ARTICLES

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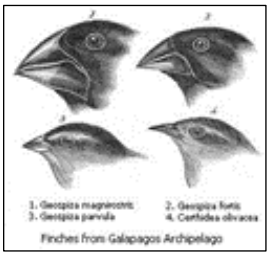
Sharply Divergent Species: The Criminal Trial Systems in England and the United States

INTRODUCTION

Darwin's *The Origin of the Species* introduced us to the concept of divergent evolution, namely, the way that a species of an animal evolves differently from others in the genus if a species is isolated in new surroundings and must adapt to novel challenges.

Darwin's landmark work showed how species of finches in the Galapagos Islands came to have different coloring and different beaks as they adapted to their unique surroundings.



Finches from Galapagos Archipelago

While the natural world surrounding justice systems in different countries may not differ so as to impact the way those systems

develop, there are many other influences—political, economic, and historical—that will impact the development of each criminal trial system. This Article will show how dramatically the criminal justice systems in England[1] and the United States have diverged, with trials continuing to flourish in England and trials in the United States "vanishing," as the phenomenon is often described. One reason for the sharp diversion over time is the very different political systems in the two countries. England has a parliamentary system in which the English Parliament controls most features of the criminal law. Criminal statutes, trial and pretrial procedures, sentencing policies, and other features of the criminal justice system are determined by Parliament.

The United States has a federal system in which different, and rather independent, levels of government define crimes as they see fit and set their own sentencing policies. Crimes such as manslaughter or fraud may be defined differently in Minnesota compared to Texas and the sentencing ranges may also differ dramatically.

The United States federal government also has criminal statutes, but it is a limited jurisdiction. Congress can criminalize only conduct that affects a federal interest. Thus, bank robbery is a federal crime because banks are federally insured, but robbery of a liquor store or jewelry store will be within the domain of the state where the act takes place.

While the federal system has jurisdiction over only a limited number of crimes compared to the states, the federal system is well constructed to prosecute complicated large criminal conspiracies that spill over state borders or even international borders. There are F.B.I. agents, Secret Service agents, Treasury agents, and other federal law enforcement officials throughout the country. In addition, the federal system has tremendous technical and financial expertise at its disposal, so it can prosecute complicated frauds, terrorism cases, and other major conspiracies that would be out of reach for state prosecutors.

American populism also has a powerful impact on the U.S. criminal justice system. State judges, even state supreme court judges, often are elected and must campaign on electoral platforms that give the voters some indication of their views on important issues likely to come their way if elected.

Because of England's parliamentary system, support for its criminal justice system will be more uniform throughout the country with

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1 References to English law and procedure in this Article include the legal systems of both England and Wales. Scotland and Northern Ireland have quite different procedures.

Parliament determining fiscal matters such as the budget of the courts, how many additional judges can be appointed, and how much funding needs to be provided for indigent defendants.

Because of the federal system in the United States, states will vary considerably in the level of support they are willing or able to provide their criminal justice systems. States have different levels of resources and may have different priorities. These differences may result in some state systems that are quite strong and progressive in tackling criminal issues, while other states may not have the resources to reform their criminal justice systems or may not have the will to do so.

These are just some of the "environmental" differences between England and the United States, such that it is not surprising that their criminal justice systems would diverge sharply. Of late, the divergence can be seen dramatically in the preference for jury trials in the two countries. In England, only very serious crimes, such as murder, rape, and aggravated assault, are tried in Crown Courts where trials are always jury trials. Despite the seriousness of the cases docketed for trials in Crown Courts in 2022, roughly 700 judges presided over 26,301 trials.[2] By comparison, in federal courts in the United States in 2022, with a similar number of judges, there were only 1,263 trials.[3]

Less serious felonies like drugs, thefts, and burglaries—as well as all minor crimes—are tried in magistrates' courts where there are no jury trials. Rather, the trial takes place in front of a single judge or a panel of lay magistrates.[4] The number of trials provided by magistrates' courts is also robust: in 2022, magistrates' courts handled 88,804 trials.[5]

Federal courts in the United States have tremendous resources and very few cases compared to state courts. In 2022, there were well over

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2 Justice Data, *Crown Court Total Number of Trials January-December 2022* (Mar. 28, 2024), https://data.justice.gov.uk/courts/criminal-courts#chart-tab-courts-magistrates-trials [https://perma.cc/AXW3-YHA2].

3 U.S. Courts, *Table D-4 U.S. District Courts Criminal Statistical Tables for The Federal Judiciary* (Dec. 31, 2022), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2022/12/31 [https://perma.cc/DY32-KFEF].

4 Lay magistrates are regular citizens appointed from the community who volunteer their time to decide cases in minor criminal matters in magistrates' courts. They are expected to be available to hear cases fifteen half days a year and they are expected to serve for five years. *See Become a Magistrate*, https://www.gov.uk/become-magistrate/can-you-be-a-magistrate [https://perma.cc/PG5L-GSKF].

5 Justice Data, *Magistrates' Courts Total Number of Trials January-December 2022* (Mar. 28, 2024), https://data.justice.gov.uk/courts/criminal-courts#chart-tab-courts-magistrates-trials [https://perma.cc/5J5R-3QBU].

a million violent crimes committed in the United States, but the federal courts prosecuted only 2,808 violent crimes. State courts bear the burden of handling the hundreds of thousands of violent crimes that do not come within the jurisdiction of federal courts.

Much the same is true of nonviolent crimes. Theft is rarely prosecuted in federal court unless it is theft of federal property, theft from the U.S. mail, theft that occurs on federal land, or a theft that spills over state borders. In 2022, there were 4,672,363 thefts committed in the United States, but there were only 1,000 theft cases prosecuted in federal courts that year.[6]

Not surprisingly, state courts have largely abandoned trials. The Criminal Court for the City of New York, for example, will handle roughly 200,000 misdemeanors a year, of which only a tiny fraction—fewer than 800—are resolved by trial.[7] New York is not an exception—courts in major urban areas will dispose of hundreds of cases a day, with each plea bargain taking a few minutes or less.[8]

The decline of trials in the United States is hardly new news. For more than twenty years, there have been scholarly articles[9] and news articles[10] about the near abandonment of trials. Not only has the percentage of cases resolved at trial declined, but the absolute number

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6 U.S. Courts, *supra* note 3.

7 Between 2007 and 2017, the number of trials each year in New York City criminal courts were never more than 645 trials in a given year while the number of those charged with misdemeanors were usually 200,000 or more. *See* LISA LINDSAY, CRIMINAL COURT OF THE CITY OF NEW YORK ANNUAL REPORT 2017 (Justin Barry ed., 2018).

A thoughtful study of New York City misdemeanor courts describes these courts as having abandoned the adjudicative model that would determine guilt or innocence of defendants, preferring a managerial model that puts vast numbers of citizens under state control for a fixed period of time. *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS 71–75 (2018).

8 *See* John R. Emshwiller & Gary Fields, *Justice Is Swift as Petty Crimes Clog Courts*, WALL ST. J. (Nov. 30, 2014, 10:33 PM), https://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782 [https://perma.cc/NE5H-F5Z9].

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

10 *See, e.g.*, Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html [https://perma.cc/Q3C8-8945] (describing how trials have vanished in the Southern District of New York, once the most prestigious trial venue in the federal system).

In state systems, the rate of trials is often less than one percent. For example, Emily Yoffe wrote about Davidson County in Tennessee where the public defender's office handled 24,900 felonies and misdemeanors of which only eighty-six went to trial. *See* Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171 [https://perma.cc/52WD-UV3F].

of trials has shrunk as well. The United States conducted more trials in its federal and state courts forty years ago than it does today despite many more judges and much greater resources.

The obvious question is: how is it that England can continue to have a rather robust trial system while trials in the United States have become rare events?

I
ARE TRIALS NECESSARY?

The most important distinction between the two criminal justice systems is that England historically and culturally has a strong need for criminal trials. The need for trials in England stems from the fact that England has a divided bar. Solicitors are the office lawyers in England who handle serious cases up to the point of trial in Crown Court. Solicitors will collect evidence and manage the case, but when the case is ready for trial, serious cases are turned over to barristers.[11] Barristers are an elite group of lawyers who specialize in and do only trials.[12]

Defendants do not hire barristers. Instead, solicitors engage barristers. The solicitor will provide the case documents to the barrister (the "case brief"), including explanations of what different witnesses will testify to, and the barrister will take it from there. Often the barrister will not even meet the defendant until the day of trial.[13] The Crown Prosecution Service (CPS) has some barristers on its staff, but even the CPS will usually hire outside barristers for cases in Crown Court.[14]

Barristers get paid only for being on trial and, therefore, depend on trials for their livelihood.[15] Because most defendants are indigent, most barristers in the criminal area rely on fees paid by the Legal Aid Agency for their days in trial.[16] It is hardly a princely sum, and many that begin trying cases in the criminal area move on to other areas of

11 *See* MICHAEL H. GRAHAM, TIGHTENING THE REINS OF JUSTICE IN AMERICA 54–61 (1983); *see also* HERBERT JACOB ET AL., *Courts, Justice, and Politics in England*, *in* COURTS, LAW & POLITICS IN COMPARATIVE PERSPECTIVE 99–103 (1996) [hereinafter JACOB].

