

2007

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Recommended Citation

Daniel C. Richman, *Judging Untried Cases*, 156 U. PA. L. REV. PENNUMBRA 219 (2007).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3380

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JUDGING UNTRIED CASES

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In response to Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

That federal criminal trials are an endangered species is clear. During fiscal year 2004, only 4% (3346) of the 83,391 federal defendants in terminated cases went to trial.¹ And, trends that Professor Ronald Wright highlights in his insightful article² have continued past the end point of his data. In 1994, 4639 defendants obtained verdicts from juries and 1050 from judges; in 2003, just 2909 and 615, respectively, did so.³ Every time one thinks that the system has hit an equilibrium at some “natural” distribution, the trial rate goes down a bit more.

Should we be worried about this? As an institutional matter, the answer is a firm “probably.” Trials do many things, only one of which is to give a criminal defendant the means to put the government to its proof before an impartial jury of his peers.⁴ After all, jurors do double service; they serve not only as triers of fact but also as dragooned witnesses to a criminal justice process that—but for a handful of well-publicized “celebrity” cases and the many fake cases on television—gets all too little attention. Trials also give us a (small) chance to address, or at least assess, the extraordinary agency problem that bedevils a low-visibility system in which advocates for both sides—defense lawyers and prosecutors—can hide their sloth or inadequacy through

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¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 59 (2006).

² Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

³ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL JUSTICE TRENDS, 2003, at 17 (2006) (my own calculations).

⁴ See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2145-46 (1998) (“The jury trial serves: (1) as a ceremonial reminder of the aspiration to due process; (2) as a protection against the punishment of those of whom the government disapproves, but about whose blameworthiness there remain troubling doubts, and (3) as the fail-safe appellate process that promotes the reasonableness of prosecutorial-administrative determinations by setting the limits within which it operates.”).

plea bargains. To be sure, the constitutional standards for ineffective assistance of counsel at trial are all too low. But at least the presence of a judge and a defendant, a lawyer's own self-respect, and the creation of a record that goes far beyond a guilty-plea allocution, provide a starting point for monitoring and review. Trials also raise the likelihood that prosecutors will adequately monitor and review the work of the investigative agents or police officers on whose work they must rely.⁵ In addition, trials (may) enlighten the negotiating that occurs in its shadow.⁶ Finally, trials give some (perhaps dim) promise that the priorities and concerns of the community will be internalized by courtroom actors.⁷

Then there are the needs of the trial participants—which need to be attended to, if for only instrumental reasons. Being “on trial” can be an ordeal, but it's what most of the lawyers in the system (including the judges) live for. It's their chance to strut their stuff (trial advocacy skills or judicial temperament, knowledge of the hearsay rule, etc.) and, particularly in the federal system, to develop valuable human capital that is extremely hard to acquire outside the criminal process (federal civil trials are even rarer than federal criminal trials).⁸ Big law firms rarely actually go to trial—they just engage in “litigation”—but they need to present a credible threat of trial and are ready to pay handsomely for that capability. Without casting any aspersions on the

⁵ See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 819 (2003) (commenting that prosecutors should be forced to sift through investigative data in preparation for trial rather than simply acquiring it).

⁶ *But cf.* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2467 (2004) (asserting that many plea bargains escape the “influence exerted by the strength of the evidence and the expected punishment after trial”).

⁷ See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966 (1997) (“That the community's voice is not directly heard on fine-grained matters of prosecutorial priorities, however, does not mean that its preferences will not resound loudly in prosecutors' offices.”).

⁸ During the twelve-month period ending on September 30, 2006, there were 12,612 trials in federal courts nationwide. Out of those, 7491 were criminal. And, of the 5121 civil trials, only 2097 took place before a jury. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 198 tbl.C-7 (2007), available at <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf>; see also Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004) (proposing an examination of the role of summary judgment in the decline in the number of trials); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004) (hypothesizing that “a shift in ideology and practice among litigants, lawyers, and judges” can help explain the historical decrease in the number of trials being held).

commitment to public service or the zealous advocacy of young prosecutors or defenders, one presumes that this aftermarket has a dramatic influence on the quality of applicants and the relatively low salaries required to attract them.⁹

I am not prepared to make the claim that any marginal additional funding of the criminal justice system would best be spent on trials or even on the adjudicative process generally. After all, police departments, law enforcement agencies, and prosecutors' offices might better spend the money on training and internal monitoring. Although someone who used the Constitution as her only guide to criminal procedure might think otherwise, we have opted for (or slid into) what Jerry Lynch has provocatively characterized as a "prosecutorial-administrative system" for handling almost all of our cases.¹⁰ And any honest budgeting process should reflect that. On the other hand, in the absence of output measures other than sheer numbers of arrests, prosecutions, and convictions, the risk that enforcers would use the extra funding simply to bring more cases—not better ones—is considerable. Such a concern highlights the need to explore the plea data.

