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# BOOK REVIEW

## TRUTH AND LEGITIMACY IN THE AMERICAN CRIMINAL PROCESS

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William Pizzi, TRIALS WITHOUT TRUTH (New York University Press, 1999) 254 pp.

Modern constitutional criminal procedure—specifically, the elaborate regime of rights and procedural safeguards for criminal suspects and defendants—has received a great deal of attention and scrutiny over the past decade. A new perspective on the criminal process, premised on the belief that the social and political conditions that necessitated liberal reform of the criminal process no longer exist, or that the normative structure that protects these reformist measures from erosion has been drained of its vitality, is quickly gaining currency in both the theoretical halls of academe and the pragmatic realm of municipal governments. This new perspective threatens to render serious talk about the need to protect the rights of the accused politically and culturally passé. If the reforms of the 1960s and 1970s constituted a revolution in criminal procedure, the current climate reflects a powerful and sustained counter-insurgency.

The touchstone of this new perspective is an abiding belief that "[t]he days of needing close judicial supervision to guard against use of the criminal process to discriminate against the

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politically powerless are over."[1] The leading proponents of this view—University of Chicago law professors Tracey Meares and Dan Kahan—contend that close judicial scrutiny of police discretion and related aspects of the criminal process is no longer necessary because minorities now possess sufficient *political* status to protect themselves from the ill-effects of pernicious police practices.[2] Similarly, Harvard University law professor Randall Kennedy, in an effort to "free [himself] of reflexive obedience to familiar signals,"[3] has argued that criminal law enforcement policy that disproportionately affects African-American suspects and defendants *may* be justified as a "public good" from the perspective of law-abiding African-Americans, who are statistically more often victims of crimes committed by African-Americans.[4] Other scholars have offered similar critiques of the modern criminal process that build on this immediate theme.[5]

The message sent by proponents of this new perspective is unmistakably clear: the criminal process *in its present form*, and especially the regime of procedural safeguards intended to protect the interests of minority and indigent defendants, is tragically out-moded—a procedural relic reflective of and tailored to social circumstances of a by-gone era. The legal doctrines underlying the "modern" regime that once served a noble purpose have simply outlived their usefulness. The image of the criminal process advanced is that of a regime rendered anachronistic by the passage of time—one that is now failing us.

William Pizzi's *Trials Without Truth* provides an interesting variation on this increasingly familiar theme. A comparative criminal proceduralist by trade, Professor Pizzi demonstrates the extent to which our criminal process purportedly fails us by

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[1] David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1061 (1999).

[2] Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998).

[3] RANDALL KENNEDY, RACE CRIME AND THE LAW x (1998).

[4] *See id.* at 69-167; Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994).

[5] *See, e.g.*, Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 562 (1997).

comparing our trial system with the trial systems of other Western, industrialized countries. According to Professor Pizzi, the American trial system is fundamentally "weak" in contrast to the "strong" trial systems of the Netherlands, Germany, Norway, and to a lesser extent England (p. 4). Professor Pizzi asserts that the dominant criterion of "strength" in a trial system is the ability of the system to make reliable determinations about the "true" guilt or innocence of any given defendant (pp. 69, 222-23). The American trial system is fundamentally "weak," according to Professor Pizzi, because it privileges fairness norms at the expense of "truth" (pp. 71-72). Professor Pizzi maintains that legal institutions—primarily courts—are far too concerned about the rights of suspects and defendants. He claims that the strong emphasis on the rights of suspects and defendants and other fairness considerations has resulted in the establishment and elaboration of rules and procedural safeguards that function as barriers to "truth" (pp. 71-72).

Professor Pizzi also argues that the truth crisis in the criminal process is further exacerbated by our stubborn adherence to a hyper-adversarial model of adjudication (p. 118-31). According to Professor Pizzi, rules designed to promote fairness and safeguard defendants' rights conspire with the adversarial model of adjudication to severely undermine the truth-seeking function of the trial process (pp. 131-33). Equally significant, in Professor Pizzi's opinion, is the way in which such reforms have turned the American trial system into a regime of "excess"—a system that is zealously confrontational, overly proceduralized, and far too concerned with "winning" and "losing" as opposed to determining the "truth" (p. 139).

The salvation of the American trial process, according to Professor Pizzi, lies in the placement of "truth-seeking" at the center of the criminal process. To accomplish this, Pizzi proposes the incorporation of discrete features of Western European inquisitorial trial processes into the American trial process. Among other things, Pizzi advocates a bestowal of greater discretion to police officers to ensure thorough and complete investigations (pp. 67-68, 222-23), and to trial judges to develop

and manage cases (p. 222).[6] Along with the aggregation of authority within law enforcement and courts, Professor Pizzi recommends a corresponding relaxation of rules, procedures, and protections enjoyed by modern criminal suspects and defendants, which in Professor Pizzi's opinion, have only served as structural impediments to accurate and reliable determinations of guilt (pp. 223-26).

Professor Pizzi has written for nearly a decade about the relative strengths and weaknesses of the American trial process vis-à-vis its Western European counterparts. Not surprisingly, *Trials Without Truth* borrows heavily from his earlier work.[7] Yet, in some of that earlier work, Professor Pizzi's praise for inquisitorial processes employed in continental legal systems was tempered by reservations about the ability to seamlessly incorporate structural elements from those regimes into the American trial system.[8] Moreover, Professor Pizzi has, on occasion, defended certain aspects of the American adversarial system—prosecutorial discretion and plea-bargaining, for example—as legitimate within the American context.[9] In this earlier work, Professor Pizzi seemed to endorse comparative approaches to criminal procedure primarily as an effective means of opening one's

[6] Pizzi is not the only scholar to have argued that the salvation of the American criminal process lies in the emulation of European processes. *See, e.g.*, John H. Langbein, *Money Talks, Clients Walk*, NEWSWEEK, Apr. 17, 1995, at 32, 32, 34 (arguing that the American criminal justice system possesses "deep structural flaws" that unduly compromise the trial process, as compared to the "effective, fair and trouble-free criminal-justice systems" of Western Europe). Interestingly, Langbein offered a similar recommendation with respect to reforming American civil procedure. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

[7] Examples of this earlier work include: William T. Pizzi, *The American "Adversary System"?*, 100 W. VA. L. REV. 847 (1998); William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial*, 67 U. COLO. L. REV. 1027 (1996); William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 CONST. COMMENTARY 55 (1996); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); William T. Pizzi, *Soccer, Football, and Trial Systems*, 1 COLUM. J. EUR. L. 369 (1995); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

[8] *See* Pizzi, *Understanding Prosecutorial Discretion*, *supra* note 7, at 1353-54, 1373.

[9] *See id.* at 1346-51, 1355-62.

mind to reformist possibilities, yet Professor Pizzi also appeared to understand that problems associated with practical implementation were both real and substantial. As Professor Pizzi himself once observed:

> [A] legal system is much more than a set of procedures for determining guilt and deciding on sentences. It is tied to important cultural, historical, and political values, making it unlikely that any reform incorporated from a system that does not share those values will be adopted or, even if adopted, will ever accomplish what it was intended to do.[10]

In *Trials Without Truth,* Professor Pizzi's tone is far less measured, and far more confrontational. What prompted this shift in position? The answer is not at all clear, but one might suspect that the acquittal of O.J. Simpson for the murders of his ex-wife, Nicole Brown Simpson, and Marc Goldman is at least partly responsible. As Professor Pizzi notes in the introduction to his book, "[t]he *Simpson* case stunned the system out of its complacency. . . . [and] showed very little of which we could be proud" (p. 2). Professor Pizzi too must have been stunned, for he seems to have abandoned all his fears and reservations about mixing elements of the American and continental trial processes. Prior to the *Simpson* case, the American criminal trial process was in need of tweaking to streamline the proceedings. Following Simpson's acquittal, America has a system of "trials without truth" that can only be salvaged by getting rid of the great majority of procedural and structural impediments that hinder the discovery of "truth" by the police, judges, and jurors. This review essay examines and critiques the descriptive and prescriptive claims regarding the trial process advanced in Professor Pizzi's book.

