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Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective

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DELAY IN PROCESS, DENIAL OF JUSTICE: THE JURISPRUDENCE AND EMPIRICS OF SPEEDY TRIALS IN COMPARATIVE PERSPECTIVE*

JAYANTH K. KRISHNAN** AND C. RAJ KUMAR***

ABSTRACT

Criminal law scholars regularly maintain that American prisons are overcrowded and that defendants in custody wait long periods of time before having their cases brought to trial. A similar refrain is made of the penal process in India—the world’s largest democracy, an ally of the United States, and a country with a judiciary that draws upon American criminal procedure law. In fact, the situation in India is thought to be much worse. Accounts of prisoners languishing behind bars for several years—and sometimes decades—awaiting their day in court are not uncommon. Many Indian prisons are between 100% and 200% over capacity, where conditions are squalid and the weaker inmates face serious physical harm.

In this study, we examine the current state of the Indian criminal justice system. Beginning in 1979, the Indian Supreme Court, referencing the American Constitution’s Sixth Amendment, held that defendants had a fundamental right to a speedy trial. We examine the evolution of the Indian jurisprudence on

* The title of this piece intentionally draws upon the famous phrase, “justice delayed is justice denied,” in that our specific focus is on procedural rules and norms and how the absence of these can lead to a systematic denial in justice. (Note there is conflict as to who actually coined this saying. It is often attributed to William E. Gladstone, while there is contention that it traces its roots to the 1215 Magna Carta. Compare LAURENCE J PETER, PETER’S QUOTATIONS 276 (1977), with Bob Woffinden, *CCRC’s Extreme Delays*, INNOCENT, July 2009, <http://www.innocent.org.uk/cases/Karl%20Watson%20-%20Woffinden%20art.pdf> (last visited Mar. 29. 2011).

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this matter, which has been quite favorable for defendants. Then we move beyond this line of inquiry by empirically evaluating whether the positive court rulings have translated into tangible changes for the criminally accused. As our findings suggest, there exists a major gap in India between these encouraging judicial pronouncements and how the right plays out in reality, which we believe provides an important perspective for comparative and criminal law scholars.

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INTRODUCTION

In the United States, perhaps no modern legal scholar has made as significant an impact on the Sixth Amendment’s speedy trial clause than Professor Akhil Amar of Yale Law School.¹ In his work, Amar uses detailed, historical legal analysis to make a provocative argument concerning the rights of defendants who failed to receive a speedy trial. Amar contends that in such cases the remedy of “dismissal with prejudice”²—the standard set-forth by the Supreme Court as early as 1972³—can perversely serve as a “windfall”⁴ for defendants and place society in danger, especially when there is overwhelming evidence that the pre-trial detainee is guilty.⁵ Instead, for Amar, the proper remedy in these instances involves releasing the defendant, allowing the prosecu-

1. See e.g., AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); Akhil Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996) [hereinafter Amar, *Sixth Amendment*]. For a classic work, to which Amar refers, see generally Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975).

2. See Amar, *Sixth Amendment*, *supra* note 1, at 645.

3. *Barker v. Wingo*, 407 U.S. 514 (1972); see also *Doggett v. United States*, 505 U.S. 647 (1992) (reaffirming the balancing test set-forth in *Barker*).

4. See Amar, *Sixth Amendment*, *supra* note 1, at 646.

5. *Id.*

tion to re-file charges at a later date, but also providing the defendant with some form of compensatory or punitive damages.⁶

Amar's framework has received a great deal of attention, but also harsh criticism from those who accuse him of rolling back the advances made on behalf of defendants who often lack sufficient resources or sophistication to have proper representation.⁷ In addition, there is the charge that his work is too ethereal and constitutionally focused (and thus ivory tower in nature);⁸ when, in fact, in practice there is little speedy trial litigation in the first place. After all, across the country there are state statutes that address this subject, with which prosecutors usually comply.⁹ If litigation does occur, it is often based on technical grounds rather than on classic Sixth Amendment principles.¹⁰

Nevertheless, the Amarian notion of not dismissing charges, *carte blanche*, against a defendant whose speedy trial right has been violated raises interesting issues especially when comparing it to other legal systems. Indeed, his framework is informative and useful for considering how India, a democracy with a common law legal system that draws on the United States, has been struggling with a serious backlog in criminal cases that have failed to reach the courts.

In India there are thousands of defendants who have been languish-

6. *Id.* at 652–58.

7. For one of the harshest critiques of Amar's criminal procedure work generally, including, in part, his Sixth Amendment analysis, see Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 L. & SOC. INQUIRY 533 (1999) (reviewing AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)).