To what extent can one go beyond "fears" and "concerns," and determine that the inexorable reduction in trials actually reflects an impairment of the federal criminal system's truth-finding function? Put differently: should we be worrying about the dispositions that are occurring in the absence of trials? Professor Wright sets out to answer these questions by considering the relationship between the trial acquittal rate and the guilty plea rate.¹¹ He also endeavors to ascertain whether the drop in the acquittal rate, even as the plea rate climbs, is a sign that prosecutors and agencies are bringing stronger cases (the

⁹ See Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 649 (2005) ("[G]overnment employment is a means to accumulate trial experience and that trial experience is beneficial in the private sector."); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 261 (2000) (describing the incentives for prosecutors to take "career concerns" cases,—the pursuit of criminals who will bring the prosecutors "private career returns"). *But see* Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 282 (2002) (noting a trend toward career assistants, particularly outside of the largest metropolitan areas).

¹⁰ See Lynch, *supra* note 4, at 2145 ("In our actual system, efficient processing of routine cases is simply not the domain of the judge and jury, but of the prosecutorial-administrative system."); *see also* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 248-49 (2006) (describing the features that characterize the federal prosecutorial adjudication system).

¹¹ Wright, *supra* note 2, at 84.

“accuracy hypothesis”), or an indication that prosecutors have been so empowered by the federal sentencing regime¹² that they have been able to pressure defendants, who would otherwise have been acquitted had they not been coerced into giving up their right to trial, into pleading guilty (“the trial distortion theory”):¹³ After carefully considering the data and taking pains to make appropriate qualifications, Professor Wright reports that “dropping acquittal rates over the last decade in federal court is a valid cause of concern,” and concludes, “The acquittal trend reveals a system that probably distorts trial outcomes and produces less reliable results than it once did.”¹⁴

In assessing the power of Professor Wright’s analysis, we confront the fundamental challenge to all quantitative analyses of the federal system. The allure of that system is obvious. It’s not just that the “feds” have always attracted lay and scholarly attention far out of proportion to their relative numbers. It’s that the same fiscal flexibility (or maybe unaccountability)¹⁵ that allows it to save up to make the big cases also permits it to fund unparalleled data-collection efforts. (The fact that only the federal system prints money, and needn’t balance its budget, helps too.) But it has one enormous drawback: in many aspects, it’s not a “system” at all, but rather an adjunct to state or, more often, local criminal justice systems. Indeed, while the involvement of a federal judge and correctional facility is generally a nonnegotiable feature of a federal prosecution, the rest is up for grabs. “Federal”

¹² Professor Wright quite rightly notes, “Recent developments in federal sentencing law accelerated the trend toward concentrating the control over the trial penalty in the hands of the prosecutor.” *Id.* at 133. It is possible that the combined effect of the Supreme Court’s decision in *Rita v. United States*, 127 S. Ct. 2456 (2007), and its forthcoming decisions in *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007) (No. 06-7949), and *United States v. Kimbrough*, 174 F. App’x 798 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007) (No. 06-6330), will start to reverse this trend by delineating the freedom of sentencing judges to reject the policy choices in the Federal Sentencing Guidelines. But it is far too soon to tell. And the limited effect of *United States v. Booker*, 543 U.S. 220, 244 (2005), holding that the sentencing ranges set by the Federal Sentencing Guidelines are advisory and not mandatory, counsels skepticism on this point. See U.S. SENTENCING COMM’N, PRELIMINARY QUARTERLY DATA REPORT 1 tbl.1 (2007) available at http://www.ussc.gov/sc_cases/Quarter_Report_3rd_07.pdf (reporting that, of sentences imposed from October 1, 2006, through June 30, 2007, 61.2% of sentences were “within guideline range” and 25.2% of sentences were “government sponsored below range”).

¹³ Wright, *supra* note 2, at 84.

¹⁴ Wright, *supra* note 2, at 150.

¹⁵ See Daniel C. Richman & William J. Stuntz, Essay, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 613-15 (2005) (contending that well-developed performance measures for federal authorities are scarce).

cases regularly arise out of arrests by local police working within “joint task forces” or on their own, with or without prearrangement with federal prosecutors.

The fact that the “federal” trademark has been thus extended (some would say diluted) poses severe challenges to the study of the federal system. Consider Professor Wright’s suggestion that when a prosecutor’s office uses new resources to buy extra quantity, “newly added cases are likely to involve less serious crimes or less persuasive evidence, because the office would have already selected the highest priority cases with the first available funds.”¹⁶ This is quite a reasonable suggestion, in the abstract, but it is highly contestable when dealing with prosecutors able to tap into an effectively inexhaustible system of strong cases involving quite serious street-level gun and drug offenses that can “go federal” if the necessary arrangements are made.¹⁷ One might argue, as a matter of policy, that these marginally federal cases could be more appropriately handled at the local level.¹⁸ But the fact remains that a U.S. Attorney can easily substitute several gun cases, presented on a silver platter by local police officers interested in the higher sentences and quicker processing offered by the federal system,¹⁹ for one complex fraud case that, because it requires a long grand jury investigation,²⁰ will require an extensive prosecutorial resource commitment.