## I. THREE PRELIMINARY CRITIQUES

*Trials Without Truth* proves to be a provocative work that accents interesting reformist possibilities within the criminal process. Yet the book is not without flaws. What follows is a brief discussion of three small criticisms that I believe point to larger, more problematic features of the book. The first of these criti-

[10] *Id.* at 1373.

cisms relates to the type of support Professor Pizzi relies upon to drive his arguments. That Professor Pizzi uses aberrational and sensational cases—the *Simpson* case, the *Louise Woodward* case, and the tragicomic episode of Colin Ferguson's self-representation—as the basis for making broad claims about the overall nature of the American criminal process might cause some readers to question from the outset the sincerity of Pizzi's critique. Indeed, in response to an earlier work in which Pizzi employed a similar approach, Professor Ronald Allen appropriately warned that "drawing lessons from the Simpson case about the criminal justice system, or designing solutions to the problems of that case that are to be applied to the system as a whole are dubious undertakings."[11]

Professor Allen made a second criticism of that earlier work that applies with equal force here—namely, that Professor Pizzi does not properly distinguish between criminal processes that are "built," such as those developed in many Western European countries following a civil code tradition, and those that are "grown," such as the regimes in England, the United States, and other common law countries.[12] The conceptual and practical differences between these two legal orders are quite substantial, and counsel us to be wary of introducing reform measures into the American system that are borrowed without regard either to context or to the possible consequences. As Professor Allen put it, "[s]hooting magic bullets into spontaneous orders raises doubts on both sides of the equations; both costs and benefits are dramatically unpredictable."[13]

Likewise, one might take issue with Professor Pizzi's fetishization of a particular kind of truth in the trial process. Professor Pizzi seems to equate historical fact—that is, whether person "X" committed a particular act proscribed by law—with a full-blown guilt determination—that is, whether person "X" should be *criminally sanctioned* for having committed the act in question. Of course, the guilt determination is far more than a simple

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[11] Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 994 (1996).

[12] *Id.* at 994.

[13] *Id.* at 999-1000.

finding of historical fact—even in an inquisitorial regime. A guilt determination contemplates moral condemnation for the act as well. Defenses and mitigating factors provide "moral" facts—tidbits of information regarding the psychology, motivation, or competency of the accused—that accent the historical facts, and inform our decision as to whether the action or event deserves criminal sanction. The moral dimension of criminal adjudication is most powerfully felt in the death penalty context.[14] In *Spaziano v. Florida*,[15] Justice Stevens remarked upon the essential role of the jury in both administering and legitimizing capital punishment. "If the State wishes to execute a citizen," Stevens wrote, "it must persuade a jury of his peers that death is an appropriate punishment for his offense."[16] Here, persuasion moves beyond the assertion of brute facts as to whether the defendant committed a particular crime for which a death sentence is statutorily authorized. It necessarily contemplates a finding of moral culpability (or deservedness). For this reason, as Justice Stevens observed, "[t]he constitutional legitimacy of capital punishment depends upon the extent to which the process is able to produce results which reflect the community's moral sensibilities."[17]

Professor Pizzi's privileging of historical truth also seems oddly misdirected given that no legal system can ever determine a defendant's guilt or innocence with absolute certainty. The reality of criminal litigation is that evidence rarely excludes all other possibilities. Witness testimony is necessarily limited by the vagaries of human memory and recall. For this reason, "truth" determinations in the criminal process contemplate far more than mere identification of historical fact, and thus re-

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[14] Of course, morality arguably plays a role in criminal trials more generally. As Judge Learned Hand stated, the institution of the jury "introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions." *United States ex rel. v. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942).

[15] 468 U.S. 447 (1984).

[16] *Id.* at 490 (Stevens, J., concurring in part, dissenting in part).

[17] *Id.*

quire a nuanced and far less anesthetized inquiry in order to trigger the moral condemnation of society.[18]

Each of these criticisms point to a deeper, more fundamental problem with the book—namely, Professor Pizzi's failure to pay close attention to certain critical features of the American criminal process that sharply limit the usefulness of making cross-national comparisons. More specifically, Professor Pizzi does not take seriously the powerful ideological and cultural underpinnings that gave rise to and continue to sustain the existing procedural regime in the face of opposition. He seems to have forgotten or chosen to ignore a critical feature of modern criminal procedure—that the criminal procedural revolution was part and parcel of a much larger liberal reformist agenda designed to counter claims of American moral and systemic illegitimacy. The transformation of the criminal process, like many other aspects of the American society at that time, was precipitated by the repeated and unapologetic exposure of American society and legal institutions as betrayers of democratic principle. In the criminal context, it became clear that the criminal process *prior to modern reform efforts* placed little value on "truth," especially when indigent and minority suspects and defendants were involved. Indeed, law enforcement played a critical role in sustaining that failure of process. Equally important was the role of courts and legislatures in compromising principle in the name of racial oppression to ensure the longevity of the biased regime. The criminal process revolution, then, was the expression of a profound desire to return *truth* and *democratic principle* to America's legal institutions—a deliberate (albeit limited) effort to attain moral redemption and regain institutional legitimacy.

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[18] Indeed, we value lay participation in guilt determination precisely because we understand this moral dimension of the trial process, and seek to have community notions of justice to temper the literal application of legal norms to facts. For a discussion of the moral dimensions of jury participation in the criminal process, see generally JEFFREY ABRAMSON, WE, THE JURY (1994) (examining the role of the jury as providers of "common sense" to the trial system) and Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 192 (1990) (conceptualizing the jury *inter alia* as a representative body that should "convey the moral condemnation of the community in a criminal case").

The crisis of institutional legitimacy and quest for moral redemption are powerfully relevant to Professor Pizzi's concerns about "truth" in the criminal trial process. As an initial matter, Professor Pizzi's lack of adequate attention to context exposes critical failings in his descriptive account of the American trial process. In particular, by failing to consider the peculiar context that gave rise to modern reform of the American criminal process, Professor Pizzi *overestimates* the truthfulness of the trial process prior to the establishment of procedural rules and safeguards that he criticizes. At the same time, Professor Pizzi radically *underestimates* the extent to which Warren era reform *enhanced* the accuracy and reliability of guilt determinations. Additionally, when placed against the backdrop of this uniquely American context, Professor Pizzi's descriptive claims regarding procedural constraints on police investigations appear somewhat exaggerated.

Professor Pizzi's inattention to the historical and arguably ongoing crisis of legitimacy in the American criminal process also exposes critical defects in his reform proposal. The fundamental problem is that each of Professor Pizzi's recommendations presupposes a level of legitimacy currently not enjoyed by the system. A number of recent, high-profile incidents involving abuses of police and prosecutorial authority, along with lingering concerns about current law enforcement and sentencing policy, suggest that we should, at a minimum, entertain serious questions regarding the legitimacy of the criminal process. From the perspective of those who continue to question the legitimacy of the criminal process, Professor Pizzi's proposal runs the serious risk of undermining "truth" insofar as he seeks to aggregate power in the hands of legal actors and institutions that, in many ways, still lack integrity in the eyes of the public. Because Pizzi does not address these indicia of the ongoing crisis of legitimacy, his recommendation to abandon a great deal of procedural protections and safeguards that provided limited protection against such transgressions raises more questions than it answers.

The remainder of this essay develops these arguments. Part II describes the early- to mid-twentieth century collapse of moral

legitimacy of American legal institutions, and the efforts undertaken by legal actors and institutions to seek moral redemption and re-establish institutional legitimacy through liberal legal reform. In Part III, I shall situate and critique Professor Pizzi's descriptive and prescriptive claims regarding the American criminal process within this expanded context. Part IV concludes.

## II. THE COLLAPSE OF INSTITUTIONAL LEGITIMACY AND THE RISE OF PROCEDURAL REFORM

The prevailing moral crisis of twentieth century American society has been the ongoing struggle to reconcile fundamental democratic and egalitarian precepts with the harshly undemocratic and inegalitarian practices carried out under the banner of those principles. This crisis constitutes a crucial dimension of any serious inquiry into the pitfalls and possibilities of mid- to late-twentieth century liberal reform of the criminal process. Indeed, the modern American criminal process and its normative underpinnings are best understood when one takes seriously the manner in which this crisis pre-figured liberal institutional reform.

### A. THE FAILURE OF PROCESS—*MOORE V. DEMPSEY* AND THE *SCOTTSBORO* CASES

The precepts of American democracy—freedom and equality of individuals—as an historical matter have had catastrophic meaning in the daily lives of many Americans. Idealized notions of freedom and equality lie at the core of American national identity, and provide the centripetal force necessary to generate coherence in such a profoundly pluralistic society. Yet beneath the heavy gloss of this idealized America lies a far more pernicious and vulgar reality. The mid-twentieth century exposure of American society as a "disparate" democracy—as betrayer of its best principles—would present a serious challenge to the legitimacy of many American institutions, and would provide a catalyst for widespread liberal reform, *including reform of the criminal process.*

Modern efforts to expose the moral illegitimacy of American legal institutions began in earnest at the dawn of the twentieth century when liberal advocates sought to highlight the betrayal of democratic principle in the name of racial subjugation. Challenges to racially restrictive covenants,[19] racially exclusive primary elections,[20] and segregated educational facilities[21] brought to light the extent of civil and social disempowerment visited upon African-Americans as marginalized citizens in a purportedly free society. This sustained effort eventually resulted in a series of landmark decisions that transformed a great deal of the racial legal order.[22]

The seeds for reform of the criminal process were likewise sown during this historic moment. A series of important criminal cases highlighted the dramatic failure of process that routinely occurred when African-American defendants were involved, but more importantly, exposed the manner in which racist politics had undermined the truth-seeking function of the trial process. In *Moore v. Dempsey*, the Court reviewed the conviction of a group of African-American men, each of whom had been sentenced to death.[23] The men were thought to have been "ringleaders" in the Arkansas race riot of 1919, in which a white deputy sheriff was killed and another white person wounded.[24] Although African-Americans in Phillips County, Arkansas outnumbered white Americans three to one, the men were nevertheless indicted by an all-white grand jury, and tried before all

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[19] Corrigan v. Buckley, 271 U.S. 323 (1926); Buchanan v. Warley, 245 U.S. 60 (1917).