8. See *id.* at 534, 536 (noting, derisively, that Amar's analysis "is myopic and his analysis fails to mesh with the empirical world of criminal law practice." And that "Amar often ignores critical issues in constitutional criminal procedure . . . [and may do so partly] because he lacks real-world experience in the criminal justice system, and in part because the issues with which he chooses to grapple are better suited for academic discourse: they do not involve factual questions requiring empirically based answers, they are relatively self-contained, and they are more amenable to a unified theory.").

9. See *e.g.*, SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 223 (2006) (noting that "[t]here are not many examples of state courts relying on their own state Constitutions to create more expansive speedy trial rights for criminal defendants, although state statutes and rules do set clearer and more demanding time limits than the federal constitutional floor would usually require."); see also Brian P. Brooks, Comment, *A New Speedy Trial Standard for Barker v. Wingo: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587 (1994); Email Correspondence with Professor, Expert Practitioner, and Criminal Defense Lawyer, Ted Sampsell-Jones (May 3, 2010) (on file with author) [hereinafter Sampsell-Jones Correspondence].

10. This might include, for example, whether a judge's schedule, which may be overbooked, tolls the prescribed period specified within a jurisdiction's given statute. See Sampsell-Jones Correspondence, *supra* note 9.

ing in jails,¹¹ awaiting trial—many for longer than a formal sentence would have brought. The term of art used to describe all non-convicted defendants within the Indian criminal justice process is “undertrial” in that these individuals are deemed to be under the umbrella of the trial process.¹² Undertrial-prisoners are thought to comprise a staggering seventy percent of India’s incarcerated population.¹³ Moreover, this issue is one that many within the country have recognized as reaching a breaking point; consider that diverse observers such as high-ranking government officials, civil society activists, lawyers, and judges have in unison called for massive reforms in the country’s penal process.¹⁴

This crisis is occurring against a paradoxical Indian landscape.¹⁵ On the one hand, India is a dominant power on the world stage today. With a potent nuclear arsenal, high economic growth, a vibrant and young labor force, and ever-increasing levels of foreign investment,¹⁶ India is

11. In India the term “jail” is used more frequently than, but interchangeably with, the term “prison.” Parts III and IV of this article discuss the statistics involving those who are in Indian jails, but one of the alarming facts is how Indian jails often do not segregate their inmates, thus resulting in a situation where people awaiting trial are sharing cells with hardened convicts. *See* discussion *infra* Parts III, IV. In contrast, in the United States, there is a distinct difference between jails and prisons, with the former often having less formalized protocol and greater variation in enforcement standards than the latter. The result is that jails can at times place inmates in greater danger than prisons. (This is even given that jails typically hold people for misdemeanors or as they await final outcomes of trials, while prisons generally incarcerate people convicted of felonies.) For a recent series on the American jail and prison system, see *Crime and Punishment in America: Rough Justice*, *ECONOMIST*, July 22, 2010, available at <http://www.economist.com/node/16640389>; see also DEP’T OF JUSTICE, REPORT ON RAPE IN JAILS IN THE U.S (Dec. 29, 2008), http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_081229.pdf [hereinafter DOJ Dec. 2008 Report]; DEP’T OF JUSTICE, REPORT ON RAPE IN STATE AND FEDERAL PRISONS IN THE U.S., (Sept. 24, 2008), http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_080924.pdf [hereinafter DOJ Sept. 2008 Report]. We thank Professor Wayne Logan (Florida State University) for highlighting this important point to us.

12. This term will be used, referenced, and cited extensively in Parts II–IV.

13. The Indian Minister for Law and Justice, M. Veerappa Moily, himself has noted this statistic. *See 92,000 Undertrial Prisoners Released Across India*, IGOVERNMENT, May 27, 2010, <http://igovernment.in/site/92000-undertrial-prisoners-released-across-india-37660>. We will be discussing the Law Minister’s efforts in Parts III and IV.

14. We highlight in detail the work and studies of these various observers in Parts II–IV. *But see* KIRAN BEDI, IT’S ALWAYS POSSIBLE: ONE WOMAN’S TRANSFORMATION OF TIHAR PRISON (2006) (arguing that the situation in one of India’s most notorious penitentiaries has improved).

15. For a discussion of this particular term and occurrence of this “paradox,” see *The Paradox of India’s New Prosperity*, REDIFF BUSINESS, Jan. 14, 2010, <http://business.rediff.com/column/2010/jan/14/guest-the-paradox-of-indias-new-prosperity.htm>.