12 For an excellent treatment of the English bar including full explanation of the differences between solicitors and barristers, see ADAM KRAMER & IAN HIGGINS, BEWIGGED AND BEWILDERED?: A GUIDE TO BECOMING A BARRISTER IN ENGLAND AND WALES (3d ed. 2016) [hereinafter KRAMER & HIGGINS].

13 *Id.* at 1–5.

14 *See* JACOB, *supra* note 11, at 100.

15 *Id.* at 100–01.

16 *See* KRAMER & HIGGINS, *supra* note 12, at 41–42.

specialization that promise greater income, such as commercial litigation, bankruptcy, contract law, employment law, and other areas of civil litigation.[17]

Adding to the economic pressure on barristers is the fact that they are independent sole practitioners. They cannot depend on the income of others, as in a law firm, to help tide them over when few cases come their way. They usually work in a chamber with other barristers, but their income is not shared.[18]

Eliminating almost all trials in favor of plea-bargaining rates of ninety-five percent or higher, as has happened in U.S. state and federal systems,[19] is unthinkable in England because the history of barristers runs deep in English history and culture. All barristers must be a member of one of the four Inns of Court: Lincoln's Inn, Middle Temple, Gray's Inn, and Inner Temple.[20] These Inns go back to Elizabethan times, and, indeed, Shakespeare's Twelfth Night[21] and A Comedy of Errors[22] were first performed in the halls of two of the Inns.

These Inns have largely ceded the training of barristers to other institutions, but they retain some disciplinary functions with respect to barristers. The Inns also have dining facilities, some accommodations, lovely gardens, and large libraries, which are at the disposal of their members.[23]

Given the tradition of barristers and the central role trials have played in English legal history, England needs trials and has developed a trial system that functions to make trials work more efficiently than

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17 In 2022, criminal barristers went on strike in England claiming that their real earnings had declined twenty-eight percent in the period from 2006 to 2022 and that the number of barristers doing criminal work had declined by a quarter over the previous five years. After a work action and strike, the government agreed to raise the legal aid fees by fifteen percent. *See* Haroon Siddique, *Criminal Barristers in England and Wales Vote to End Strike Action*, THE GUARDIAN (Oct. 10, 2022), https://www.theguardian.com/law/2022/oct/10/barristers-in-england-and-wales-vote-to-end-strike-action [https://perma.cc/F42Z-5RL5].

18 *See* KRAMER & HIGGINS, *supra* note 12, at 5.

19 *See* Lucian E. Dervan, *Fourteen Principles and a Path Forward for Plea Bargaining Reform*, A.B.A. (Jan. 22, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/fourteen-principles-path-forward-plea-bargaining-reform/ [https://perma.cc/P744-XFVE].

20 *Id.* at 11.

21 *See Middle Temple: Inn of Court*, SHALT SHAKESPEAREAN LONDON THEATRES, https://shalt.dmu.ac.uk/locations/middle-temple.html [https://perma.cc/AJZ6-N6GA] (last visited Oct. 4, 2024).

22 *See* Will Tosh, *The Night of Errors*, SHAKESPEARE'S GLOBE (May 11, 2023), https://www.shakespearesglobe.com/discover/blogs-and-features/2023/05/11/the-night-of-errors/ [https://perma.cc/JP88-NUVD].

23 *See* KRAMER & HIGGINS, *supra* note 12, at 11.

the U.S. system. The same trial will be much shorter in England than it would be in the United States.

II
FINANCIAL PRESSURES FOR TRIAL EFFICIENCY

In the United States, preparation in advance of trial by the trial attorneys is extensive. One part of that extensive preparation is the rehearsing and practicing of witnesses in the testimony they will give at trial. In England, it is forbidden to "rehearse, practise with or coach a witness in respect of their evidence."[24] This ethical restriction is backed by a financial consideration. Barristers will not get paid for extensive pretrial preparation of witnesses. As explained above, they get paid only for days in trial.[25]

Prosecutors and defense lawyers in the United States see the pretrial preparation of witnesses as a necessary and important step in shaping the way that cases will be presented or defended at trial. Not only will they go over the questions likely to be asked of the witness, but they may put the witness through a practice cross-examination to help prepare the witness for what will happen at trial.

The financial constraints that limit pretrial preparation in England are not the same in the United States, as prosecutors and public defenders are typically salaried employees and can prepare as they wish. But even when a private lawyer is brought in to defend a criminal case—perhaps where there is a conflict that does not permit the public defender to handle the case—the attorney will be paid not just for time in trial but also for pretrial work, including preparing witnesses. The English ethical prohibition against preparing or rehearsing witnesses is symptomatic of a trial system that sees the role of the trial lawyer as ethically more limited than the role that has evolved in the United States. England doesn't want lawyers "shaping" testimony for adversary advantage.

That barristers would come into an important case a day or two before trial and not meet the witnesses who will be called at trial would border on malpractice in the United States. But barristers are supposed to deal with surprises in the courtroom and make adjustments.[26]

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24 Bar Standards Board Handbook, 2024, Part 2, rC9.4 (UK).

25 *See* JACOB, *supra* note 11, at 100.

26 Barristers are litigation specialists who work on one case at a time and do trials continually. *See* Richard Samuel, *Barristers: What They Are, and Why They Exist*,

This tempering of adversarialism makes it possible for barristers to go to trial very frequently, even back-to-back, as the stress of trials is less than it is in the United States. As explained above, barristers need frequent trials as no income comes their way on days they are not on trial.

The selection of juries is another efficiency in England as peremptory challenges were abolished in 1988.[27] Jury selection is thus quite brief by comparison to the United States. Jury selection in the United States sometimes takes weeks or even months in high publicity cases.[28] Prosecutors in the United States need extensive jury selection because there is always the worry that a "stealth" juror might end up on a jury intending to acquit the defendant no matter how strong the evidence.[29] But that problem is limited in England because a judge has the discretion to accept a verdict of 11–1 or 10–2 after at least two hours of deliberation.[30] Obviously, English judges won't accept a verdict quickly in a close case or a very serious case, but where the evidence is overwhelming, they have the ability to accept a nonunanimous verdict. England does not want a case tried more than once if it can be avoided.[31]

Barristers, of course, need trial efficiency just as much as judges. For one thing, barristers have managed to maintain their central and historical role in trials in Crown Courts by showing that they can handle trials very efficiently. If a case is set for a four-day trial, barristers will

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LEGALMONDO (Apr. 5, 2020), https://www.legalmondo.com/2020/04/barristers-what-are-why-exist/ [https://perma.cc/49KF-FZ6V].

27 *See* The Criminal Justice Act, (1988) Code 33 Part VIII § 118 (Eng.).

28 In a racketeering trial in Atlanta which was expected to take nine months of trial time, it took almost ten months to select a jury. *See* Associated Press, *Jury Selected After Almost 10 Months for Rapper Young Thug's Trial on Gang, Racketeering Charges*, U.S. NEWS (Nov. 1, 2023), https://www.usnews.com/news/us/articles/2023-11-01/jury-selected-after-almost-10-months-for-rapper-young-thugs-trial-on-gang-racketeering-charges [https://perma.cc/45JS-5RCU].

29 There is an empirical debate over whether hung juries have been increasing in the United States. Eric Holder, who was Attorney General under President Obama, stated that when he was the United States Attorney for the District of Columbia, he presided over at least ten trials that resulted in verdicts of 11–1 or 10–2 despite overwhelming evidence of guilt. *See* Jeffrey Rosen, *After 'One Angry Woman,'* 1998 UNIV. CHI. LEGAL F. 179, 180 (1998).

30 *See* Juries Act 1974, (1974) ch. 23. (Eng.).