¹⁶ Wright, *supra* note 2, at 115.

¹⁷ See MALCOLM RUSSELL-EINHORN ET AL., ABT ASSOCS., FEDERAL-LOCAL LAW ENFORCEMENT COLLABORATION IN INVESTIGATING AND PROSECUTING URBAN CRIME, 1982-1999: DRUGS, WEAPONS, AND GANGS 55-68 (2000) available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201782.pdf> (report prepared for the Nat’l Inst. of Justice) (describing the increasing use of federal jurisdiction for urban street crime); Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 252-54 (2005) (providing accounts of the screening techniques federal prosecutors employ to select the strongest “local” cases for “federal” prosecution); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 400-01 (2006) (discussing dynamics of inter-governmental cooperation based on violent crime enforcement).

¹⁸ See Daniel Richman, *“Project Exile” and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 397 & n.204 (2001) (noting the argument that federal intervention reduces accountability for local authorities).

¹⁹ See Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 95 (Nat’l Inst. of Justice ed., 2000), available at http://www.ncjrs.gov/criminal_justice2000/vol_2/02d2.pdf (“State enforcers are well aware that their Federal counterparts can often devote more resources to a case . . . and that Federal prosecutions generally result in higher sentences . . .”).

²⁰ See Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 343-45 (1999) (explaining the extent of prosecutorial reliance on grand juries in white collar criminal investigations).

Because prosecutorial resource commitments are so tied to case mix, aggregate caseload statistics are also hard to interpret. Professor Wright observes that “since caseloads stayed flat during the most recent drop in acquittal rates [during the 1990s], it is hard to believe that extra prosecutor efforts in each case produced more accurate outcomes during this period.”²¹ However, “[f]rom 1989 to 1998, the number of firearms cases filed in the U.S. district courts increased 61 percent from 2,256 to 3,641.”²² By the late 1990s, firearms defendants constituted about 4.5% of all federal cases (after having comprised less than 2% in the 1980s).²³ The nature of the announced firearm programs during this period²⁴ gives good reason to assume that a large proportion of these firearms cases were the product of federal adoption of local arrests. We can be less sure of the narcotics cases (which represent a much larger chunk of the federal docket), since that category encompasses the products both of intensive federal drug investigations (which might involve considerable prosecutorial commitment) and of collaborations with local authorities that shunted prescreened, lower-level cases into the federal system for adjudication. But the programmatic commitment to street criminals—of the violent and low-level drug-dealing variety—has produced a steady stream of federal cases, and of defendants with prior convictions (since street criminals are more likely to have prior state convictions) that needs to be factored into the data.

It is therefore quite possible that the vanishing acquittal rate reflects an increase in the adoption of well-established “local” cases (that even when not “easy,” involve the commitment of nonfederal resources) even as prosecutorial efforts have been spent on making stronger cases in the white collar area. I have no idea whether this is true nationally (although it’s my impression that it is true in certain districts). But I need to know more about this possibility before I fully accept Professor Wright’s point. I would also like to know more about

²¹ Wright, *supra* note 2, at 121.

²² PATRICK WALKER & PRAGATI PATRICK, ADMIN. OFFICE OF THE U.S. COURTS, TRENDS IN FIREARM CASES FROM FISCAL YEAR 1989 THROUGH 1998, AND THE WORKLOAD IMPLICATIONS FOR THE U.S. DISTRICT COURTS 3 (2000), available at <http://www.uscourts.gov/firearms/firearms00.html>.

²³ RUSSELL-EINHORN ET AL., *supra* note 17, at 64 fig.20; see also Thomas W. Brewer et al., *A Case Study of the Northern Ohio Violent Fugitive Task Force*, 18 CRIM. JUST. POL’Y REV. 200, 217-18 (2007) (attributing a multijurisdictional task force’s success in taking guns off the streets to the access it had to the federal prosecutorial system).

²⁴ See Richman, *supra* note 18, at 374-96 (providing a brief history of two federal firearm programs in place in the 1990s, “Project Triggerlock” and “Project Exile”).

the role of immigration cases in the identified trend, and about the mix of immigration cases, since that category will include both slam-dunk cases of illegal entry and far more difficult smuggling cases.

Although I thus hesitate to join Professor Wright in worrying about the “problem” he identifies, I applaud his commitment to thinking hard about the trials that might have been. Having driven the factfinding process into law enforcement agencies and prosecutors’ offices, we should not be satisfied with either vague speculation about coerced innocents or smug confidence in “voluntary” waivers and administrative processes. We need to know much more, and the quantitative rigor that Professor Wright brings to the federal plea process is certainly a big (and appropriately careful) step in the right direction.

Preferred Citation: Daniel Richman, Response, *Judging Untried Cases*, 156 U. PA. L. REV. PENNUMBRA 219 (2007), <http://www.pennumbra.com/responses/11-2007/Richman.pdf>.