16. *Country Fast Facts: India*, CBS NEWS, http://www.cbsnews.com/stories/2007/10/04/country_facts/main3328865.shtml (last visited Mar. 20, 2011); *India’s Economy: Turning Sour*, *ECONOMIST*, Aug. 2, 2008, http://www.economist.com/node/11848576?story_id=E1_TTRQRVSG;

a country that most acute international observers see as being a lead actor in the twenty-first century.¹⁷ Further, the beauty of the Indian experiment is that despite the odds, it succeeds as a pluralist parliamentary democracy.

At the same, however, India suffers from a host of major problems. Corruption, intense poverty, illiteracy for large swaths of the population, a lack of adequate educational institutions, and poor infrastructure are just some of the daunting challenges that confront the Indian state.¹⁸ Furthermore, empirical research conducted on the civil justice side of the Indian legal system highlights a routine failure, on the part of the courts, to provide remedies to aggrieved parties in a timely manner.¹⁹ With these hardships present, it is difficult to envision how the state can also cope with such an underperforming criminal justice system. Yet that is the place India currently finds itself; namely, in a situation where because of how glacially slow the adjudication process is for criminal matters, this system and many of its administrators are seen as all but ineffectual. For a country that aspires to be a leading democratic power during the millennium, it thus seems untenable that this goal can be achieved when speedy trials for defendants, and an

Dreaming with BRICs: The Path to 2050 (Oct. 2003), <http://www2.goldmansachs.com/ideas/brics/book/99-dreaming.pdf>; BRICs and Beyond (Nov. 2007), <http://www2.goldmansachs.com/ideas/brics/BRICs-and-Beyond.html>; Neil Rose, *Passage to India?*, LAW SOC'Y GAZETTE, Apr. 17, 2008, <http://www.lawgazette.co.uk/features/passage-india-0>.

17. See *supra* text accompanying note 16.

18. In terms of data on corruption in India, Transparency International (TI) has been at the forefront of tracking and critiquing this problem. For information from TI-India (TII), see Transparency International India, <http://www.transparencyindia.org/> (last visited Mar. 6, 2011); see also Jayanth K. Krishnan, *Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, 29 J. APP. PRAC. & PROCESS 255 (2007) [hereinafter Krishnan, *Scholarly Discourse*]; C. Raj Kumar, *Corruption as a Human Rights: Promoting Transparency in Good Governance and the Fundamental Right to Corruption-Free Services in India*, 17 COLUM. J. ASIAN L. 31 (2003). For a sample of other works that have focused on these various subjects, see generally PAUL BRASS, *THE POLITICS OF INDIA SINCE INDEPENDENCE* (1994); ATUL DOHLI, *DEMOCRACY AND DISCONTENT: INDIA'S GROWING CRISIS OF GOVERNABILITY* (1990); ATUL KOHLI, *THE STATE AND POVERTY IN INDIA: THE POLITICS OF REFORM* (1987); PRATAP BHANU MEHTA, *THE BURDEN OF DEMOCRACY* (2003); LLOYD RUDOLPH & SUSANNE RUDOLPH, *IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE* (1987); Pratap Bhanu Mehta, *A Decade of Hope*, OUTLOOK INDIA, Jan. 11, 2010, <http://www.outlookindia.com/article.aspx?263732>.

19. See e.g., Marc Galanter & Jayanth K. Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in India*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 96 (2003) [hereinafter Galanter & Krishnan, *Debased Informalism*]; ROBERT MOOG, *WHOSE INTERESTS ARE SUPREME? THE ORGANIZATIONAL POLITICS OF THE CIVIL COURTS IN TWO DISTRICTS OF UTTAR PRADESH* (1997); Jayanth K. Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, 21 AM. ASIAN REV. 91 (2003).

efficient criminal justice system overall—all vital lynchpins in a consolidated democracy—are so unrealized in everyday practice.

In this article, we assess systematically the undertrial predicament in India. Because so little rigorous jurisprudential and empirical work has been done on the subject, we approach our task through a set of deliberate steps. In Section I, we contextualize our India-project within the broader academic literature on speedy trials. To be sure, American scholarship on this topic is relevant, particularly because Indian courts have often looked to U.S. law in adjudicating these matters; but scholars from other jurisdictions have also contributed.