31 In the case that shocked England, Lucy Letby, a neonatal nurse, was charged with the murders of ten infants and the attempted murder of seven other infants in her care. The judge in that case did not allow a majority verdict until the jury had spent four weeks deliberating. *See* Josh Halladay, *Lucy Letby Trial Jury Told It Can Reach a Majority Verdict*, THE GUARDIAN (Aug. 8, 2023), https://www.theguardian.com/uk-news/2023/aug/08/lucy-letby-murder-trial-jury-told-reach-majority-verdict [https://perma.cc/C3MN-622N].

work hard to keep within that time frame. This is not just a matter of professionalism but economics as well. The barristers will often have other cases set for trial to follow the present one, and they will lose those cases if the present trial exceeds four days.

Predicting the length of a trial in England is easier because the issues to be contested are very clear. The prosecution must disclose to the defense in advance of the trial all evidence that they will present at trial and all evidence that might "reasonably be considered capable of undermining" the prosecution's case.[32] But, in addition, the prosecution must disclose all evidence "that might be reasonably considered capable of . . . assisting the case for the accused,"[33] and the Disclosure Manual for Crown Prosecutors sets out detailed lists of items that should be disclosed and also adds that "[p]rosecutors should resolve any doubt they have may have in favour of disclosure."[34] But, in turn, the defense has to show its hand. Twenty-eight days before a jury trial, the defense must fill out a Defence Statement that indicates the nature of the defense that will be put forward at trial and the witnesses that will be called.[35]

Perhaps just as important to trial efficiency, the statement requires that the defense indicate the "matters of fact" with which it takes issue with the prosecution and the reasons why for each dispute.[36] This disclosure means that many elements of a crime will be admitted and conceded prior to trial. Among the examples might be that the property possessed was stolen, that the drug in question was heroin, or that the defendant's fingerprint was on the knife. When factual disputes are thus narrowed, the trial becomes shorter, the length of the trial can be better predicted, and the trial can focus on the issues where there is real dispute.

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32 Criminal Procedure and Investigations Act 1996, (1996) CODE 25, PART 1 § 3 (Eng.).

33 *Id.*

34 *See* Crown Prosecution Service, *Disclosure Manual, Chapter 12 – Applying the Disclosure Test* (Oct. 21, 2021), https://www.cps.gov.uk/legal-guidance/disclosure-manual-chapter-12-applying-disclosure-test [https://perma.cc/BJ9V-NMUX].

35 *See Defence Statement, CrimPR 15.4*, (Aug. 19, 2021), https://www.gov.uk/government/publications/defence-statement [https://perma.cc/JG6K-KKHE]. For an example of a completed Defence Statement, see Regina v. W, *Consent Form for the Service of a Defence Statement*, UNIV. OF HERTFORDSHIRE (2022–2023), https://www.studocu.com/en-gb/document/university-of-hertfordshire/criminal-evidence/r-v-w-example-defence-statement/24695932.

36 *Id.*

By comparison, discovery in the United States can be a complicated and drawn-out battle, especially in important cases, as prosecutors are often reluctant to open their files to the defense.[37] Nor is there any obligation similar to that in England for defense attorneys to narrow factual issues to those that can truly be disputed. There will thus be more pretrial hearings needed to decide discovery issues, and trials will also be longer as the defense will require the prosecution to bring in witnesses to prove factual issues that cannot be disputed.

III
WHEN DOES A TRIAL START?

Discovery is more complicated in advance of trial in the United States, in part because the United States has a different conception of the start of trials—trials will often begin early in the investigative stage of a criminal case.

This is perhaps best illustrated by the conception of trial put forward in *Miranda v. Arizona*.[38] Readers are no doubt familiar with *Miranda* and how it works. When a suspect is arrested in the United States, the suspect is given *Miranda* warnings and can cut off all questioning by asking for a lawyer. Lawyers will uniformly tell the arrestee to decline to answer any questions, as there is nothing to gain by answering questions and much to lose.[39]

A suspect must be protected from "being a witness against himself" under the Fifth Amendment as if the arrestee was being forced to testify in the government's case at trial.[40] The *Miranda* opinion backs up the application of the Fifth Amendment to the police station by explaining that arrest marks the start of our adversary trial system. The opinion explains: "It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries."[41]

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37 Rule 16 of the Federal Rules of Criminal Procedure governs discovery, and it is quite narrow. For example, there is no requirement that the government turn over to the defense in advance of trial the statements of witnesses the government intends to call at trial. *See* FED. R. CRIM. P. 16(a)(2).

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

39 There is a certain naivete in Chief Justice Warren's opinion. He suggests that perhaps a lawyer might help an arrestee make a better and more accurate account of the crime if the arrestee wanted to confess. *Miranda*, 384 U.S. at 470. It will not happen. If the arrestee has something to contribute to the case and wants to cooperate, that is a matter for bargaining with the prosecutor, not to be offered freely to the police.

40 U.S. CONST. amend. V.

41 *Miranda*, 384 U.S. at 477.

That the adversary system begins at arrest distinguishes the United States from England, and indeed other western countries. Other countries see a case as proceeding generally along the following chronological sequence. First, there is a crime, and it is reported. Then, the crime is investigated—witnesses are interviewed, suspects are questioned, lab work is done, and so on. When the investigation is complete, someone is charged with the crime. Finally, those charges are tested at a trial.

Most arrests for street crimes—murders, assaults, thefts, etc.—will happen quickly before an investigation has even begun and, indeed, before a prosecutor may even be involved.[42]

The United States' expansive view of the adversary system, as reaching back into the investigation stage, paints a picture of investigators as aligned on the side of the prosecution. It is natural that police want to see a crime solved and an offender duly punished, but that should not affect the duty to carry out a full and fair investigation. When police see themselves as aligned with the prosecutor, investigations may become one-sided. It may also encourage police to hold back evidence that would be helpful to the defense.

One of the consequences of seeing the trial as extending quite early in most criminal cases is that charging, discovery, and many other pretrial matters are more adversarial in the United States than in England. Discovery can be a battle—prosecutors and defense attorneys are often reluctant to share information in important cases. Rather than being obliged to turn over anything that is capable in any way of assisting the defense, as is the case in England, prosecutors are obligated only to turn over "exculpatory" material to the defense.[43] The line between what is exculpatory and what is helpful to the defense is often not easily drawn.

As for the specifics of the defense, there is nervousness in the United States over whether advanced disclosure can be required.[44] One defense that presents special problems is an alibi because its contours cannot usually be anticipated. The defendant may, as the last witness for the defense, testify that he or she was in another city or another state at the

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42 Indeed, Ernesto Miranda was arrested for rape and questioned by the police before any prosecutor was involved in the case. *See Miranda*, 384 U.S. at 491–92.

43 The leading cases are *Brady v. Maryland*, 373 U.S. 87 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

44 Rule 16 of the Federal Rules of Criminal Procedure has no requirement that a defendant disclose the specific defense to be raised at trial. *See* FED. R. CRIM. P. 16.

time of the crime. This is awkward, as it may require a continuance to give the prosecution time to investigate the alibi and try to gather evidence that might rebut it. To prevent the delays that a late alibi entails, there are usually rules that require the disclosure of this defense. Under the federal rule, the prosecution must ask for such disclosure and, in return, give the defense the names of witnesses that will counter the alibi.[45] If the alibi can be shown to be false, the defendant can withdraw the alibi defense and put forward a different defense with no consequences. The federal rule, for example, states that notice of an alibi later withdrawn is not admissible in any criminal proceeding.[46]

This sort of gamesmanship is unique among western countries, and it stems from a concept of trial that encompasses not just what happens in a courtroom, but also the investigatory stage as well.

The *Miranda* Court was nervous, and rightfully so, over what happens when police question suspects in an incommunicado setting. *Miranda* tries to give arrestees the power to stop all questioning. This is perhaps consistent with the view that the police are adversaries, and the questioning is a phase of the trial.

The questioning of suspects at a police station in England is approached very differently. It is not referred to pejoratively as "interrogation," rather it is "interviewing" the suspect and there is nothing shady or doubtful about such questioning.[47] Police have the right to question suspects, and the strong preference with important witnesses is that the questioning be done at a police station in a room where it is recorded.[48](Signs on the door of the interview room warn that it is a "Recorded Interview Room.") Of course, there can still be trickery or abuse, but a recording helps avoid that, and recording of interviews has long been required.[49] More importantly, the recording can prevent courtroom battles over what was said when the arrestee was questioned, as there will be a record of the interview.

An arrestee has the right to free legal counsel, and the arrestee will be told of the right as soon as the arrestee arrives at the police station. There is a rota of duty solicitors who will come to a police station when

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45 *Id.* at 12.1.

46 *Id.* at 12.1(f).