[20] *See* Grovey v. Townsend, 295 U.S. 45, 46 (1935); Nixon v. Condon, 286 U.S. 73, 82 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[21] Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927).

[22] The most notable of these decisions were: *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944), which declared an all-white Democratic primary in Texas unconstitutional; *Morgan v. Virginia*, 328 U.S. 373, 386 (1946), which declared state-compelled segregation in interstate public transportation unconstitutional; *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948), which declared court enforcement of racially restrictive covenants unconstitutional; and *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954), which declared segregation in public schools unconstitutional.

[23] *See* Moore v. Dempsey, 261 U.S. 86, 87 (1923).

[24] *See id.* at 87-89.

white juries.[25] The first trial lasted forty-five minutes.[26] The jury deliberated for five minutes, and returned with a verdict of guilty of murder in the first degree, which carried with it a mandatory death sentence.[27] The remaining defendants received similar treatment, each ultimately sentenced to death.[28] The defendants subsequently filed writs of habeas corpus, in which they claimed that they had been deprived of due process under the Fourteenth Amendment.[29]

In a 7-2 decision, the Court overruled the lower court's dismissal of the writs of habeas corpus, finding that mob domination of the trial proceedings constituted reversible error.[30] The Court held that the petitioners' allegations sufficiently demonstrated that they had been deprived of their lives without due process of law.[31] Two years later, these men—along with sixty-seven other African-Americans who had been coerced into pleading guilty and had received life sentences—were set free by the state of Arkansas.[32]

In *Powell v. Alabama*,[33] also known as the *Scottsboro Boys Case*, the Supreme Court considered the conviction and capital sentence of nine black teenagers for the alleged rape of two white girls. Justice Sutherland describes the manner in which they were brought to trial:

> Both girls and the negroes then were taken to Scottsboro, the county seat. Word of their coming and of the alleged assault had preceded them, and they were met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility. The sheriff thought it necessary to call for the militia to assist in safe-

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[25] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 113 (1976).

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *See id.* at 114.

[30] Moore v. Dempsey, 261 U.S. 86, 91-92 (1923).

[31] *Id.*

[32] *See* KLUGER, SIMPLE JUSTICE, *supra* note 25, at 114.

[33] Powell v. Alabama (Scottsboro I), 287 U.S. 45 (1932).

> guarding the prisoners. Chief Justice Anderson pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers took the defendants to Gadsden for safe-keeping, brought them back to Scottsboro for arraignment, returned them to Gadsden for safe-keeping while awaiting trial, escorted them to Scottsboro for trial a few days later, and guarded the court house and grounds at every stage of the proceedings. It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment. During the entire time, the defendants were closely confined or were under military guard. The record does not disclose their ages, except that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as "the boys." They were ignorant and illiterate. All of them were residents of other states, where alone members of their families or friends resided.[34]

The Court declared that in cases involving circumstances as egregious as those present in Scottsboro, an indigent accused of a capital crime has the right to a state-provided attorney.[35] However, as the Court observed, defendants were not given a reasonable opportunity to obtain counsel.[36] The Court thus concluded that the trial court's failure to make an effective appointment of counsel to aid the defendants in preparing and presenting their defense constituted a denial of defendants' right to due process of law under the Fourteenth Amendment, and remanded the case back to the trial court.[37] The defendants were subsequently retried and convicted, and three years later, the Court reversed the second conviction.[38] In a unanimous decision, the Court reversed the conviction on the ground that the State of Alabama had denied defendants due process of law on account of their race.[39]

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[34] *Id.* at 51-52.

[35] *Id.* at 59-60, 73.

[36] *Id.* at 71.

[37] *Id.* at 71, 73.

[38] Norris v. Alabama (Scottsboro II), 294 U.S. 587 (1935).

[39] *See id.* at 599. An Alabama statute at the time was being interpreted by state authorities to exclude African-Americans consistently from participating as grand or petit jurors in the criminal trials of other African-Americans. *See id.* at 590-91. The Court held that this practice violated the Equal Protection clause of the Fourteenth Amendment and denied defendants a fair trial. *Id* at 596. The Court reaffirmed this holding three years later in *Hale v. Kentucky*, 303 U.S. 613, 616 (1938) (per curiam).

*Dempsey* and *Scottboro* are compelling cases not only because they highlight obvious failures of process commonly endured by early twentieth century African-Americans, but because they remind us that things might have been a great deal worse. In both cases, the defendants faced a very real possibility of death at the hand of an angry, white lynch mob. In the early part of the twentieth century, the practice of lynching was the power offstage that subverted a great deal of civil and criminal justice.[40] In *Dempsey* and the *Scottsboro* cases, law enforcement officials and lower courts were directly involved in the subjugation of the complaining litigants. Of course, it was not uncommon for local enforcement officials to conspire with unruly whites to facilitate the execution of lynch mob justice.[41] When one situates *Demsey* and the *Scottsboro* cases against the backdrop of prevailing norms of justice, the image is not simply of a trial process rendered unfair, but that of a legacy of racial subjugation absurdly carried out on behalf of a democratic state made singular based upon its purported commitment to equality and the rights of individuals.[42]

In addition to providing a window into the nature of criminal process for minority and indigent defendants, as it existed prior to reform, *Dempsey* and the *Scottsboro* cases point to the

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[40] The power of lynching lies in the sheer absurdity of violence carried out against its victims. *See, e.g.*, WALTER T. HOWARD, LYNCHINGS: EXTRALEGAL VIOLENCE IN FLORIDA DURING THE 1930S at 60-61 (1995) (describing a lynching preceded by "a carnival of sadism" that included amputation of victim's fingers and toes, burning of the victim's torso with "[r]ed hot irons," and cutting off the victim's genitals); NAACP, *The Story of 100 Lynchings, in* THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918 at 26 (1919) (describing in graphic detail the lynching of Georgia woman: "Mary Turner was pregnant and was hung by her feet. Gasoline was thrown on her clothing and it was set on fire. Her body was cut open and her infant fell onto the ground with a little cry, to be crushed to death by the heel of one of the white men present. The mother's body was then riddled with bullets.").

[41] *See* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 at 8 (1980) (remarking that "public officials . . . either cooperated with the mob or sought refuge in silence and inaction").

[42] *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 115 (rev. ed. 1992) (noting that "lynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand"). According to historian Arthur F. Raper, such sham proceedings "retained the essence of mob murder, shedding only its outward forms." *Id.* (quoting Arthur F. Raper, Race and Class Pressures 277-78 (1940) (unpublished manuscript)).

primary means through which the system sought to redeem itself. In both cases, appellate courts were made available to the litigants to contest the legitimacy of the lower court's ruling.[43] With each succeeding challenge—and the corresponding exposure of the failure of process[44]—the legitimacy of American institutions and the integrity of institutional actors were increasingly called into question.[45] Modern reform of the criminal process, like most liberal reform that occurred during this period, came about in response to sustained efforts to highlight the prevailing social crisis of moral legitimacy in American society and legal institutions. In short, the task was to brand American legal institutions as betrayers of principle in order to trigger a sympathetic institutional response that would signal a return to legitimacy.

### B. MORAL REDEMPTION AND THE RECLAMATION OF INSTITUTIONAL LEGITIMACY

The touchstone of any democratic legal order is legitimacy.[46] A legal regime must be *perceived* as legitimate by members of the regulated body if it is to retain any authority over that body.[47] Accordingly, perhaps the single greatest challenge

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[43] For a more comprehensive discussion of *Dempsey*, see RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES (1988). For a detailed account of the events surrounding the *Scottsboro* cases, see JAMES GOODMAN, STORIES OF SCOTTSBORO (1994), and DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

[44] The trial and acquittal of two whites charged with the lynching of Emmitt Till in 1955 presents a compelling example in this regard. For a brief but compelling discussion of this case, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW 59-63 (1998).

[45] Notably, in both *Dempsey* and the *Scottsboro Cases*, it was the Supreme Court that prevented the execution of the defendants through the articulation of rules designed to reclaim legitimacy for the criminal process.

[46] The legitimacy of any legal order must rest on law's claim to emerge from a democratically reasoned and "reason-giving" process. *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 409 (1996) ("A legal order *is* legitimate to the extent that it equally secures the cooriginal private and political autonomy of its citizens; at the same time, however, it *owes* its legitimacy to the forms of communication in which alone this autonomy can express and prove itself.").

