is so riddled with exceptions and limitations that it rarely prevents the police from pursuing any reasonable crime control tactic";[3] that "judges have virtually gone out of the business of actually policing the voluntariness of confessions and regularly sanction the sort of coercive tactics that would have led to the suppression of evidence a half century ago";[4] and that courts tolerate courtroom performances by counsel "that make a mockery of the formal protections [of the sixth amendment]."[5]

The picture that Professor Seidman draws of a barbaric system in which constitutional protections are not nearly as strong as they ought to be if they are to protect defendants from such a system might not seem the meat for a response. After all, his picture of the system was tossed off with broad brush strokes in a brief essay. But two reasons compel me to respond to Professor Seidman's picture of the system. The first is that this picture of a system of brutal unfairness is common in law review writing and

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1. Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 Const. Comm. 207, 207-08 (1995).
2. Id. at 210.
3. Id. at 209.
4. Id.
5. Id.

is often used to justify extreme positions on legal issues. Consider, for example, an essay by Professor David Luban, entitled *Are Criminal Defenders Different?*,[6] in which he argued that a more aggressive level of advocacy is justified in criminal cases than is appropriate in civil cases because our criminal justice system is so unfair. Like Professor Seidman, Professor Luban claimed that prosecutors "enjoy overwhelming procedural advantages"[7] over the defense in the American criminal justice system. Again, like Professor Seidman, he considers the American criminal justice system to be overwhelmingly harsh in its sentencing of defendants. For Professor Luban, proof of the harshness of the system lies in the fact that we have "the dubious distinction of having a higher percentage of our population under lock and key than any nation in the world, including the pre-Glasnost Soviet Union, post-Tiananmen Square China, and pre-deKlerk South Africa." He goes on to ask, "Is this 'political abuse'? I believe that it is."[8]

My second reason for responding to Professor Seidman is that he offers this picture of a system that is terribly unfair to defendants at a time when broad segments of the public are angry at the system for exactly the opposite reason. Statement after statement from victims complains angrily that the criminal justice system cares about little except the rights of defendants and systematically ignores the interests of victims or the broader public.[9] These complaints are backed up by public opinion polls that show that the public has little confidence in the criminal justice system[10] and very low respect for lawyers in general.[11] In the

6. 91 Mich. L. Rev. 1729 (1993).

7. Id. at 1736.

8. Id. at 1749-50.

9. See, e.g., Comment, *Criminal Law — Victim Rights: Remembering the "Forgotten Person" in the Criminal Justice System*, 70 Marq. L. Rev. 572 (1987) (citation omitted) ("My life has been permanently changed. I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment with the judicial system is many times more painful. I could not, in good faith, urge anyone to participate in this hellish process."); Steve Baker, *Justice Not Revenge: A Crime Victim's Perspective on Capital Punishment*, 40 UCLA L. Rev. 339, 340 (1992) ("Like other family members of murder victims, I found myself excluded from the system, unable to participate in the formal proceedings. The criminal justice equation does not include the relatives or friends of victims.").

10. A 1993 poll aimed at gauging public confidence in selected institutions showed that only 17% of the public had a high level of confidence in the criminal justice system. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1992* 164, table 2.4 (U.S. Dep't of Justice, 1993). The same poll showed that 52% of the public had a high level of confidence in the police. Id.

In 1989, in a Gallup public opinion survey, those polled were asked the following question, "In general, do you think the courts in your area deal too harshly, or not harshly enough with criminals?" Eighty-three percent responded "not harshly enough" to the

wake of recent high publicity cases, one wonders if public confidence in the system might not sink to even lower levels.

Because I believe that the picture offered by Professor Seidman is inaccurate, I want to criticize that view of the system and offer a different view, in which punishment and procedure are synergistically related. Readers can decide which view of the system is more accurate, understanding of course that both pictures are painted with broad strokes. But even if readers disagree with the view of the system I will put forward, they will at least better understand the public anger directed at the system, because my view of the system is much closer to the views of the system offered by victims and others outside the system than it is to the picture presented by Professor Seidman.