47 Police and Criminal Evidence (PACE) Act, (1984) CODE C § 11 (Eng.). This is one of the regulations dealing with the detention, treatment, and questioning of persons by police officers that sets out regulations for "interviews."

48 *Id.*

49 There is a separate code governing the recording of interviews. *See* Police and Criminal Evidence (PACE) Act, (1984) CODE E (Eng.).

called to assist those asking for counsel.[50] Solicitors are given background information about the facts leading to the arrest so they can better advise the arrestee. Their job is to make sure the questions are fair and appropriate, to provide legal advice, and to protect the arrestee from being tricked or deceived in some way. But they can't stop proper questions from being asked—there are regulations dealing with the removal of a solicitor if the solicitor is behaving in a way that questions cannot properly be put to the subject.[51] And while suspects will be told they don't have to answer any questions, there is an additional warning given: "But it may harm your defence if you do not mention when questioned something which you later rely on in Court."[52] In other words, if you have an explanation or a defense, you should put it forward, or the failure to assert it may be brought out and commented on if the defendant chooses to testify at trial.

IV
DELAY AS AN ADVERSARY WEAPON

The insistence in England that the defense concede obvious issues and indicate those which are in dispute is reinforced by ethics rules that state that barristers "must take reasonable steps to avoid wasting the Court's time."[53]

This is in marked contrast to the ethics standards in the United States, which state that defense lawyers must "make reasonable efforts to expedite litigation," but this duty is immediately undercut by the caveat that expediting litigation must be "consistent with the interests of the client."[54]

Delay thus remains a potent weapon in the United States for both the defense and the prosecution. If a trial can be delayed, it puts pressure on prosecutors to settle for a plea bargain that the defense desires. As a delay goes on for months, witnesses move, memories fade, and it becomes harder to keep a case together. Victims grow frustrated going

50 *See* JACOB, *supra* note 11, at 101–02.

51 The code of practice governing questioning of subjects makes clear what solicitors may do and what they may not do in an interview room. *See* Police and Criminal Evidence (PACE) Act, (1984) CODE C § 6D (Eng.).

52 *See id.* § 10.5.

53 Bar Standards Board Handbook, *supra* note 24, at Part 2, rC3.3.

54 MODEL RULES OF PRO. CONDUCT r. 3.2 (A.B.A. 1983).

to court for hearings on issue after issue, or for trials that get repeatedly delayed.[55]

Prosecutors in the United States are also able to wield delay as an adversary weapon. This is particularly the case with misdemeanors and minor felony charges.[56] Requiring defendants to come to court and wait hours in a crowded courtroom day after day for a hearing that may or may not take place that day wears down defendants, even those who have strong defenses. Each postponement can mean lost wages, childcare problems, school absences, and the expense of traveling to and from the courthouse.

England does not have the same problems with less serious crimes as the United States because only very serious crimes require jury trials. Most nonjury trials will be brief because, as is true of trials in Crown Court, the defense must file a Defence Statement that indicates the nature of the defense and concedes the factual issues that it cannot contest.[57]

V
CIVILITY AND MUTED ADVERSARIALISM

One of the features of English trials that has attracted the attention of lawyers and judges in the United States is the civility with which the advocates treat each other. Cultural ethnographers who have studied trial systems in different countries described the English system as a "muted" adversarial system.[58] Some of this stems from the fact that barristers are a rather small and select group of lawyers, with many coming from the top English universities. They are, in a sense, part of a club, and they dress as barristers have for hundreds of years, wearing robes, traditional white wigs, and dicky collars. They also address each other in court, as barristers have done traditionally, as "my learned

55 The rules of evidence mandate that the rules be interpreted to avoid "unjustifiable expense and delay." FED. R. EVID. 102. However, this is not an ethical mandate on lawyers to avoid delay and, in any case, the ethics rules would certainly permit or even mandate that a defense lawyer delay proceedings if "consistent with the interests of the client."

56 A sad account of how delays wear down defendants forcing guilty pleas is an account by the Bronx Defenders of what happened to fifty-four defendants with "winnable" cases. *See* THE BRONX DEFENDERS, NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS (2013).

57 *See supra* text accompanying note 36.

58 *See* THOMAS SCHEFFER, ET AL., CRIMINAL DEFENSE AND PROCEDURE: COMPARATIVE ETHNOGRAPHIES IN THE UNITED KINGDOM, GERMANY, AND THE UNITED STATES (2010); THOMAS SCHEFFER, ADVERSARIAL CASE-MAKING: AN ETHNOGRAPHY OF ENGLISH CROWN COURT PROCEDURE xvii (2010).

friend."[59] The social connection among barristers is reinforced by the requirement that they be a member of one of the Inns of Court, which were described at the start of this Article.

But there are other factors that demand muted adversarialism. It would be difficult to handle trial after trial without some respect and understanding between the opposing barristers. In addition, the need to see cases resolved efficiently within the limit set for the trial requires that barristers be candid with each other and treat each other with respect.

Another moderating influence is the fact that barristers come from a tradition of switching sides: sometimes hired to prosecute and sometimes hired to defend.[60] This is especially the case with young barristers trying to earn a living and establish respect among solicitors. They need to take whatever cases they can to survive.

Barristers also follow the "cab rank rule," meaning that a barrister must take any case in their area of expertise that comes their way and fits within their pay scale.[61] Whatever their thoughts about the client or about what the client has done, they are advocates for the client and must use their skills for the client, despite not having chosen the client.

But the biggest restraint on advocacy in England concerns the way the conflict between a barrister's duty to the administration of justice and a barrister's duty to the client is resolved. While barristers must act in the best interests of each client, this is secondary to the duty they owe to the court in the administration of justice. A barrister has an overriding duty "to act with independence in the interests of justice," and this duty means that a barrister "must not knowingly or recklessly mislead or attempt to mislead the court," and "must not abuse [their] role as an advocate."[62]

This "overriding duty" to the administration of justice explains why there is no qualification on the duty not to waste the court's time as explained in the previous section: the duty to the court comes first even if it conflicts with the interests of the client.

The difference in the relationship between a barrister and a client compared to a U.S. defense attorney and client is evident physically in the courtrooms in the two countries. The prosecuting and defense

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59 *See* KRAMER & HIGGINS, *supra* note 12, at 22–25.

60 *See* JACOB, *supra* note 11, at 102.

61 *See* KRAMER & HIGGINS, *supra* note 12, at 16.

62 Bar Standards Board Handbook, *supra* note 24, at Part 2, rC3.1–2.

barristers will be seated near each other at the front of the courtroom, often at a single bench next to each other. Seated behind them are the solicitors who developed the case. The defendant sits at the very back of the courtroom in a box known as the "dock."[63]

In the United States, the defendant will be seated next to defense counsel so they can communicate easily with each other and defend together as a unified team.

Not surprisingly, in the United States, the tension between a lawyer's duty to the administration of justice and the duty to one's client is resolved in the opposite way it is resolved in England. Defense lawyers in the United States are described by the American Bar Association Standards for the Defense Function in Standard 4-1.2 (b) as having "the difficult task" of being both "officers of the court" and "zealous advocates for their clients."[64] But the standard then explains that a defense lawyer's duty as an officer of the court is subordinate to the duty owed to the client. The Standard 4-1.2 (b) states that "the primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion . . . ."[65]

There is no requirement that a defense lawyer act independently in the interests of justice. This can be seen in small ways as well as important ways.

A small difference has to do with the situation in which a lawyer in the United States is aware of legal authorities that run counter to the legal issue the defense has raised. The ABA Standards state that a defense lawyer must "disclose . . . legal authority in the controlling jurisdiction known to [defense counsel] to be directly adverse to the position of the client and not disclosed by [others]."[66]

Notice that this is a very narrow and grudging duty. It is not enough that an authority is adverse, but it must be "directly adverse" to the lawyer's position, and it must be from the controlling jurisdiction. Strong dicta or well-reasoned opinions from neighboring jurisdictions

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63 While the dock is an ancient part of courtrooms in England, it has often been attacked as unfair and prejudicial. *See, e.g.*, Oliver Small, *In the Dock: Why the Setup of the British Courtroom Needs to Change*, JUST. GAP (Oct. 20, 2020, 8:09 AM), https://www.thejusticegap.com/in-the-dock-why-the-setup-of-the-british-courtroom-needs-to-change/ [https://perma.cc/7UBW-M6RM].

64 CRIM. JUST. STANDARDS: DEFENSE FUNCTION, Standard 4-1.2(b) (A.B.A. 2017).

65 *Id.*

66 MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (A.B.A. 1983).

that might be helpful to a judge trying to rule on a legal issue need not be disclosed.