[47] This is especially true in the criminal context, where the use of force is at its height. "Constitutional, democratic, humane legal orders are distinguishable from their lawless, authoritarian, and barbaric counterparts by the ways they authorize and use the coercive force at their disposal. . . . Yet constitutional violence is violence

presented by the mid-century push for liberal reform was the structuring of a *legitimizing* institutional response that would return the privileged moral and political status that American institutions were thought to have previously enjoyed. The loss of moral authority for American institutions—especially American legal institutions—created a social crisis of epic proportions that American institutions had no legitimate power to correct in the name of principle. Indeed, one might have argued at the time that the extended legacy of betrayal in the name of such principles rendered the principles themselves inherently suspect. In the absence of a legitimate moral authority to speak self-consciously about a commitment to racial equality, in the vacuum of trust generated by exposure of the lie of American democracy, American institutions sought moral redemption through *structural* changes that would place strong limits on the ability of majoritarian society to abuse authority and further compromise an already morally suspect regime.

Criminal procedural reform therefore was part and parcel of these structural reforms tailored to attain moral redemption and re-establish institutional legitimacy. The most prominent features of the structural reforms of the criminal process were the various rules and procedural "safeguards" established by the Warren Court. The institutional response to claims that police officers routinely trampled on the rights of suspects in order to facilitate harassment, seize evidence, or extract confessions was the establishment of a *regime of rules* to guide police investigations. In order to place some limits on the unprovoked harassment of criminal suspects, the Court, in *Terry v. Ohio*[48] created a two-tiered approach to classify police conduct in order to bring these "low-level" detentions within the ambit of the Fourth Amendment by requiring police to show a reasonable suspicion in order to justify such investigatory stops.[49] To place limits on the intrusiveness of police searches for evidence, the Court in *Mapp v. Ohio* held that the Fourth Amendment not only

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nonetheless; it crushes and kills with a steadfastness equal to a violence undisciplined by legitimacy." AUSTIN SARAT & THOMAS R. KEARNS, *Introduction to* LAW'S VIOLENCE 5 (Austin Sarat & Thomas R. Kearns eds., 1992).

[48] 392 U.S. 1 (1968).

[49] *See id.*

guarded against unreasonable searches and seizures, but also justified the exclusion of any illegally seized evidence from criminal trials.[50] With respect to the claim of coerced confessions, the Court in *Miranda v. Arizona* placed clear limits on the manner in which suspects could be questioned at the police station.[51] Additional safeguards were put in place to protect a suspect's rights at line-ups,[52] trial,[53] and on appeal.[54]

The Warren era reforms of the criminal process are best understood as part of the overall struggle to regain institutional legitimacy—to gain moral redemption in the wake of racial shame. As one commentator wrote in 1968:

> The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights. . . . It is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process. It would have been equally anomalous for such a Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity.[55]

This reformist disposition would inform subsequent attempts to regulate grand and petit jury selection. For instance, modern criminal procedure now regulates grand jury selection in three distinct ways. First, the Equal Protection Clause forbids discriminatory selection practices.[56] The complaining party

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[50] Mapp v. Ohio, 367 U.S. 643 (1961).

[51] *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[52] *See* United States v. Wade, 388 U.S. 218, 227 (1967) (defendant has right to counsel at post-indictment line-ups).

[53] *See* Griffin v. California, 380 U.S. 609, 615 (1965) (Fifth Amendment forbids both comment by prosecution on defendant's refusal to testify and instructions to jury that defendant's trial silence is evidence of guilt); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (providing right to counsel for indigent defendants in felony cases).

[54] *See* Douglas v. California, 372 U.S. 353, 357-58 (1963) (indigent entitled to appointed counsel at state mandatory appeal stage); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (indigent defendant has right to obtain free trial transcripts in order to ensure adequate appellate review).

[55] A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

[56] *See* Castaneda v. Partida, 430 U.S. 482 (1977).

must show that the discrimination was intentional, of course, but intent is somewhat less difficult to prove in grand jury cases than in other kinds of equal protection cases.[57] Second, the Equal Protection Clause forbids intentional discrimination in the selection of the grand jury foreman.[58] Third, the Fifth Amendment requires that grand juries be selected from a fair cross-section of the community.[59] Petit jury selection is likewise governed by both the Sixth Amendment's fair cross-section requirement[60] and the Equal Protection Clause.[61] Selection-related violations in both the grand and petit jury context mandate automatic reversal.[62] An important feature of these reforms is that they have the dual-effect of ensuring fairness while simultaneously improving accuracy and reliability of jury verdicts.

When one situates the reform of the criminal process within the larger context of Warren Court era liberal reform—which included not only racial reform of public education[63] and social interaction,[64] but also the elaboration of protections afforded to religious minorities,[65] free speech advocates,[66] and the indi-

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[57] *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1119-26 (1989).

[58] *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.4(c), at 699-702 (1992).

[59] *See id.* § 15.4(d), at 702-03.

[60] *See* Duren v. Missouri, 439 U.S. 357 (1979). Fair cross-section violations, however, apply only to the pool from which the jury is drawn, not to the jury itself. *See* Lockhart v. McCree, 476 U.S. 162, 173-74 (1986).

[61] *See* Batson v. Kentucky, 476 U.S. 79 (1986).

[62] *See* Vasquez v. Hillery, 474 U.S. 254, 260-64 (1986) (grand jury); *Batson*, 476 U.S at 100 (petit jury, equal protection challenge); *Duren*, 439 U.S. at 370 (petit jury, fair cross-section).

[63] Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

[64] Loving v. Virginia, 388 U.S. 1 (1967) (Virginia statute prohibiting interracial marriages violates "the central meaning" of the Equal Protection Clause).

[65] *See* Sherbert v. Verner, 374 U.S. 398 (1963) (requiring government to prove compelling interest in applying purportedly neutral government policy that compromises minority religious beliefs); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (declaring unconstitutional a state law requiring ten verses from the Bible to be read aloud at the opening of each public school day); Engel v. Vitale, 370 U.S. 421 (1962) (finding school prayer unconstitutional).

[66] *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that First Amendment shielded newspaper from a libel suit for printing falsehoods about a public official). Like many cases during the Warren years, there was a racial subtext to the

gent[67]—as well as congressional racial reform,[68] one gains a fuller appreciation of the extent to which the Court sought moral redemption and institutional legitimacy as a means to dispel America's profound sense of shame.[69]

This, of course, is *not* to suggest that modern criminal procedure is either unproblematic or enjoys the highly coveted status of near-universal acceptance. One can point to a number of issues—incidents of police brutality, alleged abuses of prosecutorial authority, and curious sentencing disparities, for example[70]—that cause many observers of the criminal process to question the integrity of both the system and its administrators. Indeed, the persistence of these kinds of incidents suggests quite strongly that the criminal process continues to suffer from a legitimacy crisis. Warren era reform of the criminal process, then, proves disappointingly incomplete. Nevertheless, this period of reform is an important historic moment insofar as it tells us a great deal about the nature of the crisis of criminal procedure in American society, and focuses our attention on the underlying principles that should discipline our impulse for systemic reform.

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*Sullivan* case, it involved an attempt by the State of Alabama to force a newspaper that had published pro-desegregation advertisements out of business. Thus, as Professor Horwitz remarked, "Even those Warren Court cases that are doctrinally not about race are almost always, in one way or another, ultimately about the agony of race relations in America." Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8 (1993).

[67] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667-68 (1966) (striking down a poll tax of $1.50 on all Virginia residents over twenty-one as discriminating against the indigent's right to vote); Gideon v. Wainwright, 372 U.S. 335 (1963) (providing a right to counsel for the indigent at all felony trials); Douglas v. California, 372 U.S. 353, 358 (1963) (granting the right to counsel because of the equality demanded by the Fourteenth Amendment); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (holding that an indigent criminal defendant's direct appeal cannot be denied because of an inability to afford a transcript).

[68] The legislative bestowal of the 1964 Civil Rights Act and the 1965 Voting Rights Act can likewise be interpreted as an effort at moral redemption—an admission by larger society that the fruits of American freedom and democracy had been deliberately and unjustifiably restricted to white Americans.

[69] Not surprisingly, commentators increasingly suggest that the Warren Court's reform of the criminal process ought to be treated as a branch of race relations law. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1, 5 & n.4 (1997).

[70] These and related items are discussed *infra* Part III.B.

## III. REDEMPTION, SYSTEMIC LEGITIMACY, AND THE PURSUIT OF TRUTH IN THE CRIMINAL PROCESS

The crisis of institutional legitimacy and quest for moral redemption are powerfully relevant to Professor Pizzi's concerns about "truth" in the criminal trial process. Professor Pizzi points to the *Simpson* case and others as examples of trials characterized by the subversion of truth. But if there is one lesson to be taken from the *Simpson* case, it is that "truth" in the American trial system (or *any* democratic legal order for that matter) depends upon the *perceived* legitimacy of the finder of that "truth," the means by which "truth" is discovered, and the manner in which the system acts upon that "truth." In this sense, questions of institutional legitimacy are inseparable from concerns about truth in the trial process. As discussed below, Professor Pizzi's failure to give adequate attention to these legitimacy concerns exposes critical failings in both his descriptive account of the American trial process, and in his prescription for reform.