I. A PRELIMINARY MATTER: JUDGING A SYSTEM BY ITS INCARCERATION RATES

Both Professors Seidman and Luban make dramatic use of the high incarceration rate in the United States when compared with other western countries. In 1993 the United States had an incarceration rate of 519 citizens per 100,000.[12] This is roughly ten and a half times that of the Netherlands (49), eight times that of Norway (62), six times that of Germany (80) and France (84), and five and a half times that of England/Wales (93).[13] But while these statistics are sad and disturbing, are they a fair measure of how harshly particular defendants are actually sentenced and do they show a criminal justice system that is repressive and unjust? The answer is no. Because these figures do not take into account other societal factors such as the strength of the particular country's social services system, the availability of handguns, the rate

question, while only 3% thought courts were too harsh. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1991* at 203, table 2.35 (U.S. Dep't of Justice, 1992).

11. The American Bar Association was stunned when its own poll, designed to show public attitudes toward lawyers and the legal system, found that only 40% of those polled had a favorable opinion of lawyers. See Gary A. Hengstler, *Vox Populi (The Public Perception of Lawyers: ABA Poll)*, A.B.A. J. 60, 62 (Sept. 1993). Lawyers remained ahead of politicians (21%) and stockbrokers (28%), but were way behind the poll leaders, teachers (84%), pharmacists (81%), and police officers (79%). Id. Worse yet was that those who had had prior experience working with lawyers had a lower opinion of lawyers than those who had not done so. Id.

12. Marc Mauer, *Americans Behind Bars: The International Use of Incarceration, 1992-93* at 4 (The Sentencing Project, 1994) ("*The Sentencing Project 1994*").

13. All of these statistics appear in the chart on cross-national incarceration rates in *The Sentencing Project 1994* at 4 (cited in note 12), with the exception of the figures for Norway for 1993, which were obtained directly from Mr. Mauer at The Sentencing Project. Letter from Marc Mauer, Assistant Director, The Sentencing Project, to William Pizzi (Sept. 26, 1995) (on file with William Pizzi).

of violent crime, the extent of the country's drug problem, etc., these dramatic figures do not tell us nearly as much about the criminal justice system in those countries as these figures in isolation would suggest. Ken Pease, an English criminologist who has tried to determine the level of comparative punitiveness among European countries, concluded that measuring a country's punitiveness according to the number of its citizens incarcerated compared to the country's total population "is liable to produce misleading results."[14]

A recent article by Professor Richard Frase comparing sentencing practices in France with those in the United States illustrates just how difficult it is to compare different countries, even when the comparison is limited to only two countries.[15] He describes France as a country that makes "very sparing use of custodial penalties" and as a country with a "less punitive attitude."[16] He then explains how hard it is to document statistically the conclusion that France is less punitive than the United States because, among other problems, crimes are categorized differently and data are often not comparable between the two countries or are simply unavailable.[17] Doing the best he can with the figures, he concludes that "it seems likely that, overall, fines and other non-custodial sentences are used less often in the United States than in France," and that "[i]t may also be the case that custodial terms are, on the average, longer in the United States."[18] These are rather tenative conclusions considering that the incarceration rate of France is one-sixth that of the United States.

This is not to claim that the United States does not punish criminals more severely than many or even most other western countries. But it is difficult to find data that would show exactly how much more criminals are punished in the United States and

14. Ken Pease, *Cross-National Imprisonment Rates*, 34 Brit. J. Criminol. 116, 125 (1994).

Professor James Lynch, who has published several studies aimed at trying to determine the comparative punitiveness of different countries, warns that cross-national comparisons are difficult to do well: "The "foreign-ness" of culture, laws, and practices in other nations makes it easy to misrepresent policies and outcomes, and thereby the relative condition of nations. This misinformation distorts rather than informs policy debates by focusing attention on mythical problems or by overstating those that do exist." James Lynch, *Crime in International Perspective*, in James Q. Wilson and Joan Petersilia, eds., *Crime* 11 (ICS Press, 1995).

15. Richard S. Frase, *Sentencing Laws & Practices in France*, 7 Fed. Sent. Rptr. 275 (1995).

16. Id.

17. Id. at 275-76.

18. Id. at 277.

whether this is true for all crime categories[19] and for all regions of the country. Like Professor Frase and other comparatists, I believe it to be the case that defendants in the United States are generally punished somewhat more severely than similar defendants on the continent. I am also worried that whatever disparity exists at present may be aggravated as legislatures continue to enact mandatory sentences (such as the "three strikes" legislation in California) and to increase sentencing ranges generally. Thus, in this article I will assume what I believe to be true—that defendants in the United States tend to receive sentences that are somewhat longer than those they would receive in other western countries and that some defendants in the United States receive sentences that are much harsher than they would receive in Europe (including a death penalty, which does not exist in Europe). But while not denying that we have serious problems in our criminal justice system with the harshness of certain laws, I do not think it is fair to our system to use raw incarceration figures to suggest the system as a whole is barbaric or repressive, or to suggest that all defendants receive sentences in the United States that are terribly unfair and unjust. These comparative incarceration figures mean far less than they appear to mean. At a time when our criminal justice system has many serious problems, I do not think it is helpful to exaggerate the problems that do exist.