By contrast, Rule C3 on the Code of Conduct in the Bar Standards Handbook in England requires a barrister to "take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions."[67] The guidance notes to this rule make it clear that this requirement applies even to a decision or provision "which may be adverse to the interests of your client."[68] There is no hesitancy or qualification to the duty to assist the court because advocates in England have an overriding duty to the court.[69]

As for the admonition that a barrister not abuse their role as an advocate, this leads to notable differences between what is forbidden in England but permitted in the United States. Consider the situation in which a client has admitted to defense counsel that he or she committed the charged crime. Can defense counsel continue to proclaim the client's innocence in court or argue that a third person committed the crime?

Given the overriding duty to the administration of justice, England specifically restricts what a barrister can do when a defendant has admitted the crime. The barrister can cross-examine to test the reliability of the evidence and can argue to the jury that the prosecution has not succeeded in making the jury sure of the client's guilt.[70] However, what the barrister cannot do is put forward a defense inconsistent with the confession, such as suggesting to witnesses that the client did not commit the crime, or suggesting that some third person had done so.[71] Nor can it put forward an alibi defense in such a situation.[72]

In the United States, there is no overriding duty to the administration of justice, nor is there a duty to act toward the court with integrity and honesty. There is, thus, no ethical rule that would limit what a lawyer can do when a client has confessed to the crime. But should lawyers

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67 Bar Standards Board Handbook, *supra* note 24, at Part 2, rC3.4.

68 *Id.* at rC3–rC6, gC5.

69 *See* KRAMER & HIGGINS, *supra* note 12, at 16.

70 Bar Standards Board Handbook, *supra* note 24, at Part 2 rC4–rC6; Bar Standards Board Handbook, *supra* note 24, at Part 2 gC9–gC10; *see also* KRAMER AND HIGGINS, *supra* note 12, at 18–19.

71 *See* Bar Standards Board Handbook, *supra* note 24, Part 2 rC3–rC6; Bar Standards Board Handbook, *supra* note 24, Part 2 gC10.

72 *Id.* at gC10–13.

proclaim the defendant's innocence or accuse a third person of the crime if it helps the defendant obtain an acquittal?

Some scholars have argued that a defense lawyer with the knowledge that the defendant committed the crime should be restricted from proclaiming the defendant's innocence of the crime or blaming the crime on a third person.[73] But there are many scholars—and trial attorneys—who take the opposite position and see nothing wrong with insisting that the client is innocent or that a third person committed the crime. In fact, they insist it is the defense lawyer's duty to make such arguments if it will help the defendant.[74]

Without an overriding obligation to the administration of justice as exists in English ethics, everything that is not forbidden becomes permitted in the eyes of those who believe defense ethics demand that lawyers do things that are personally offensive. Thus, it has been argued defense lawyers may put forward a defense theory that exploits racism, sexism, homophobia, or ethnic bias if it will aid their client.[75] It has also been argued that defense lawyers may aggressively cross-examine a truthful rape complainant even though it will cause pain and perpetuate sexism.[76]

There are certainly many defense lawyers—probably a majority of defense lawyers—who would not engage in such extremes of advocacy. But the ethics rules don't support them, and they are often attacked for the quality of their work. Those insisting that extremely aggressive advocacy is required tend to see the defense bar as populated, in large part, by lazy, incompetent lawyers.[77]

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73 *See* Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 126 (1987); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1717–18 (1993).

74 *See* ALAN DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996) ("What a defense attorney 'may' do, he *must* do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client's best interest . . . ."); *see also* MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 43–49 (1973); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999).

75 *See* Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defenders*, 28 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV 1, 42–45 (1993).

76 *Id.*

77 Alan Dershowitz has defended himself against the charge of being overzealous by stating that "[i]n a world full of underzealous, lazy, and incompetent defense lawyers, I am proud to be regarded as overzealous . . . ." ALAN DERSHOWITZ, THE BEST DEFENSE 410 (1983); *see also* Abbe Smith, *Promoting Justice Through Interdisciplinary Teaching,*

This uncertainty over the limits of advocacy is not healthy for the legal profession, and it helps explain the abandonment of trials. It also ignores the fact that there are important situations where muted adversarialism is the most effective advocacy. A prime example can be seen in sentencing, where an effective advocate who helps a judge see the defendant in a better light and the crime as a single mistake can shave years from a potential sentence.[78]

The problem for many defense lawyers is the tension that exists between extreme advocacy at trial and muted advocacy at sentencing. Many lawyers will prefer to have their clients forgo a trial because they can do better for their clients at sentencing if they have not aggressively attacked the victim and the prosecution's evidence at trial.

This can be seen playing out in U.S. federal courts. Once the Supreme Court freed lawyers from the tyranny of the Federal Sentencing Guidelines, which had made sentencing a matter of calculation not judgment, the expectation of lawyers and legal experts was that there would be a trial resurgence.[79] In fact, the opposite occurred, and the number of trials plummeted to new lows.[80]

This should not be surprising as, once the guidelines became advisory,[81] defense lawyers no doubt realized they could do much better for their clients at sentencing using muted advocacy, but only if they did not first attack the prosecution's evidence aggressively at trial.

VI
AGGRESSIVE ADVOCACY AND THE INTENTIONAL INSERTION OF ERROR

Aggressive advocacy takes a toll on trial judges. It is difficult to keep a case moving along if delay is being used as an adversary weapon. When a trial does take place, it may be difficult to control the trial if the prosecutor and defense lawyer do not place limits on their behaviors.

Practice, and Scholarship: The Difference in Criminal Defense and the Difference It Makes, 11 WASH. U. J.L. & POL'Y 83, 92 (2003) ("most criminal lawyers do not engage in zealous advocacy . . . mostly out of institutional expedience or laziness").

78 Another area where extreme adversarialism is out of place is in restorative justice which undercuts what is trying to be achieved.

79 *See* Robert J. Conrad & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 132 n.179 (2018).

80 *Id.* at 133–34.

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

Complicating the position of trial judges in the United States is the practice by defense attorneys of trying to get reversible error into a trial to obtain a retrial if the defendant is convicted. This can be done in many ways—seeding a genuine request among many frivolous motions, provoking the judge to an erroneous ruling in jury instructions, or even provoking the judge into an angry outburst that could be challenged on appeal.

In 1980, Judge Marvin Frankel wrote a short but powerful book entitled *Partisan Justice*.[82] The book, which has been heavily cited in law reviews since its publication, explained the pressures on trial judges as litigators try to get possible reversible errors into the trial record to provide "insurance" if the trial does not go the way the litigators hoped. Frankel explained: "Every ruling is a potential weapon on appeal . . . . The appeals, when they happen, will be times for careful study and reflection by a panel of higher court judges. The rulings destined for that scrutiny are, in most cases, relatively instantaneous responses to questions that burst upon the trial scene with insistent suddenness."[83] While we tend to think of adversary trials as battles between the prosecutor and the defense attorney, Frankel reminded us that often the battle is between the defense lawyer and the judge.

The appellate system for criminal cases in England and how it differs from that in the United States will be discussed in the following section. But for now, suffice it to say that the whole idea that barristers would try to insert a reversible error into a case goes against the duty of a barrister. They must observe their duty "to the court in the administration of justice"[84] as well as their duty to "act with honesty, and with integrity."[85] Not only should they not introduce procedural error into a case, but they have an obligation to point out any "procedural regularities . . . which are likely to have a material effect on the outcome of the proceedings."[86]

VII
APPELLATE REVIEW AND JUDICIAL PASSIVITY

Trial judges play a more active role at trials in England compared to U.S. judges. England still follows common law tradition, which

82 *See generally* MARVIN E. FRANKEL, PARTISAN JUSTICE (1980).

83 *Id.* at 44.

84 Bar Standards Board Handbook, *supra* note 24, at Part 2 CD1.

85 *Id.* at CD3.

86 The Code of Conduct for Solicitors, RELs and RFLs, 2023, Rule 2.7 (UK).

requires that a trial judge summarize the evidence for the jury at the end of the trial.[87] This tradition stems from the belief that jurors have not done factfinding before and they need a review of the testimony and other evidence to pull it all together. The result of the obligation to summarize the evidence is that English judges pay close attention to what the witnesses say and are not hesitant to ask clarifying questions if there is confusion or uncertainty over what the witness has said or what is meant by an answer.