### A. A CRITIQUE OF PIZZI'S DESCRIPTIVE CLAIMS

Professor Pizzi's failure to appreciate the extent to which the American criminal process has suffered the taint of illegitimacy weakens his descriptive account of the trial process. As an initial matter, Professor Pizzi's failure to consider the context causes him to *overestimate* the truthfulness of the trial process prior to the establishment of procedural rules and safeguards that he criticizes. According to Professor Pizzi, Warren era reform measures have resulted in the erosion of truth in the criminal process. In advocating the removal of these reform measures, our process will become appropriately refocused and truth will be magically restored to the trial process. Yet as *Dempsey*, *Scottsboro*, and many other cases suggest, truth was not always at the center of the trial process.

Consider Professor Pizzi's discussion of police investigations. For Professor Pizzi, truth is first sacrificed during the investigatory stage, where police are subject to various constraints on their ability to search and question suspects. He argues that the exclusionary rule, which suppresses reliable evidence un-

constitutionally seized by police officers, sacrifices too much "truth" while at the same time does a poor job of deterring police misconduct (p. 37). Professor Pizzi also questions the wisdom of the *Miranda* ruling, which places constraints on the ability of police officers to question suspects, and suppresses incriminating statements obtained during the course of improper questioning (pp. 62-68). He suggests that criminal defendants should be given less protection so as to enable the police to conduct a more "complete" investigation because a "complete" investigation is likely to yield a more accurate and reliable outcome (pp. 67-68).

In making this recommendation, however, Professor Pizzi fails to address the fact that the moral crisis of the criminal process resulted, in part, from the key role played by law enforcement in undermining the integrity of the criminal process. Consider, for example, the case of *Screws v. United States*,[71] as described by Justice William O. Douglas:

> This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy, in arresting Robert Hall, a citizen of the United States and of Georgia. The arrest was made late at night at Hall's home on a warrant charging Hall with theft of a tire. Hall, a young negro about thirty years of age, was handcuffed and taken by car to the court house. As Hall alighted from the car at the court-house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court-house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.[72]

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[71] 325 U.S. 91 (1945).

[72] *Id.* at 92-93.

The record makes clear that pursuit of the "truth" played little part in this "investigation."

Professor Pizzi suggests that alleviating existing constraints on the ability of police to investigate as they please will move us closer to "truth." What he fails to acknowledge is that it was the abuse of authority and absence of integrity in the investigatory process that led to the imposition of procedural constraints *in the first instance.* In this sense, Professor Pizzi's account reflects a false nostalgia for a truth-centered regime that never existed.

In addition to *overestimating* the truthfulness of trial process prior to modern reform, Professor Pizzi radically *underestimates* the extent to which Warren era reform enhanced the accuracy and reliability of guilt determinations. A great deal of the modern criminal procedural regime that Professor Pizzi claims undermines truth actually *enhances* the truth-seeking function of trials while simultaneously accenting the fairness of the criminal process. Indeed, one might argue that much of modern constitutional criminal procedure promotes accuracy and reliability—at least to the extent that it encourages police, courts, and lawyers to conduct themselves in a responsible way. However, certain bodies of law governing the use of suspect line-ups,[73] discovery process,[74] grand jury selection,[75] and petit jury selection[76] are accuracy-enhancing in the specific sense of producing a more reliable outcome in a particular case. Yet even in the two main aspects of the criminal process that Professor Pizzi claims serve as powerful obstacles to truth—the procedural constraints on police investigations, and the right to and role of counsel in the trial process—it is not entirely clear that truth has been sacrificed to the extent he suggests. In this sense, Professor Pizzi's one-dimensional analysis—one dimensional in the

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[73] *See, e.g.*, Foster v. California, 394 U.S. 440 (1969) (holding that due process mandates exclusion of out-of-court identification based on unnecessarily suggestive identification procedure).

[74] *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (holding that prosecutor has duty to disclose exculpatory evidence to defendant at trial). Two subsequent cases—*United States v. Agurs*, 427 U.S 97 (1976) and *United States v. Bagley*, 473 U.S 667 (1985)—have helped to clarify the scope and contour of the prosecutor's duty.

[75] *See supra* notes 56-62 and accompanying text.

[76] *See supra* notes 56-62 and accompanying text.

sense that any given aspect of the regime either promotes truth, or promotes fairness, but never both at the same time—proves descriptively false.

For instance, Professor Pizzi tends to exaggerate the extent to which modern criminal procedure restricts police investigations. As professor David Cole has pointed out, "since the short-lived Warren Court era the Supreme Court has consistently watered down constitutional restrictions on police activity, leaving wide areas of police conduct virtually unregulated."[77] Most notably, in *United States v. Whren*,[78] the Supreme Court held that police may rely upon a traffic code violation as a pretext to stop and detain a suspect for other reasons.[79] As the Court noted, "a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search.'"[80] The Court further held that, in the course of this stop, a police officer may choose to search the vehicle without first informing the detainee of their right to leave.[81] This ruling is consistent with the Court's ruling in *Ohio v. Robinette*, in which the Court remarked that "so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."[82] In the "stop and frisk" context, the police officers' discretion is regulated in the mildest sense—police officers need only find "reasonable suspicion" in order to detain an individual.[83] And, of course, there still remain areas in which police investigations are completely unregulated because the Court has declined to find a reasonable expectation of privacy protected by the Fourth Amendment. For example, in *California v. Greenwood*, the Court held that police officers could freely

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[77] David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1071 & n.70 (1999).

[78] 517 U.S. 806 (1996).

[79] *Id.* at 811, 829.

[80] *Id.* at 812-13 (quoting United States v. Robinson, 414 U.S. 218, 221 n.1 (1973)).

[81] *Id.*

[82] Ohio v. Robinette, 519 U.S. 33, 39-40 (1996); *Cf.* Florida v. Bostick, 501 U.S. 429 (1991) (finding that suspect consented to search where officers stood over passenger, brandishing firearms, and requested permission to search passenger's luggage).

[83] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

search through suspected drug defendant's garbage bags because the suspects did not have a reasonable expectation of privacy under the Fourth Amendment in garbage bags placed outside their home.[84] Police officers have exercised and continue to exercise a great deal of latitude in performing their investigatory functions—evidenced most recently in the Supreme Court's decision in *Illinois v. Wardlow*[85]—and as David Cole points out, "the Court has consistently acknowledged the need to defer to police officer's experience and to ensure that they have the flexibility to react effectively to fluid situations."[86]

Similarly, Professor Pizzi tends to exaggerate the extent to which the exclusionary rule undermines truth-seeking in the trial process. A point that seems lost on Pizzi is that the exclusion of evidence that points toward a suspect's guilt is not necessarily sacrificial of truth. For example, in *Stovall v. Denno,* the Supreme Court stated in dicta that due process mandates exclusion of out-of-court identification based on unnecessarily suggestive identification procedures.[87] Although the court acknowledged that such a rule seeks to prevent unfairness—that "[a] conviction which rests on a mistaken identification is a gross miscarriage of justice"[88]—it is obvious that this notion also furthers the truth-seeking function of the criminal process. Suggestive identification procedures raise questions about the accuracy and reliability of the identification testimony, and may not be counted upon to support an accurate assessment of guilt. A similar rationale provides the normative basis of the exclusionary rule—that the failure of police officers to abide by a particular set of procedures renders that evidence or confession fundamentally unreliable.

Although it is true that procedural constraints on the ability of police officers to investigate and extract confessions enhance the overall accuracy and reliability in the criminal process, Pro-

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[84] *See* California v. Greenwood, 486 U.S. 35, 39-40 (1988).

[85] 120 S. Ct. 673 (2000). In *Wardlow,* the Supreme Court upheld the stop and frisk of a person where the only cause for suspicion was the person's "headlong flight" from police officers in an area known for heavy narcotics trafficking. *Id.* at 676.

[86] Cole, *supra* note 1, at 1072 & n.78.

[87] Stovall v. Denno, 388 U.S. 293 (1967).

[88] *Id.* at 297.

fessor Pizzi correctly observes that such constraints *may* pose a barrier to truth in certain, individual cases (p. 67). But one might interpret these as transaction costs incurred to obtain moral legitimacy—the "price of the ticket," so to speak, for bringing the regime in line with the best of American democratic principles. Professor Pizzi's position undoubtedly would be that this "price" is simply too great to bear. But he cannot make this claim in good faith acontextually. He must speak to the legitimacy concerns to which the regime responded. He must argue either that the goals that procedural reform were intended to meet—the moral redemption of the criminal process and demonstration of fidelity to the best of America's democratic principles—are no longer relevant, or that the reform measures, in today's context, no longer serve those goals. Professor Pizzi does neither.