II. INCARCERATION RATES AND DEFENDANTS' RIGHTS

Professor Seidman presents the picture of a system in which constitutional protections have not done the job of protecting suspects, and as evidence of this, he points to our startling incarceration rate. He thinks prosecutors have an easy time of it in the United States, with most of our protections watered down and full of exceptions. This logic would certainly suggest that if we look to European countries with low rates of incarceration we would see criminal justice systems that make the prosecutor's job

19. One study, using cross-national data from the 1980's comparing the United States to England and what was then West Germany, concluded that prison use in the United States was not radically different from these other countries as far as crimes of serious violence were concerned, but the propensity to incarcerate and the amount of time served was greater in the United States than in the other nations for property and drug offenses. See Lynch, *Crime in International Perspective* at 34-38 (cited in note 14). This suggests that perhaps the United States is more harsh in its sentencing practices for some crimes but not for others. But the data for this study seem a bit dated given the rapid changes in sentencing laws over the last several years, and thus it is hard to know if the study's conclusions are valid today.

much more difficult and protections for defendants that dwarf those that exist in the United States.

But when you look at those systems, the relationship that Professor Seidman assumes exists between incarceration rates and protections for defendants doesn't hold at all. Consider, for example, the Netherlands, a country with an incarceration rate that is the lowest in Europe[20] and with a reputation for tolerance[21] and a tradition that has favored lenient sentencing policies.[22] It is also a country that is well-known for its bold attempts to explore alternatives to incarceration for drug offenders, such as de facto legalization of soft drugs and novel measures to make sure addicts stay in treatment, for example, the "methadone bus" which brings methadone to the addict.[23]

But when one looks at the Dutch system of criminal procedure, one sees a system with many features that would be violative of all sorts of constitutional rights in the United States. For example, the level of lay participation in the decision-making process is easily stated: it is zero.[24] There is no right to a jury or even to lay judges as you find elsewhere in Europe. Moreover, the trial places considerable emphasis on the materials gathered during the closed pretrial stage by the police and the investigating judge. Trials tend to center on a discussion of the materials contained in the dossier and place less emphasis on oral testimony and the examination of witnesses in open court.[25] Because

20. See *The Sentencing Project 1994* at 4 (cited in note 12).

21. See Constantijn Kelk, *Criminal Justice in the Netherlands* in Phil Fennell et al., eds., *Criminal Justice in Europe: A Comparative Study* (Clarendon Press, 1995) ("*Criminal Justice in Europe*").

22. See Josine Junger-Tas, *Sentencing in the Netherlands: Context and Policy*, 7 Fed. Sent. Rptr. 293 (1995); J.F. Nijboer, *The Requirement of a Fair Process and the Law of Evidence in Dutch Criminal Proceedings* in J.F. Nijboer, C.R. Callen and N. Kwak, eds., *Forensic Expertise and the Law of Evidence* 161 (Royal Netherlands Acad. of Arts and Sciences, 1993); Constantijn Kelk, Laurence Koffman and Jos Silvis, *Sentencing Practice, Policy, and Discretion* in *Criminal Justice in Europe* at 319 (cited in note 21); L.H.C. Hulsman and J.F. Nijboer, *Criminal Justice System* in Jeroen Chorus et al., eds., *Introduction to Dutch Law for Foreign Lawyers* 309 (Kluwer Law and Taxation Publishers, 2d ed. 1993).

23. See generally Jos Silvis and Katherince S. Williams, *Managing the Drug Problem: Tolerance or Prohibition* in *Criminal Justice in Europe* at 149, 157 (cited in note 21).

24. See Nijboer, *Dutch Criminal Proceedings* at 164 (cited in note 22); Nico Jörg, Stewart Field and Chrisje Brants, *Are Inquisitorial and Adversarial Systems Converging?* in *Criminal Justice in Europe* at 41, 50 (cited in note 21).