The United States has moved away from the tradition of summarizing the evidence. American populism holds considerable sway on this issue as some states have statutorily forbidden judges from summarizing the evidence,[88] but, even where permitted, it is not done. Federal judges have the power to summarize the evidence but do not do it. Part of the reason for this reluctance stems from our appellate system—if there is a conviction, one of the arguments on appeal will be the claim that the summary was not balanced or did not adequately explain an aspect of the defense.

English judges are much less worried about appellate review because it is not easy to get a case reviewed on appeal and even harder to get a conviction reversed. Immediately after a conviction, the defense can request permission to appeal and indicate the issue or issues to be raised.[89] There will be a review of the request by a judge who is or has been a trial judge. And unless it is a pure issue of law which needs clarification, an appeal will not usually be granted unless there is a chance that there is a miscarriage of justice or, in the terms

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87 *See* Courts and Tribunal Judiciary, *Criminal, Criminal Justice*, https://www.judiciary.uk/about-the-judiciary/our-justice-system/jurisdictions/criminal-jurisdiction/#:~:text=During%20the%20trial&text=Once%20all%20evidence%20in%20the,what%20the%20prosecution%20must%20prove [https://perma.cc/V56H-XBZZ] (last visited Oct. 9, 2024).

88 *See generally* JACK B. WEINSTEIN, THE POWER AND DUTY OF FEDERAL JUDGES TO MARSHALL AND COMMENT ON THE EVIDENCE IN JURY TRIALS AND SOME SUGGESTIONS ON CHARGING JURIES 161 (1988).

89 *See generally* JACOB, *supra* note 11, at 107–09.

In a high-profile criminal case in England where the defendant was a neonatal nurse found guilty of killing seven infants and attempting to kill six others, her initial appeal from conviction was denied by a judge who reviewed her petition. *See* Helen Pidd, *Child Serial Killer Lucy Letby Loses Initial Attempt to Challenge Convictions*, THE GUARDIAN (Jan. 30, 2024), https://www.theguardian.com/uk-news/2024/jan/30/child-serial-killer-lucy-letby-loses-initial-attempt-challenge-convictions [https://perma.cc/EBL6-MJJ2].

The forms for seeking permission to appeal require a defendant or the defense barrister to set out the specific errors alleged. *See* Criminal Appeal Office Form NG Conviction (Sept. 1, 2018), https://www.gov.uk/government/publications/criminal-appeal-office-form-ng-conviction [https://perma.cc/R2DR-YC2H].

under the statute on appeals, there is a danger "that the conviction is unsafe."[90]

By contrast, in the United States, appeals are essentially mandatory, which necessitates a trial transcript and a review of it to see if there may be errors. The leading case on criminal appeals is a Warren Court decision, *Anders v. California*.[91] Under the procedure laid out in *Anders*, even if an attorney decides after a conscientious review of the record that there are no appealable issues, the lawyer must (1) advise the appellate court by letter, (2) accompany the letter with a brief referring to anything in the trial record that might possibly support an appeal and showing why it was meritless, and (3) furnish a copy of the brief—now usually referred to as an *Anders* brief—to the defendant with sufficient time to allow the defendant to raise issues of the defendant's choosing. Lastly, the appellate court must make a full examination of all the proceedings to see if, in the Court's turn of phrase, any possible issues are "wholly frivolous."[92]

When there are genuine issues of merit raised on appeal, appellate courts in the United States don't balance the error against the weight of the evidence to see whether the conviction is unsafe or might be a miscarriage of justice. Instead, appellate courts must assess how the error might have impacted the minds of jurors.[93] This is not an easy standard to meet when there is no access to a jury's deliberations.

Many decisions at a trial are, to borrow a sports term, "judgment calls,"[94] and to have these decisions routinely reviewed on appeal as the basis for reversal is difficult for trial judges and strongly encourages passivity at trial. Cutting off a line of defense questions as being repetitive, denying a request for a continuance, or asking a clarifying question to help the jury becomes risky. The different approaches to appellate review in the two countries reflect different levels of trust in trial judges. In England, almost all Crown Court judges have been successful criminal barristers.[95] They have had years of trial experience, and the system wants them to control the trial and trusts them to do so.

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90 *See* Criminal Appeal Act 1968, 1968, Part I §§ 1, 2(a) (UK).

91 *See* Anders v. California, 386 U.S. 738 (1967).

92 *Id.* at 744.

93 *See* Kotteakos v. United States, 328 U.S. 750, 764 (1946).

94 *See* William T. Pizzi, *"Makeup Calls" in Sports and Courts*, 11 GREEN BAG 2D 333 (2008).

95 *See* JACOB, *supra* note 11, at 89–90.

Part of that trust may also come from the fact that they are part of a tradition in which barristers will often represent both the prosecution and the defense during their years in court. This is very different from the United States where often lawyers come to the bench with no criminal experience or, if they have criminal experience, it will have been only as a prosecutor or defense lawyer.[96]

Things are different in the United States, where the appointment of judges is nakedly political, and, where judges are not appointed, many are elected in partisan contests.[97] Some trial judges do not come from the trial bar and lack trial experience, civil or criminal.

Also, trial judges in the United States usually handle both civil and criminal cases, which can be demanding. In contrast, judges in the Crown Court hear only criminal cases.[98]

Maybe these differences in the way judges come to the bench in the United States and in the breadth of their dockets justify more appellate review in the United States than is available in England. If so, there could be many different options. But the present system of demanding close scrutiny of trial rulings after every trial by appellate judges, who have very often not been trial judges and may not fully appreciate what it is like making rules in the heat of a difficult trial, is dispiriting for trial judges, and it takes a toll.

In an article in the New York Review of Books entitled *Why Innocent People Plead Guilty*, Jed Rakoff, a federal judge in New York City, notes that judges taking guilty pleas are supposed to question defendants about the facts of the case to make sure the defendant is actually guilty of the crime in question.[99] He goes on to explain that this doesn't happen because, "in practice, most judges, happy for their own reasons to avoid a time-consuming trial, will barely question the defendant . . . ."[100]

This backhanded slap at fellow judges by Judge Rakoff is a bit unfair. When you understand the pressures that our criminal justice system puts on trial judges, the complexity and costs of trials, and the

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96 *Id.*

97 *Id.*

98 *Id.* at 87–88.

99 Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/JK8Z-NNN2].

100 *Id.*

lack of support ethics rules give trial judges, it is not so surprising that judges, even in our federal courts, are happy to avoid trials.

VIII
EVIDENCE RULES AS TEMPERING ADVERSARIALISM IN ENGLAND

In the United States, there is a powerful deterrent that keeps defendants from testifying if they have a prior conviction. The prosecutor will attack the defendant's character for truthfulness by bringing out evidence of that conviction.[101]

This is a much-debated practice as it is obvious from the nature of a criminal trial that a defendant always has a motive to testify falsely to avoid the consequences of a conviction. In addition, there is the worry that jurors are likely to see a prior conviction as additional evidence that the defendant committed the crime in question. While judges will caution jurors that they should consider the prior conviction for credibility only and not for propensity,[102] whether jurors can limit the use of the conviction in that way seems unlikely. Many defendants in U.S. courtrooms who have a prior conviction are often advised not to risk testifying, even if they have a colorable defense.

England protects defendants from character attacks of this sort by linking attacks on the defendant's character to attacks on the character of a prosecution witness. The English rule states that the prosecution may not attack the character of a defendant unless "the defendant has made an attack on another person's character."[103] What this means in practice is that defense barristers will usually be careful in cross-examining a prosecution witness to avoid calling the witness's character into question. They will suggest that perhaps the officer "misheard" what the defendant said or that the victim's memory of the events might "not be quite accurate." But to go the next step and suggest a witness is lying or making up evidence opens the defendant up to impeachment with convictions and other character evidence.

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101 This is usually specifically permitted by rules of criminal procedure. *See, e.g.*, FED. R. EVID. 609.

102 The following model instruction for the United States Courts for the Ninth Circuit reflects the general standard of jury instructions relating to prior convictions:

> You have heard evidence that the defendant has previously been convicted of a crime. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial. U.S. 9TH CIR. MANUAL MODEL CRIM. JURY INSTRUCTIONS § 4.6.

103 *See* Criminal Justice Act 2003, § 101 (g) (UK).