Rather, Professor Pizzi simply asserts that such exclusions are bad *per se*, at least to the extent that they subvert the discovery of "truth." In addition, he points to the practice of "testilying"—where officers choose to lie under oath regarding purported compliance with rules and procedural safeguards in lieu of actually abiding by such procedures[89]—as a practice that not only undermines truth, but one that is a natural byproduct of a regime that places too much emphasis on procedural rules (pp. 66-67). Again, Professor Pizzi's acontextual approach prohibits him from seeing the obvious—that testilying is simply a modern iteration of the crisis of legitimacy that gave rise to procedural reform in the first place. If existing constraints are insufficient to preserve the integrity of police investigations, it cannot be, as Pizzi argues, that removal of all such safeguards will render the investigations more reliable and accurate. If the moral crisis is so ingrained that the officers choose to compromise their personal and official integrity when questioned about the validity of any given investigation, we should draw little comfort from a proposal that permits such investigations to go unquestioned.

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[89] For interesting discussions of this practice, see Morgan Cloud, *Judges, "Testilying", and the Constitution*, 69 S. CAL. L. REV. 1341 (1996) and Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U COLO. L. REV. 1037 (1996).

Professor Pizzi also contends that the expanded role of defense counsel has further compromised the truth-seeking function of the trial process. For example, Professor Pizzi argues that structural changes have interposed counsel during the investigatory phase, and thereby created an additional barrier to the "truth" (pp. 52, 124-36). What Professor Pizzi fails to recognize is that *Miranda* represents a systemic acknowledgement that police station confessions were presumptively illegitimate—that the legacy of coerced and falsified confessions relied upon in the administration of criminal justice rendered existing police practices suspect. Absent some procedural safeguard, then, there was no reason to believe that such statements were truthful and accurate.

Interestingly, Professor Pizzi does not claim that presence of counsel at other phases of the criminal process functions as a barrier to truth, though this is certainly one obvious implication of his argument. As cases from *Scottsboro* to *Gideon v. Wainright*[90] to *Coleman v. Alabama*[91] make plain, the presence of defense counsel is indispensable to the accurate and reliable determinations of guilt. Rather, Professor Pizzi argues that the modern emphasis on procedural rather than substantive errors has rendered the trial process far too adversarial. Counsel become fixated on winning and losing, which leads to overzealous litigation of collateral matters at the expense of accurate and reliable outcomes.

Here, Professor Pizzi has it absolutely correct. Relying on William Stuntz's observation that more procedure "encourages defense lawyers and courts to shift energy and attention away from the merits and toward procedure,"[92] Professor Pizzi highlights the risks that excessive procedure poses to accurate and reliable determinations (p. 193). But as Stuntz notes, the tradeoff of merits-based claims in favor of procedural ones is caused mainly by the lack of resources allocated toward criminal

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[90] 372 U.S. 335 (1963) (establishing right to counsel for indigent defendants in felony cases).

[91] 399 U.S. 1, 9-10 (1970) (holding that the preliminary hearing constitutes a "critical stage" to which the Sixth Amendment right to counsel attaches).

[92] Stuntz, *supra* note 69, at 44.

defense. The regulatory regime is "incomplete" because it provides lawyers with claims and arguments that would not otherwise exist, but fails to provide appointed counsel with adequate resources to pursue all relevant claims. The implication of Stuntz's observation is that the acquisition of additional funding from the legislature would go a long way to eliminating the trading off of such claims, and thereby enable zealous advocacy that does not sacrifice truth—a point Professor Pizzi reluctantly concedes (p. 194).

Finally, Professor Pizzi's failure to consider context causes him to ignore the critical role of human agency in the administration of criminal justice. He tends to blame "the system" for the erosion of truth when the better target might be the legal actors within the regime. Professor Pizzi seems to have forgotten that the day-to-day impact of Warren Court era criminal reform is heavily dependent on lower court interpretation and application of the various rules, safeguards, and doctrines. The Court plainly did not possess the capacity to allocate resources, nor could it make all the structural changes needed to provide for fair and reliable guilt determinations in all cases.[93] Ultimately, the Court was dependent on the states' willingness to finance, fashion, and administer significant structural reform of the trial system. Lower courts quickly became primary judicial regulators of police conduct and, as such, could either dilute or expand the procedural safeguards.[94] Thus, as Professor Peter

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[93] In at least two of its landmark opinions—*Miranda*, and *United States v. Wade*—the Warren Court explicitly sought legislative assistance in regulating police. "In Miranda, for example, the Court stated that the specified procedures would be required 'unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it.'" Welsh S. White, *Improving Constitutional Criminal Procedure*, 93 MICH. L. REV. 1667, 1683-84 (1995) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

> Similarly, in *United States v. Wade*, the Court emphasized that "[l]egislative or other regulations . . . eliminat[ing] the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial" could displace the constitutional requirement imposed by the Court. . . . In both cases, Congress failed to provide a meaningful response.

*Id.* (quoting United States v. Wade, 388 U.S. 218, 239 (1967)).

[94] As Professor Amsterdam observed, a Fourth Amendment ruling by the Supreme Court "filters down to the level of flesh and blood suspects only through the refracting layers of lower courts, trial judges, magistrates and police officials" and "in few

Arenella observed, to a large extent, "judicial implementation of the Warren Court's due process norms rested on the lower courts' sympathy or hostility to the values served by the Court's doctrine."[95]

That the efficacy of Warren Court era procedural reform was dependent upon voluntary compliance should not be overlooked. Professor Pizzi asserts that there is a dramatic failure of process in the American trial system, and places that blame squarely on the procedural mechanisms that he claims serves as barriers to truth. But it is not entirely clear whether the root cause of the failure is due to actors within the regime, or the structure of the regime itself. One might justifiably criticize the regime as poorly thought out[96] or incomplete[97] in terms of its ability to adequately regulate conduct by legal actors. But to simply assert a failure of process, without making an effort to identify its root causes, ultimately fails to persuade.

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other areas of law are the filters as opaque as in the area of suspects' rights." Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970).

[95] Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. J. 185, 191 (1983). More often than not, hostility towards suspects and defendants reigned supreme:

> To a mind-staggering extent . . . the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate judges can throw off the fetters of their middle-class backgrounds . . . and identify with the criminal suspect instead of with the policeman or with the putative victim of the suspect's theft, mugging, rape or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their coworkers in the unending and scarifying work of bringing criminals to book.
>
> These trial judges and magistrates are the human beings that must find the "facts" when cases involving suspects' rights go into court . . . . Their factual findings resolve the inevitable conflict between the testimony of the police and the testimony of the suspect—usually a down-and-outer or a bad type, and often a man with a record. The result is about what one would expect.

Amsterdam, *supra* note 94, at 792.

[96] *See* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 523 (1975) (commenting that "[o]ne devising institutions for Utopia would not likely delegate so large a responsibility for maintaining the integrity of the criminal justice process to the courts").

[97] *See, e.g.*, Stuntz, *supra* note 69, at 21 (arguing *inter alia* that criminal procedure's regulatory regime is incomplete).

B. A CRITIQUE OF PIZZI'S PRESCRIPTIVE CLAIMS

Professor Pizzi offers a variety of reform measures to promote the truth-seeking function of the trial process. As an initial matter, he argues that the nature of police investigation must be fundamentally transformed so that police can carry out thorough and complete investigations in a non-adversarial manner (pp. 62-67). To that end, he suggests that officers should be encouraged to view their role as independent from the prosecution of the case, although he fails to explain precisely how this is to occur (pp. 222-23). A second set of proposals appears to be aimed at strengthening the role of the trial judge. Professor Pizzi advocates granting the trial judges more authority to control the trial process, and to develop cases substantively (p. 222). With the increase in judicial authority, Professor Pizzi offers a corresponding reduction in the role of laypersons (i.e., jurors) in the trial process (pp. 224-25). Specifically, he argues that all-layperson juries should be used only in the less serious cases, whereas the more serious cases should be tried before mixed panels of judges and jurors (pp. 224, 226-28). Finally, Professor Pizzi suggests that trial procedures and evidentiary rules should be relaxed so that legal actors can pursue the "truth" more freely (p. 224).

Each of Professor Pizzi's reform measures is perhaps meritorious in the abstract, but proves immensely problematic when viewed against the backdrop of the moral crisis of legitimacy within the criminal justice system. The dominant feature of Professor Pizzi's reform measures is the aggregation of power within legal actors and institutions to enable more "complete" investigations and more accurate guilt determinations. But for Professor Pizzi's reform to work, the American people must be convinced that these legal actors and institutions will not betray their trust. In this sense, his reform presupposes (and depends upon) substantial trust by members of the community that legal institutions will render "truthful" determinations. Problems arise, however, because it is not at all clear that such trust actually exists. Furthermore, recent incidents of police brutality, racial profiling, and the abuse of prosecutorial discretion suggest that betrayal and illegitimacy continue to plague the criminal

justice system. In light of ongoing concerns about legitimacy of the criminal process, it is not entirely clear that Professor Pizzi's reform proposals would promote "truth." One might argue that such proposals are equally likely to promote abuses, which would exacerbate rather than improve perceptions of the criminal trial process as illegitimate and inconsistent with democratic principle.