25. See Nijboer, *Dutch Criminal Proceedings* at 166 (cited in note 22); Jörg et al., *Are Inquisitorial and Adversarial Systems Converging?* in *Criminal Justice in Europe* at 50-52 (cited in note 21).

Dutch trials do not bar hearsay, there are cases in which the conviction is supported by statements from anonymous witnesses.[26]

The Netherlands is unusual among European countries because it remains so heavily inquisitorial at a time when most other European countries have moved away from such a heavy emphasis on the investigatory phase of the procedure. But even compared to other continental countries, the notion that the American criminal justice system makes it too easy to convict defendants, leading to a high incarceration rate, seems ridiculous. Consider two other examples, Norway and Germany, both with incarceration rates much lower than that of the United States. In Norway, as is traditional in civil law systems, the judges always ask the defendant, after the state's attorney has read the charges, if he wishes to respond to the charges. The defendant need not respond—he has the right to remain silent—but in such an event the Norwegian code provides: "If the person charged refuses to answer, or states that he reserves his answer, the president of the court may inform him that this may be considered to tell against him."[27] Adding additional pressure to respond to the charges is another feature of civil law trials: trials on the continent have the dual function of determining sentence as well as guilt. Both issues are resolved at the conclusion of the trial and announced in the court's judgment. The dual nature of the inquiry means that the defendant will not have the chance to speak prior to sentencing in the event of a conviction as would be the case in the United States. Thus, the fact that the trial has a dual function as well as that the factfinders are seeking the defendant's response means that defendants almost always choose to respond to the charges and answer the judges' questions. This means that the defendant is usually an important source of evidence at civil law trials. The fact that sentence is a possible trial issue has another advantage for the state's attorney: the defendant's criminal record is directly relevant to the issue of the appropriate sentence

26. In *Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (Ser. A) at 6 (1989), the European Court of Human Rights condemned the Netherlands for having violated Article 6(3)(d) of the European Convention on Human Rights which guarantees a citizen the right to examine witnesses against him. Kostovski had been found guilty of robbery solely on the basis of the statements of anonymous witnesses. What this decision means for civil law countries, in which much less emphasis is placed on the interrogation of witnesses because the trial is seen as an official inquiry rather than a contest between opposing parties, is uncertain. See Bert Swart and James Young, *The European Convention on Human Rights and Criminal Justice in the Netherlands and the United Kingdom* in *Criminal Justice in Europe* at 57, 71-72 (cited in note 21).

27. The Criminal Procedure Act of Norway, Ch. 9, § 93 (1991) (unofficial English translation).

and so will always be brought out, whether the defendant chooses to respond to the charges or not.

Germany, like other civil law countries, accords victims of serious crimes (or the family of the victim in the case of homicide) far greater rights at trial than is the case in the United States. In Germany, victims of very serious crimes, such as homicide or rape, have the right to participate in the trial as a "secondary accuser" which gives the victim a status nearly equal to that of the defense during pretrial proceedings and at trial.[28] There is even the possibility of appointed counsel if the victim is indigent.[29] Because the defendant responds first to the charges, this means that in a rape case, for example, the defendant will give his account of the events before the victim has been called as a witness, the reverse of what it would be in the United States. As for removing the victim as part of a sequestration order when the defendant gives his account of the events, that would not be possible in Germany if the victim has chosen to participate at the trial because such a victim is treated like the defendant as far as presence in the courtroom is concerned and is entitled to remain in the front of the courtroom throughout the trial just like the defendant. Like the state's attorney or the defense attorney, the victim's attorney can ask questions of witnesses, suggest additional witnesses and even make a closing statement on behalf of the victim at the end of the trial.

These are hurried glimpses of other systems. But even these glimpses suggest that something is badly amiss in the mindset that sees our constitutional protections as eroded to the point that the prosecutor has an easy time of it. On a comparative basis, civil law countries with much lower incarceration rates grant defendants far fewer protections than defendants receive in American courts.

The same relationship exists when we move from civil law systems to common law systems: common law systems with much lower incarceration rates have far more limited protections than defendants would receive in the United States. In England, for example, the difference for defendants is apparent even in the position of the defendant in the courtroom. During the trial, except if he takes the stand, the defendant must remain in the dock,

28. See Strafprozeordnung (StPO) § 395. On the treatment of crime victims in German courtrooms in general as well as the procedure which permits a crime victim in certain cases to participate as a secondary accuser or *nebenkläger*, see generally William T. Pizzi and Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 Stan. J. Int. L. — (1996) (forthcoming).