This may seem like a small difference between the two systems, but it is symptomatic of the way England tries to moderate adversarialism, in this case by keeping cross-examination within limits, if possible, and helping more defendants with a criminal history testify.[104]

IX
CHARGING AND PLEA BARGAINING

It should not be surprising that a trial system that sees the adversary system as being in play from the point of arrest, and that tolerates aggressive adversarialism, would tolerate very aggressive charging as well. Just as the defense is often trying to make the trial complicated and stressful in order to obtain an attractive plea bargain,[105] the prosecution wants to avoid trial as well. One way to do that is to put pressure on defendants to plea bargain. The best way to accomplish that is to charge the crime as high as ethically possible and then accept a guilty plea that would reduce a defendant's sentence to a penalty proportional to the crime and the defendant.[106]

Many criminal statutes in the United States prescribe a range for a particular crime that mandates the minimum sentence a judge must impose and the maximum sentence that a judge may impose. A conviction of a more serious charge may result in a minimum sentence that will be three or four times longer than a less serious charge would require. In addition, many criminal episodes can be charged several different ways. For example, a person who started a bar fight might be charged with simple assault, aggravated assault, or even assault with a deadly weapon, depending on the events and the local statutes. But it also might be handled as disturbing the peace, which might be appropriate given the arrestee's background and the provocation for the fight.

In the United States, the rules of ethics for prosecutors state that a prosecutor "is not obliged to file or maintain all criminal charges which

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104 In this regard, special note must be taken of the federal district court judges' warnings to the Supreme Court prior to the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, judges warned the Court not to try to make trial judges ferret out the motives behind peremptory challenges. Better, they said, to abolish peremptory challenges wholesale. The Court did not take this advice and today, we have the spectacle of attacks on the racial motives of trial lawyers in the exercise of peremptory challenges. *See generally* WILLIAM T. PIZZI, THE SUPREME COURT'S ROLE IN MASS INCARCERATION, 20–21 (2012).

105 *See supra* text starting at 54.

106 For a case that shows how federal prosecutors have used harsh and brutal sentences to coerce guilty pleas, see United States v. Kupa, 976 F. Supp. 2d 417 (E.D.N.Y. 2013).

the evidence might support."[107] The rules further state that among the factors that a prosecutor might consider in deciding not to charge a certain crime is "whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender."[108] The problem with this rule is that it is permissive—a prosecutor may forbear from charging a crime that would result in a sentence disproportionate to the crime and the offender, but it does not obligate such forbearance. If the prosecutor charges proportionally, a defendant may be much more likely to contest the charge as the consequences of a conviction may be minimal. Thus, prosecutors tend to charge aggressively.

There are many cases in which defendants have received brutal sentences—much harsher than their crimes deserved—for daring to go to trial and getting convicted. One such case is a Supreme Court case, *Bordenkircher v. Hayes*, in which the prosecutor had offered to recommend a five-year sentence if Hayes pleaded guilty to uttering a forged instrument in the amount of $88.30.[109] However, the prosecutor also warned Hayes he would be indicted as a habitual criminal, which mandated a life sentence, if he refused to "save the court the inconvenience and necessity of a trial."[110]

Amazingly, Hayes refused to waive his right to trial. The prosecutor followed through on the threat and filed a habitual offender charge. Hayes was convicted of uttering the forged instrument—in the amount of $88.30—and of being a habitual offender. Hayes received a life sentence.[111]

What was interesting about *Bordenkircher v. Hayes* was the naked admission of the prosecutor that the additional charge was being levied specifically to "save the court the inconvenience and necessity of a trial." Yet, the Supreme Court refused to condemn what the prosecutor did. The Court reasoned that "the course of conduct . . . which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment."[112]

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107 CRIMINAL JUSTICE STANDARDS: THE PROSECUTION FUNCTION 3-4.4 (A) (A.B.A. 2017).

108 *Id.* at 3-4.4 (A)(VI).

109 Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).

110 *Id.*

111 *Id.* at 359.

112 *Id.* at 365.

In strong contrast to the United States, England specifically prohibits prosecutors from adding charges or filing a more serious charge for plea bargaining leverage. The Code for Crown Prosecutors states, "Prosecutors should never proceed with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never proceed with a more serious charge just to encourage a defendant to plead guilty to a less serious one."[113]

Obviously, one reason England has been better able to restrict plea bargaining is that it employs the two trial models discussed earlier.[114] Only very serious crimes are tried by a jury in Crown Court, such as murder, rape, and robbery. Crown Court also hears appeals from magistrates' courts.[115]

The real workhorses are the magistrates' courts, where trials take place before a judge or a panel of lay magistrates. Magistrates' courts go back historically to the early thirteenth century and handle ninety-five percent of the criminal cases in England today.[116] A trial that would take a week if tried to a jury in Crown Court would take an hour or two in magistrates' court. Thus, it is usually to the advantage of the Crown Prosecuting Service to keep charges low enough that the case can be tried in magistrates' court. This is rather the opposite of the charging pressure in the United States, where it is to the advantage of prosecutors to charge high.

As explained earlier, misdemeanors and minor felonies must be tried in magistrates' courts, while very serious crimes like murder and rape must always be tried in Crown Court.[117] But there is a large category of

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113 *See* Director of Public Prosecutions, *Rule 6.3*, CODE FOR CROWN PROSECUTORS (2018), https://www.cps.gov.uk/publication/code-crown-prosecutors#:~:text=6.2%20This%20means%20that%20prosecutors,plead%20guilty%20to%20a%20few [https://perma.cc/B3WE-SEYB].

114 *See supra* text at 2.

115 *See Criminal Courts, Crown Court*, GOV.UK, https://www.gov.uk/courts/crown-court [https://perma.cc/YRB6-R7BK] (last visited Oct. 8, 2024).

116 *See Overview of the Judiciary, The First Magistrates' Courts*, CTS. AND TRIBUNALS JUDICIARY, https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary-in-england-and-wales/history-of-thejudiciary/#:~:text=Magistrates'%20courts%20hark%20back%20to,to%20keep%20the%20King's%20peace [https://perma.cc/4BKC-4MHZ] (last visited Oct. 8, 2024).

117 *See Which Court Will a Case Be Heard In?*, SENT'G COUNCIL, https://www.sentencingcouncil.org.uk/going-to-court/which-court-will-a-case-be-heard-in/ [https://perma.cc/J82L-YSQ8] (last visited Oct. 8, 2024).

what are known as "either-way" offenses that could be tried in either court. Among those offenses are theft, burglary, and drug offenses.[118]

Given the option, defendants almost uniformly choose magistrates' court because the sentencing authority of that court cannot exceed one year in prison.[119] Thus, they are guaranteed a modest sentence compared to what they might receive after trial in Crown Court. Statistics bear out the reasons defendants choose magistrates' courts if given an option: Very few defendants charged with either-way offenses are sentenced to prison. Most defendants receive fines, or some form of probation.[120]

Even with two trial models, England cannot begin to offer trials to the vast majority of those charged with crimes, so England openly permits plea bargaining.[121] But it is a very different type of plea bargaining than that practiced in the United States because the starting point for any bargain is *the sentence that would normally be imposed for that offense after trial*.[122] There are detailed sentencing guidelines for high-volume offenses such as burglary, theft, and robbery, so a defendant can get a very good idea of the sentence that would normally be imposed for the offense after trial. Judges may also give indications of the likely sentence in some circumstances if they are requested to do so.[123]

Plea bargaining must follow set guidelines that offer fixed percentage discounts on the likely sentence that would normally be imposed after trial in exchange for a guilty plea. The guidelines encourage early guilty pleas. A defendant who pleads guilty at the first opportunity is entitled to receive a one-third sentence reduction.[124] If

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118 *Id.*

119 *See Sentencing in Magistrates' Courts*, SENT'G COUNCIL, https://www.sentencingcouncil.org.uk/going-to-court/ [https://perma.cc/2G5Q-A4KH] (last visited Oct. 8, 2024).

120 *See* JACOB, *supra* note 11, at 104.

121 *See Reduction in Sentence for a Guilty Plea – First Hearing on or After 1 June 2017*, SENT'G COUNCIL, https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/#Flowcharts%20illustrating%20reductions (last visited Oct. 8, 2024).

122 Before any reduction is considered in exchange for a guilty plea, the first step is to determine what the appropriate sentence for the offense would be under the specific sentencing guideline. That is the starting point from which the sentence will be reduced depending on the stage of the proceedings at which the guilty plea is offered. *Id.*

123 *See* Attorney General's Office, *The Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise, D: Sentencing Indications*, GOV.UK (Nov. 20, 2022), https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise#d-sentence-indications [https://perma.cc/3XEZ-4385].