The ongoing crisis of legitimacy in the criminal process is sustained in large part by a *perception* that something must be amiss within a criminal process that, despite its purportedly strong orientation towards fairness and equality, proves so disproportionately harmful to minority and indigent defendants. In *No Equal Justice*, Professor David Cole combines statistics from a variety of sources that highlight the disparity in punishment received by African American offenders vis-à-vis their white counterparts.[98] Perhaps most startling is his collection of data on the enforcement of drug laws. Under current *federal* law, a person charged with a crack-related offense faces a sentence 100 times harsher than a person charged with a similar crime involving powder cocaine.[99] In 1992, an estimated 65% of all crack users were white.[100] However, in that same year, 92.6% of those convicted for federal crimes involving crack cocaine were African-American—only 4.7% were white.[101] Cole also highlights a 1992 survey by the United States Sentencing Commission, which found that, in seventeen states, not a single white person had been prosecuted on federal crack cocaine charges.[102] Cole also draws attention to disparities in punishment meted out under state laws that provide for the imposition of life sentence upon conviction of a second or third felony offense. A Georgia sentencing law provides that a defendant convicted of a second drug offense may, at the request of the district attorney, receive

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[98] *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 132-53 (1999).

[99] As Cole points out, "a small-time crack 'retailer' caught selling 5 grams of crack receives the same prison sentence as a large-scale powder cocaine dealer convicted of distributing 500 grams of powder cocaine." *Id.* at 142.

[100] *Id.*

[101] *See id.*

[102] *See id.*

a sentence of lifetime incarceration.[103] According to Cole, in 1995, 98.4% of those persons serving life sentences under the provision were African-American.[104] Similarly, African-Americans are sentenced under California's three-strikes law at a rate 13.3 times that for whites.[105]

One might be inclined to question the legitimacy of the process based upon these statistics alone. Yet when considered in conjunction with the prevalence of police brutality, the predominance of racial profiling, and the protections afforded to prosecutorial discretion, there is ample evidence to lead people to question the legitimacy of the trial process.

The persistence of police brutality powerfully undermines feelings of trust in law enforcement agencies and reinforces core perceptions of law enforcement as an essential component of racial oppression. Professor Pizzi proposes that we relax restraints on the ability of the police to investigate crimes in the field, but recent events suggest that additional constrains are in order. For example, in June 1999, in two separate incidents, Chicago Police officers fatally shot two unarmed African-American motorists.[106] Four months earlier, New York police officers fired forty-one rounds in the fatal shooting of Amadou Diallo, an unarmed suspect, as he stood in the doorway of his home.[107] The Diallo shooting resulted in severe popular backlash against New York police practices.[108] The initial insensitivity

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[103] *Id.* at 143

[104] *See id.*

[105] *See id.* at 148.

[106] Todd Lighty & Gary Marx, *Questions, Protest Clouds Cop Shootings*, CHI. TRIB., June 8, 1999, at B1.

[107] On February 4, 1999, four white New York City police officers, members of a Bronx street crimes unit, shot and killed Amadou Diallo, a 22-year-old unarmed West African immigrant street peddler, who had no criminal record, in a "ferocious barrage" of 41 bullets in the vestibule of his apartment building in the Bronx borough of New York City. Robert D. McFadden & Kit R. Roane, *U.S. Examining Killing of Man in Police Volley*, N.Y. TIMES, Feb. 6, 1999, at A1. Diallo suffered 19 gunshot wounds. *See id.*

[108] *See, e.g.*, Dan Barry & Marjorie Connelly, *Poll in New York Finds Many Think Police Are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1 (reporting on poll results in wake of Diallo killing, showing widespread concern about racial discrimination in policing); Jodi Wilgoren & Ginger Thompson, *After Shooting, an Eroding Trust in the Police*, N.Y. TIMES, Feb. 19, 1999, at A1 (reporting on widespread resentment of young minority New

expressed by New York public officials only fueled further resentment.[109] Not surprisingly, the ultimate acquittal of the officers for the Diallo shooting was perceived by many observers as injustice heaped upon injustice.[110]

The current crisis of corruption in law enforcement in Los Angeles, California further undermines public confidence in the legitimacy of the administration of criminal justice, and militates against further expansion of investigatory authority of police officers. In what some commentators have described as "the worst [police scandal] in [Los Angeles] history,"[111] investigators have uncovered scores of allegations of unjustified shootings, beatings, evidence planting, false arrests, and perjury.[112] Rumors of widespread corruption were first substantiated by the testimony of former LAPD officer Rafael Perez, who provided authorities with information as part of a plea bargain to obtain a lesser sentence on cocaine theft charges.[113] In the first of many startling revelations, ex-officer Perez admitted to shooting a handcuffed suspect in the head, planting a rifle next to the fallen body, and fabricating a police report that identified the suspect as the armed agressor.[114] Nineteen year-old Javier Francisco Ovando, paralyzed by the gunshot wound, was convicted and sentenced to twenty-three years in prison based in large part upon Perez' perjured testimony.[115] Ovando's conviction

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Yorkers regarding apparently race-based police stops in the wake of four white police officers' shooting of Amadou Diallo).

[109] *See* Dan Barry, *Giuliani Says Diallo Shooting Coverage Skewed Poll*, N.Y. TIMES, Mar. 17, 1999, at B3 (quoting New York City Mayor Rudolph Giuliani complaining that the public and media have overreacted to police killing of Amadou Diallo, and noting that since Diallo's killing, there have been 60 other murders in New York that have not received the same attention).

[110] *See* Robert D. McFadden, *Verdict Bares Sharp Feelings on Both Sides*, N.Y. TIMES, Feb. 26, 2000, at A1.

[111] Henry Weinstein & Jim Newton, *THE RAMPART SCANDAL Civil Rights Lawyers Form a Gathering Storm for L.A.*, L.A. TIMES, Mar. 1, 2000, at A1.

[112] *Id.*

[113] Scott Glover & Matt Lait, *4 Officers Back Tales of Parties After Shootings*, L.A. TIMES, Feb. 12, 2000, at A1.

[114] Joseph Trevino & Anne-Marie O'Connor, *Sooner or Later the Truth Will Come Out*, L.A. TIMES, Sept. 17, 1999, at A1.

[115] *See id.*

was voided and he was released from prison following Perez' disclosure.[116]

In addition to his own criminal acts, Rafael Perez revealed to investigators that he helped cover up three additional unjustified shootings, and knew of at least five others in which his fellow officers and their supervisors tainted crime scene evidence in order to conceal their mistakes.[117] Since September 1999, when the scandal broke, over thirty-two convictions have been overturned because of corrupt investigations.[118] At least seventy LAPD officers are currently under investigation for either committing crimes or assisting other officers in their cover-up efforts.[119] In a revealing statement, United States Attorney Alejandro Mayorkas, who is currently leading the federal investigation into the local scandal, described the corruption and civil rights violations as "tear[ing] at the foundation of not only our law enforcement community, but of our civil society as a whole."[120] Cast against the backdrop of such rampant abuses, one might view Pizzi's proposal to increase police discretion and broaden investigatory authority with a substantially elevated degree of skepticism.

Professor Pizzi also recommends that we allow police to question suspects in the absence of lawyers, but one cannot help but question such a proposal in light of the torture of Abner Louima at a Brooklyn police station.[121] Press accounts of the sta-

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[116] *See id.*

[117] Matt Lait & Scott Glover, *Shooting Scenes Were Doctored, Perez Says LAPD*, L.A. TIMES, Feb. 15, 2000, at A1. In one of these cases, Perez and fellow LAPD officers intentionally delayed calling an ambulance while they planted a gun near a suspect they had shot and agreed upon a story. The suspect, twenty-one year old Juan Saldana ultimately died from his wound. *See* Weinstein & Newton, *supra* note 111.

[118] Matt Lait, Scott Glover & Tina Daunt, *Scandal Could Taint Hundreds of Convictions*, L.A. TIMES, Feb. 17, 2000, at A1.

[119] *Id.*

[120] Matt Lait & Scott Glover, *FBI Launches Probe Into Rampart Scandal*, L.A. TIMES, Feb. 24, 2000, at A1. The exposure of corruption and brutality is expected to generate scores of civil law suits, costing the city of Los Angeles hundreds of millions of dollars. *See* Shirley Leung, *Los Angeles Looks for Ways to Pay Claims Arising From Police Scandal*, THE WALL STREET JOURNAL, Mar. 3, 2000, at B4 (estimating liability payouts at between $125 million and $1 billion).