29. See StPO §§ 406g (1) and (2), 406e.

a small box at the very back of the courtroom where he sits, usually next to a bailiff, far removed from his barrister. There is in England, as in the United States, the right to self-representation, but unlike the United States, the defendant cannot participate from the well of the courtroom as if he were a member of the English bar. He must represent himself from the dock. The right to self-representation is also more limited than it is in the United States. In Colorado, there has been considerable difficulty in sexual assault cases with defendants choosing to represent themselves, thereby forcing victims to endure cross-examination, at rather close range, from the offender.[30] In one very serious case involving sexual abuse of children, the defendant personally cross-examined three of the victims, ages 10, 11, and 14.[31] The latter problem will not occur in England as the right of a defendant to personally cross-examine child victims in sexual assault cases has been statutorily abolished.[32]

Professor Seidman complains that our fourth amendment is "riddled with exceptions and limitations." But I doubt that there is any common law country that would suppress the evidence in cases such as *Gates* or *Leon,* two of the cases complained about by Professor Seidman, where the officers were acting in good faith and had judicial approval based on a warrant for searches that resulted in the seizure of substantial amounts of drugs. In England, the courts have traditionally not seen it as their function to discipline police officers, believing that to be a function of the executive branch, not the judiciary.[33] This has been changed under the Police and Criminal Evidence Act of 1984. But that act permits courts to exclude prosecution evidence only if the admission of such evidence "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit

30. In 1988, Quintin Wortham was charged with a series of six rapes in Denver and chose to represent himself. In the middle of the trial, the judge tried to order standby counsel to take over the case because the defendant refused to obey court rulings. Standby counsel refused, arguing that she would need weeks of preparation and a mistrial resulted. See Howard Pankratz, *Wortham Rape Trial Called a Disaster*, Denver Post 1A (Jan. 24, 1988); Howard Pankratz, *Mistrial Stalls Wortham Case After 20 Days*, Denver Post 1A (Jan. 27, 1988). At his second trial, Wortham again represented himself, and he was convicted. See Howard Pankratz, *376-Year Term Reimposed for 'Capitol Hill Rapist,'* Denver Post B4 (Apr. 9, 1994).

31. See George Lane, *Dunann Convicted on All Sex Counts*, Denver Post 1A (Jan. 29, 1993); Ginny McKibben, *Boy Battles Fear, Tells of Forced Sex*, Denver Post 1A (Jan. 23, 1993).

32. See Criminal Justice Act 1988 (Eng.) § 34A.

33. See Michael Zander, *The Police and Criminal Evidence Act 1984* at 198-200 (London, Sweet & Maxwell, 1990).

it."[34] Canada appears to take a somewhat similar stance, requiring suppression of evidence under Section 24 of the Charter of Rights and Freedoms "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[35] Under either standard, it is doubtful in the extreme that suppression of important evidence would be likely in any situation where an officer was acting in a reasonable, good faith belief in the lawfulness of his action.

Professor Seidman also complains that while "the Supreme Court continues to insist on the ritualistic reading of *Miranda* warnings, judges have virtually gone out of the business of actually policing the voluntariness of confessions and regularly sanction the sort of coercive tactics that would have led to the suppression of evidence a half century ago."[36] I don't know if this accusation is true—Professor Seidman cites no studies—but certainly the rights a suspect has in the United States under *Miranda* and its progeny to halt all questioning are far stronger than they would be for such a suspect in England. Suspects in England have the right to refuse to answer, but at the same time, it is understood that the police have the right to question. Thus, when a suspect refuses to answer a question, the police will often proceed to the next question. And while there is the right to representation during interrogation, it is not seen as the function of the defense solicitor to bar all interrogation, but rather to make sure that the questioning is fair and that the suspect is treated properly.[37] Should a suspect refuse to answer questions, it will be reported at trial by the interrogating officer that the

34. The Police and Criminal Evidence Act 1984 (Eng.) § 78(1).

35. Charter of Rights and Freedoms (Can.) Section 24(2), reprinted in Gérald-A. Beaudoin and Ed Ratushy, eds., *The Canadian Charter of Rights and Freedoms* 926-34 (Carswell, 2d. ed. 1989).