124 *Id.*

the defendant pleads guilty after that point, the discount is reduced to one-quarter.[125] Finally, if the defendant pleads guilty on the first day of trial, the discount is reduced to one-tenth.[126]

CONCLUDING THOUGHTS

Darwin's finches came to have somewhat subtle physical differences over time. However, some other birds in the Galapagos evolved to have much more dramatic differences between species. The Galapagos cormorant, for example, is the only cormorant species in the world that is completely flightless, with wings too stubby to carry it aloft.[127] Confined to two islands where there are few predators, this species has evolved to have a larger body that is better for gathering food in the surrounding ocean waters, but to be flightless.[128]

The trial systems in England and the United States have evolved to be dramatically different from each other in much the same way as the two species of cormorants. While the United States is not "trial-less" in the way that the Galapagos cormorant is flightless, trials continue to decline dramatically.

Lawyers and judges in the United States have sometimes longed for some of the civility that defines litigation in England. To try to stem a wave of incivility, in 1985 the American Inns of Court were established.[129] These inns are associations that bring lawyers and judges in a community together to try to strengthen professional relationships and provide a forum for discussing legal issues and concerns. Some also have mentoring programs where experienced lawyers can give advice and help to newer members of the legal community. The American Inns of Court are helpful in encouraging

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125 *Id.*

126 *See Reduction in Sentence for a Guilty Plea – First Hearing on or After 1 June 2017*, SENT'G COUNCIL, https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/ [https://perma.cc/23KU-JRET] (last visited Oct. 8, 2024).

127 *See* Galapagos Conservation Trust, *Flightless Cormorant*, https://galapagosconservation.org.uk/species/flightless-cormorant/ [https://perma.cc/PJ9M-2MMX] (last visited Oct. 8, 2024).

128 *Id.*

129 The movement to establish American Inns of Court began in 1977 when Chief Justice Warren Burger visited England and was impressed with the way the Inns of Court worked in England. For a timeline on the establishment of American Inns of Court, see *About Us*, AM. INNS OF CT., https://www.innsofcourt.org/AIC/About_Us/AIC/AIC_About_Us/About_Us.aspx?hkey=72647b55-4a23-4263-8a3e-817098c808fa [https://perma.cc/DD4U-NZUQ] (last visited Oct. 9, 2024).

professionalism among members of the bar, but as voluntary associations of lawyers, they cannot alone temper aggressive adversarialism when it occurs. The American system lacks the fee structure, the ethics rules, the discovery rules, and the evidentiary rules that help moderate adversarialism in England.

The U.S. Supreme Court has also gone in very different ways from England so that most of the English laws and ethics rules discussed in this essay would be flatly unconstitutional, or certainly arguably unconstitutional, in the United States. The United States has a federal system, so to achieve a basic minimum of fair procedure, we use our Constitution. However, a criminal justice system needs to evolve as society changes. It would be difficult, and almost unthinkable, for the United States to rethink its approach to jury trials or its position on appellate review after convictions. Unfortunately, constitutional rulings are not immune from what economists refer to as "the law of unintended consequences," meaning that sometimes decisions result in consequences that are worse, or even completely opposite to what was intended. In theory, defendants have stronger protections in the United States than they have in England. But the reality is something else.

The decline in trials is a tragedy for many reasons. The most obvious is that a strong criminal justice system needs the discipline that trials provide. Prosecutors facing the realistic prospect of a trial must set priorities on the crimes and cases they will pursue. Some antisocial behaviors will have to be dealt with outside the criminal justice system. Of those crimes prosecutors will pursue, a strong trial system forces them to make sure cases are strong and that investigations have been done well. When there are no trials, investigations become sloppy, and police abuse of citizens can remain hidden behind plea bargains.

Trials are also important because they provide an opportunity for defendants to be heard. Many trials are not focused on innocence as much as on the moral guilt of the defendant. Crimes are often committed for reasons that are understandable, even if the reasons fall short of a formal legal defense. There is value in listening to these reasons and sometimes giving a defendant a break, as factfinders have done for centuries.

In England, in early common law cases, jury nullification was not uncommon. Juries would sometimes return a verdict in flat contradiction of the evidence to avoid the death penalty. A jury might, for example, return a verdict declaring that the amount of the property involved in a theft was "less than 12 pence," when it was clearly more

valuable. This reduced the crime sufficiently to allow a thief to avoid the gallows.[130]

Plea bargaining, as practiced in the United States, where defendants are under tremendous pressure to plead, no doubt hides many miscarriages of justice. How many defendants with strong defenses have entered a guilty plea because the threat of punishment was a risk they couldn't take?

In addition, we have miscarriages of justice hiding in plain sight—defendants who receive punishments in great excess of what they deserve because they dared to risk a trial and were convicted. *Bordenkircher v. Hayes*,[131] described above, shows how a harsh sentence—far greater than the prosecution desired—was imposed because Hayes chose to go to trial. Many defendants, even in our federal courts, have received brutal sentences for daring to exercise their constitutional right to trial.[132]

This Article has admittedly painted the English trial system with broad brushstrokes. There are many nuances and qualifications that could be added. It is a system with its own serious problems, including a tremendous backlog of cases awaiting trial. England has also had its

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130 *See* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 58 (2003).

Reducing the crime of conviction, despite evidence that would demand a higher crime, came to be known as "pious perjury" on the part of the jury. The term "pious perjury" is traced to William Blackstone's mid-eighteenth-century treatise where he described the practice which violated the jurors' oaths—and was therefore perjurious—but was pious in its intent of sparing the life of the defendant. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 239 (1765–69). Both nullification of criminal charges through false acquittals and pious perjury to understate crimes were widespread in eighteenth century England. *See* PETER KING, CRIME, JUSTICE, AND DISCRETION IN ENGLAND 1740–1820 (2000).

Juries also had other ways of obtaining a result that better squared with their sense of fairness. Used both in England and Ireland until the middle of the twentieth century, juries would sometimes attach "riders" to their verdicts—a brief piece of information or commentary—that explained the jury's reasoning or perhaps what troubled them about the case, and they frequently asked the judge to seek the commutation of the death sentence from the king, or even to use the exercise of clemency to pardon the offender. *See* Mark Coen & Niamh Howlin, *The Jury Speaks: Jury Riders in the Nineteenth and Twentieth Centuries*, AM. J. LEG. HIST. 58 (2018).

131 *Bordenkircher*, 434 U.S. at 358.

132 In *United States v. Kupa*, 976 F. Supp. 2d 417, 448–49 (E.D.N.Y. 2013), Judge John Gleeson, a former federal prosecutor, wrote a scathing sixty-page opinion that not only excoriated the plea bargaining threats that had compelled Kupa to plead guilty but also detailed the way federal prosecutors around the country had threatened other defendants to try to force them to plead guilty, some of whom refused to plead and received life sentences when they were convicted.

own share of miscarriages of justice.[133] The purpose of the comparison is not reformist; rather, it is to do what a comparative study does best: get us out of our legal system so we can see it from a distance and appreciate its strengths and weaknesses. England's trial system is thus a vehicle to give us perspective on ourselves, but we could just as well have studied the systems in Canada, New Zealand, or another system that is an heir to the common law tradition. Any of these comparisons would similarly show the United States to be a sharply divergent species.

Criminal justice systems evolve over time, but they do not always improve. Sometimes costs drown benefits, sometimes values shift, and sometimes a human element is lost.

It is a common refrain that "our criminal justice system is broken." Some evidence of this is the growth in our incarceration rate over the last fifty years. We went from a rather moderate or even lenient rate in the mid-1970s to a rate five times higher.[134] Today, even after reforms to drug laws and bail laws in some states, our incarceration rate is four times higher than that of England and nearly six times higher than that of Canada.[135] In a global context, even "progressive" states like Massachusetts and New York are extreme in the number of citizens they incarcerate.[136] It is probably fair to put some blame for this dilemma on people: prosecutors, judges, legislators, and even the U.S. public. But sooner or later, we must ask hard questions about our criminal justice system, even if it is painful.

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133 A series of high-profile miscarriages of justice in the 1970s led to the establishment of a permanent body, the Criminal Cases Review Commission, that can review cases alleged to be miscarriages of justice. *See How It All Began*, CRIM. CASES REV. COMM'N, https://ccrc.gov.uk/how-it-all-began/#:~:text=In%20the%201970s%20there%20was,and%20Judith%20Ward%20 [https://perma.cc/QAK3-3GHE].

134 *See* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), https://www.nytimes.com/2008/04/23/us/23prison.html (charts accompanying this front page article show the dramatic historical rise in our incarceration rate).

135 *See* Emily Widra, *States of Incarceration: The Global Context 2024*, THE PRISON POL'Y INITIATIVE (June 2024), https://www.prisonpolicy.org/global/2024.html [https://perma.cc/4A25-5DRB].

136 *Id.*