[121] *See* David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1 (stating that police officers at a Brooklyn police sta-

tionhouse encounter were stunning: "according to Louima, he was strip-searched at the duty sergeant's desk and then walked to the bathroom, where he was sodomized in the anus and mouth. 'One [police officer] said, 'You niggers have to learn to respect police officers . . . .'"[122] Given that such clear abuses of discretion continue to occur under a regime that purportedly constrains such conduct, there seems little justification to grant additional authority to police officers.

The prevailing practice of racial profiling by law enforcement agencies likewise proves a powerful catalyst for community skepticism regarding the legitimacy of police practices. The lawsuit and eventual settlement of a case against the Maryland State Troopers is instructive on this point. According to computer data collected by Maryland State Troopers, African-American motorists, who comprised about 17% of motorists along the Interstate 95 corridor comprised more than 70% of the people stopped between 1995 and 1997.[123] For nearly a decade, trial and appellate courts have permitted local law enforcement agencies to consider a person's race as an element of criminal suspicion, provided that race is one of several factors considered.[124] Recent efforts to broaden the authority of law en-

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tionhouse had beaten and shoved the wooden handle of a toilet plunger into the rectum of a Haitian immigrant who had been arrested for disorderly conduct, obstructing governmental administration, and resisting arrest and stating that some community leaders and minority residents [of the New York City area] have long complained of misconduct and brutality by police officers in minority neighborhoods).

[122] Michael Claffey et al., *Cop Nabbed in Torture Case: Sgts. Grilled About Assault*, DAILY NEWS (N.Y.), Aug. 14, 1997, at A3.

[123] *See* Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 727 (1999); *see also* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Still Matters*, 84 MINN. L. REV. 265 (1999); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 563-566 (1997).

[124] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (permitting race as an element of suspicion in border patrol stops); United States v. Weaver, 966 F.2d 391 (8th Cir. 1992) (permitting airline security to use race as an element of criminal suspicion for narcotics trafficking); State v. Dean, 543 P.2d 425 (Ariz. 1975) (authorizing use of race as an element of suspicion to justify stop of Mexican male in predominantly white, middle to upper-middle class neighborhood).

forcement officials to use race as an element of suspicion[125] have led one scholar to remark that "[t]oday, police departments across the nation . . . continue to target blacks in a manner reminiscent of the slave patrols of colonial America."[126]

The prosecutor's charging decision—the decision of which crimes and persons to charge—remains controversial in large part because it remains highly discretionary and largely insulated from legal challenge. In *Yick Wo v. Hopkins*,[127] the Court prohibited selective prosecution on racial lines. The Court proclaimed:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[128]

Although acknowledging that this principle remains in effect, the Court's ruling in *United States v. Armstrong*[129] makes it

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[125] Modern efforts of this sort were first given tacit approval by the Supreme Court in *Whren v. United States*, 116 S. Ct. 1769, 1772-73 (1996), a decision involving a Fourth Amendment challenge to a possible racial profiling in routine traffic stops. The Court's holding that existing Fourth Amendment doctrine "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved," *see id.* at 1774, was interpreted by most to mean that traffic stops motivated by racial prejudice of the officers do *not* violate the Fourth Amendment provided that there are other, non-racial reasons for making the stop. For additional discussion of the import of the *Whren* decision, see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1998), and Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997).

Recently, in *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Supreme Court struck down an anti-loitering statute that afforded police officers exceptionally broad power to disperse any group of two or more people standing in public if the police suspect that the group includes a gang member. As one commentator observed, "[d]uring the three years the law was in effect, it yielded arrests of more than 40,000 citizens, most of whom were Black or Latino residents of inner-city neighborhoods." Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. AND CRIMINOLOGY 775, 775-76 (1999).

[126] Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336 (1998).

[127] 118 U.S. 356, 373 (1886).

[128] *Id.* at 373-74.

[129] 517 U.S. 456 (1996)

nearly impossible to prove a claim of selective prosecution on the prohibited ground of race.

In *Armstrong*, the defendant argued that his prosecution in federal as opposed to state court for possession of crack cocaine was motivated on racial grounds.[130] In support of his claim, the defendant presented evidence that African-Americans arrested for crack cocaine possession were handed over to federal authorities for prosecution and punishment pursuant to the tough sentencing guidelines that now control the discretion of district judges, while white suspects, arrested for the same offense, were directed into the more lenient state court system.[131] The Court declared that the prosecutor enjoys a strong presumption that its charging decisions are not motivated by racial animus, and found that Armstrong's evidence was insufficient to rebut that presumption.[132] The Court's ruling makes clear that selective prosecution claims, though theoretically possible to raise, are virtually impossible to win.

Examples of prosecutorial misconduct in connection with death penalty cases only raise further questions of the legitimacy of the criminal justice regime. Just last year, citizens of Illinois learned that several innocent people—most of them members of racial minorities—had served many years on death row before the efforts of journalism students at Northwestern University uncovered evidence that led to their release.[133] As one commentator observed, "[p]erhaps the most shocking dimension of this story is the alleged complicity of prosecutors in the

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[130] *Id.* at 458-59.

[131] *Id.* at 459-60.

[132] *Id.* at 465, 470.

[133] *See* Douglas Holt & Flynn McRoberts, *Porter Fully Savors 1st Taste of Freedom; Judge Releases Man Once Set for Execution*, CHI. TRIB., Feb. 6, 1999, at A1 (reporting release of death row inmate Anthony Porter after journalism students at Northwestern University produced evidence of his factual innocence, including recantations of witness testimony that Chicago police claimed connected Porter to fatal shootings in 1982, and a videotaped statement by Alstory Simon, implicating himself in the murders for which Porter had been convicted, ending nearly 17 years of imprisonment, which included an execution date stayed only two days before Porter was to die); Lawrence C. Marshall, *Innocence and Death; Lessons the State Must Heed Before It Kills Again*, CHI. TRIB., Feb. 11, 1999, at A29 (giving details of ten death row inmates in Illinois released after determination of innocence).

knowing use of perjured testimony and refusal to disclose exculpatory evidence to the defense."[134] When viewed in conjunction with the Court's decision in *McCleskey v. Kemp*, which held that the imposition of the death penalty was constitutional despite evidence of a pattern of discrimination,[135] one cannot help but conclude that there is an ongoing crisis of moral legitimacy within the prosecutorial ranks.[136]

The central problem with Professor Pizzi's recommendations for reform, then, is that he presupposes a level of legitimacy currently not enjoyed by the system. To promote "truth" within the criminal process, one must first secure a level of legitimacy for that process so that "truth" discovered by legal actors and acted upon by legal institutions is *perceived* as truth. In avoiding the legitimacy question, Professor Pizzi's reform proposals seem to raise more questions than they answer—the most difficult being, "why should we embrace reform that seeks to aggregate authority in the hands of institutional actors whose conduct is increasingly being called into question?" Pizzi may have a response—some explanation as to how his proposal meets the peculiar challenges of the American context while simultaneously enhancing the "truth-seeking" function of the trial process. But that response does not appear in *Trials Without Truth*, and in the absence of some compelling explanation,

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[134] Edward McGlynn Gaffney, Jr., Book Review, *Removing the Blindfold From Lady Justice*, 88 GEO. L.J. 115, 132 & n.128 (1999) (reviewing COLE, *supra* note 98). Indeed, investigative efforts into death penalty procedures in Illinois recently revealed, in the words of Illinois Governor George Ryan, such a "shameful record of convicting innocent people and putting them on Death Row" that the Governor declared a moratorium on all executions in that state. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty—Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at A1. In the wake of the Illinois moratorium, a number of other states—including New Hampshire, Nebraska, Maryland, and Indiana—have raised questions about their own procedures for handling death penalty cases. *See* Stevenson Swanson, *New Hampshire Bill Would Repeal Death Penalty—House Passes the Measure, But Governor Pledges to Veto It*, CHI. TRIB., May 11, 2000, at A1.

[135] 481 U.S. 279 (1987). Interestingly, the author of the bare majority decision, Justice Powell, later told his biographer that McCleskey was the biggest mistake in his career and that if he had to do it over again, he would rule the death penalty unconstitutional. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).

[136] For an interesting discussion of racial disparity in punishment, see generally COLE, *supra* note 98.

there seems little reason to embrace his recommendations for reform.

## IV. CONCLUSION

*Trials Without Truth* serves as an important reminder that all is not well within our system of criminal justice. It attempts to lay bare the American trial process so that we all might take a serious look at the way criminal justice is administered in this country. One might dispute whether improvement means refocusing the trial process by placing "truth-seeking" at the center, and structuring our trial system accordingly. But the urgency with which Professor Pizzi speaks should encourage us all to look closely at where the criminal process appears to fail us, and contemplate ways in which it might be improved.