36. Seidman, 12 Const. Comm. at 209 (cited in note 1).

37. A booklet published by the governing body for solicitors, the Law Society, entitled *The Law Society's Guidelines: Advising a Suspect in the Police Station* (3rd ed. 1991), offers guidelines that make it clear that the solicitor is not present to prevent the interview but to see "that the interview is being and will be conducted fairly." See David Roberts, *(1) Questioning the Suspect: the Solicitor's Role*, 1993 Crim. L. Rev. 368, 368 (discussing the role of the solicitor in the interrogation room and in light of the Law Society's guidelines). The guidelines state specifically, "the officer should be allowed to conduct an interview in his/her own way provided that he/she does so properly and fairly." Id. See also Ed Cape, *Police Interrogation and Interruption*, 144 New. L.J. 120 (1994) (discussing the sort of questions that ought to prompt a solicitor to intervene on behalf of the client).

defendant was "cautioned" following his arrest and said nothing.[38]

Given the acceptance of a system in which the police have a right to ask questions of a suspect as well as a system in which the refusal to answer questions is often introduced at trial, it is not surprising that a substantially greater percentage of suspects in England make damaging statements to the police compared to the United States.[39] The percentage of suspects who refuse to answer questions in the interrogation room is likely to shrink in the future because the right to silence has been drastically narrowed under the Criminal Justice and Public Order Act of 1994.[40] To mention just one change, section 34 of the act permits a negative inference to be drawn at trial from the failure of a suspect to mention any fact to the police at the time of questioning that the suspect could have mentioned at that time and which the suspect now relies on at trial.[41]

The privilege against self-incrimination also provides protections for defendants in American courtrooms that have no equivalent in courtrooms in England (or most other common law countries). In *Brooks v. Tennessee*, the Supreme Court struck down a Tennessee statute that required the defendant to testify as the first witness on the defense case if the defendant chose to testify. The Court ruled that this statute violated the privilege against self-incrimination as well as due process, because the defendant must have complete freedom to testify whenever he

38. For some time, the issue of whether comment should be permitted on the defendant's refusal to answer questions in the interrogation room has been uncertain and viewed as unsatisfactory. See generally A.A.S. Zuckerman, *The Principles of Criminal Evidence* 328-32 (Clarendon Press, 1989). In *Alladice*, 87 Crim. App. 380 (1988) (Eng. C.A.), the Court of Appeals argued that since section 58 of the Police & Criminal Evidence Act 1984 gave a suspect the right to legal advice at the station house, it was time to broaden the right to comment at trial on the suspect's silence in order to maintain a proper balance between the prosecution and the defense. With the passage of the Criminal Justice and Public Order Act 1994, that call for a broader right of comment on the suspect's silence has been answered and certain inferences adverse to the defense are permitted at trial where the suspect has refused to answer certain questions in the interrogation room. See infra note 41 and accompanying text.

39. See Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 Hast. L.J. 1, 128 (1986).

Research conducted for the latest Royal Commission on Criminal Justice showed that the exercise of the right to remain silent was not a frequent event: only six to ten percent of suspects outside London and between fourteen and sixteen percent of suspects within London exercised the right to silence. See Ian Dennis, *The Criminal Justice and Public Order Act of 1994: The Evidence Provisions*, 1995 Crim. L. Rev. 4, 12 n.52 (citing Royal Commission on Criminal Justice Report, Ch. 4, para. 15).

40. See generally Martin Wasik and Richard D. Taylor, *Criminal Justice & Public Order Act 1994* §§ 3.6-3.18 (Blackstone Press, 1995).

41. The Criminal Justice and Public Order Act 1994 § 34 (Eng.).

chooses during the defense case.[42] In England, the defendant has no right to decide when he will testify at trial. It remains the practice in England that the defendant must be the first witness for the defense if the defendant chooses to testify.[43]

III. AN ALTERNATIVE PICTURE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM

Professor Seidman sees the American criminal justice system as a harsh system, and he places the blame largely on the failure of our system of constitutional protections, which in his view do not make the prosecutor's job sufficiently difficult. I have accepted his premise to the extent of agreeing that the American criminal justice system punishes defendants more severely than other Western countries, but the evidence on this issue is not as clear as Professor Seidman suggests. I have strongly disagreed with his view that our constitutional protections make it too easy for prosecutors to convict the guilty, and I think the case is fairly overwhelming that defendants have more rights and far stronger rights than defendants in other western countries.

Professor Seidman seems frustrated and angry that our country would develop an elaborate system of constitutional rights that has no equivalent in other countries and, at the same time, punish defendants more severely than other countries, sometimes much more severely. But I think that it is not surprising to find extremes in procedure and punishment linked in this way because there is a synergy between procedure and punishment such that extremes in one encourage extremes in the other and vice versa. It is thus not an accident that a country with a system of criminal procedure that is the most complicated and the most expensive in the western world and, if the truth be known, a trial system that is not very reliable, would also turn out to have a system that threatens, and sometimes inflicts, punishments that are harsh compared to those in other countries. Such

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42. 406 U.S. 605, 611-13 (1972).

43. Section 79 of the Police and Criminal Evidence Act of 1984 provides:

> If at the trial of any person for an offence —
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> (*a*) the defence intends to call two or more witnesses to the facts of the case; and
>
> (b) those witnesses include the accused, the accused shall be called before the other witness or witnesses unless the court in its discretion otherwise directs.

This is interpreted to permit the defense to call a formal or noncontroversial witness prior to the defendant, but other than such an exception, the defendant must testify first among any fact witnesses. See P.J. Richardson, ed., 1 *Archbold: Criminal Pleading, Evidence and Practice 1995* § 4-318 (Sweet & Maxwell, 1995).

a system needs to put pressure on defendants by threatening them with harsh punishments if they insist on trial, so that high mandatory minimums, habitual offender statutes, tough sentencing guidelines, and the like are encouraged by such a procedural system. Essentially, the system needs to work around its own procedures, and in the United States this is done by accepting types of charge bargains and sentence bargains—even bargains from defendants who insist that they are innocent[44]—that would not be accepted in other systems.[45]

Harsh punishments in turn encourage even more emphasis on procedure. Certainly, there is no better example than the death penalty, where even a single mistake in jury selection by a trial judge invalidates the death sentence no matter how heinous the crimes committed by the offender or how many such crimes he may have committed in the past.[46] The system's reluctance to use the death penalty translates into a requirement of technical perfection in capital cases that can rarely be met. This in turn feeds anger at the system[47] and the main outlet for that sort of anger is to pressure legislatures for ever harsher punishments for criminals.[48]

To understand more clearly the synergy between procedure and punishment and why the two would tend to extremes together, imagine a fictional country that has a criminal justice system that leans heavily toward rehabilitation in its sentencing

44. I question whether there is any country other than the United States that would permit a defendant to be sentenced to prison based on a plea in which the defendant insists that he is innocent of the crime to which he is pleading guilty. Such pleas are permitted by *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

45. England, for example, permits plea bargaining but not negotiated sentences. See *R. v. Turner* (F.R.) [1970] 2 Q.B. 321, 54 Crim. App. 352 (guidelines for plea bargaining). See generally Richardson, 1 *Archbold* §§ 4-51 to 4-54 (cited in note 43).

46. See *Gray v. Mississippi*, 481 U.S. 648 (1987) (reversing judgment because trial court excluded a qualified juror).

47. In my own state, Colorado, one of the harshest critics of our state supreme court and its decisions in the areas of search and seizure and confessions as well as decisions on the death penalty has been Richard Lamm, a former democratic governor, who had appointed most of the justices. In 1985, he lashed out at the court for a series of decisions that he felt were too protective of criminals' rights and that had the result of "releasing dangerous people back to the streets." See Marjie Lundstrom and Cindy Parmenter, *State's High Court Catches Heavy Fire*, Denver Post 1A (Sept. 15, 1985). More recently, he has attacked the court on its death penalty decisions. See Richard Lamm, *Judiciary Has Sabotaged the State's Death Penalty*, Denver Post F-1 (Mar. 13, 1994).

48. An essay by Steve Baker, a police detective whose son was among those killed by Robert Alton Harris, is an example of the way anger at the system leads to calls for harsher penalties. In the essay, Baker describes his experiences as the father of a crime victim and concludes, "[t]he criminal justice equation does not include the relatives or friends of victims." Baker, 40 UCLA L. Rev. at 340 (cited in note 9). At the end of the essay, he urges "those who sit in judgment" to remember the victims and "the rights of the innocent." Id. at 343.

policy and thus takes a strongly individualized approach to sentencing. The system understands that social and personal problems can lead to crime, so that a judge in sentencing can call upon a large number of well-trained social service people who will work hard with the offender to try to help solve problems the offender may have if that appears the best route to rehabilitation. Because the country strongly believes in rehabilitation, there are no sentencing guidelines or mandatory minimums because they would restrict the ability of judges to treat offenders as individuals. While there are maximum sentences for each criminal offense, there are no minimum sentences for any crime, even for murder. Custodial sentences are sometimes imposed but they are considered the last resort, and when custodial sentences are imposed they tend to be short. Plea bargaining of the type that permits the prosecutor and the defense attorney to negotiate or compromise a sentence is not allowed.[49]

Presumably, this is the sort of sentencing system that Professor Seidman would applaud. But it would be very unlikely that our present system of criminal procedure would ever mesh very well with a sentencing system that was so strongly committed to rehabilitation and to treating offenders as individuals. For example, how could a system that had this outlook on offenders ever embrace a tough exclusionary rule? In the first place, a tough exclusionary rule would undercut the goal of rehabilitation in many cases. If the defendant has a problem, the system needs to be able to act on the problem before things get more serious and the defendant gets into more trouble. It also is inconsistent with the way the system is committed to understanding the behavior of individuals. For a judge to say to a police officer, "We don't care what your reasons were for the search, what pressures you were under at the time, or what precautions you took to assure the constitutionality of your actions, if it turns out there was no probable cause, no matter how reasonable the mistake, the evidence will be suppressed," but then expect the same judge in sentencing to treat the defendant as an individual by making an effort to learn what led this defendant into crime, is to suggest that human conduct should be judged by two different standards.

49. The fictional country I have described has features in common with the Netherlands, though perhaps it is more the Netherlands of ten years ago as the Netherlands, like all western countries, seems under more and more pressure to adopt policies that are more punitive and retributive in nature. See Kelk et al., *Sentencing Practice* at 319-32 (cited in note 22); Peter J.P. Tak, *Sentencing in the Netherlands: Discretion and Disparity*, 7 Fed. Sent. Rptr. 300 (1995); Hulsman and Nijboer, *Justice System* at 356-58 (cited in note 22).

And wouldn't the American notion that constitutional rights are there to be asserted aggressively by lawyers on behalf of their clients have to yield in such a system? Would lawyers in such a system see it as important, as do American defense lawyers, to instruct their clients at the station house categorically not to talk to the police and not to waive any right or consent to anything?[50] And isn't it unlikely in the extreme that defense lawyers in such a system would see themselves, as it has been claimed American public defenders do, as "Robin Hood" figures "who do[ ] not always have to conform to the moral rules society reserves for others"[51] and who take pride in "stealing" cases from the prosecution?[52]

In short, if we were to move to a sentencing philosophy that mirrors that of this fictional country and were to reform our sentencing laws in conformity to that philosophy, I don't see how that sentencing system could survive without de-emphasizing our present emphasis on defendants' rights and without major changes in the responsibility that lawyers have to the system.

CONCLUSION

In this article I have taken strong issue with the claim that our system of constitutional protections are not nearly strong enough and that evidence of this is our high incarceration rate compared to other countries. I have tried to show that those who think our constitutional protections are riddled with exceptions or have been watered down by this or that decision of the Court have no perspective on our system. Compared to criminal justice systems in other countries, defendants in the United States have many procedural advantages that make the prosecutor's job more difficult. Among comparatists who have compared the American criminal justice system to other systems, it is not uncommon to conclude that if one is really guilty, one would prefer to be tried in the United States.[53]

But there is a downside to going to trial in the United States: the risks at sentencing if found guilty. Not many offenders choose to go to trial in the United States because few can afford to run the risk of being sentenced if they are found guilty. I have

50. See Anthony G. Amsterdam, 1 *Trial Manual 5 for the Defense of Criminal Cases* § 37-A at 44 (American Law Institute, 1988).

51. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239, 1275 (1993).

52. Id. at 1276.

53. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 132 (Stanford U. Press, 1985).

suggested that this is part of the synergy between procedure and punishment and it ought not to surprise us that a country might tend to the extremes in both its procedures and its punishments.

Like many readers, I am sure, I would like to see our sentencing laws substantially reduced and prisons improved for those who must be incarcerated. Perhaps this is an impossible goal and other western countries will tend to become more punitive like the United States as their crime rates rise and public apprehension about crime grows. But however unlikely reform of our sentencing laws may be, it becomes much more unlikely if we move in the direction Professor Seidman would like to see us go and substantially increase the rights that defendants have in our system.