In Section II, we focus on the Indian constitutional approach to speedy trials. During the framing of the Indian constitution in the late 1940s, assembly-members, when drafting Article 21, discussed due process, the right to life, and other issues;²⁰ but the notion of a speedy trial was not explicitly included within the constitutional text. It was only in 1979 that the Supreme Court of India held that a speedy trial was a fundamental constitutional right (under Article 21) for criminal defendants.²¹ As we will show in the first part of this section, the Indian courts have proceeded to reiterate this principle in subsequent cases. Unfortunately the empirical reality for defendants in India awaiting trial has failed to conform with these repeated judicial pronouncements. Drawing on a series of statistical data, we highlight, in the second part of Section II, how since that late 1970s Supreme Court case the number of undertrial-prisoners has significantly increased to the point where the vast majority of incarcerated are not those who have been convicted but instead are simply those waiting for their day in court.

In Section III, we evaluate the various governmental reports that over the years have attempted to address this undertrial quandary. Included in our evaluation is the current government's plan to release a large percentage of the undertrial population.²² Our thesis is that while on paper many of these past and present proposals have good intentions and offer some relief, greater structural and fundamental reform is needed throughout various points in the criminal justice process before the undertrial problem is resolved.

In Section IV we offer our preliminary set of recommendations. We

20. See *e.g.*, Transcript of the Constituent Assembly Debates, Volume VII, at 1–20 (Dec. 6, 1948), available at <http://parliamentofindia.nic.in/ls/debates/vol7p20b.htm>.

21. This occurred in the important case of *Hussainara Khatoon v. Home Ministry*, (1979) 3 S.C.R. 169.

22. See *infra* Parts III, IV.

base these recommendations on fieldwork and interview data collected during the summer of 2010 from a range of experts, many of whom have experience working in the criminal justice system, but currently serve as vigorous non-governmental activists. We provide a set of proposals we believe could help alter the undertrial pathology inhering within the Indian penal process. Ultimately, our belief is that to further strengthen India's democratic state there must be an end to the undertrial debacle. Ensuring that the criminally accused are provided with the right to a speedy trial would go a long way in having this important objective realized.

I. THE ACADEMIC LITERATURE ON SPEEDY TRIALS: A BRIEF OVERVIEW

As several writers note, references to a speedy trial date back to the twelfth century and the Assize of Clarendon, followed by its presence in the Magna Carta of 1215, as well as in the famous tomes of Sir Edward Coke.²³ And because this sacred "entitlement . . . had been present in English law for over half a millennium,"²⁴ it should not be surprising that revolutionaries in colonial America valued this right.²⁵

The speedy trial case law in the United States did not begin to develop until the twentieth century, with the Supreme Court's 1905 decision in *Beavers v. Haubert*.²⁶ In what was a rather unhelpful ruling for future cases, the Court in *Beavers* held that the speedy trial clause would be violated "depend[ing] upon the circumstances"²⁷ of the particular facts at hand. For the next several decades the Court incrementally enhanced the speedy trial rights of defendants in a series of judgments.²⁸ It was not until 1972, in *Barker v. Wingo*, that the Court

23. See, e.g., Darren Allen, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101, 103 (2004); Patrick Ellard, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207, 1209–10 (2007); Lewis LeNaire, *Vermont v. Brillon: Public Defense and the Sixth Amendment Right to a Speedy Trial*, 35 OKLA. CITY U. L. REV. 219, 220–21 (2010); Brooks, *supra* note 9, at 587. For a discussion of Coke's views, see EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 54–56 (1809).

24. See LeNaire, *supra* note 23, at 221.

25. *Id.*

26. See *Beavers v. Haubert*, 198 U.S. 77 (1905); see also LeNaire, *supra* note 23, at 221.

27. See *Beavers*, 198 U.S. at 87; see also Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 419 n. 442 (1990).

28. See, e.g., *Dickey v. Florida*, 398 U.S. 30 (1970); *Smith v. Hooy*, 393 U.S. 374 (1969); *Klopfert v. North Carolina*, 386 U.S. 213 (1967); *United States v. Ewell*, 383 U.S. 116 (1966); *Pollard v. United States*, 352 U.S. 354 (1957). All of these cases are nicely discussed and the evolution is presented in LeNaire, *supra* note 23, at 221–23. For other literature discussing this

enunciated a four-part balancing test meant to clarify when this provision of the Sixth Amendment would be violated.²⁹

In *Barker*, a unanimous opinion, Justice Lewis Powell stated that courts needed to weigh factors such as “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant”³⁰ when deciding if prosecutors were complying with the speedy trial guarantee of the Constitution. Almost immediately after the decision, though, the Supreme Court’s rationale came under great scrutiny by prominent scholars. For example, Columbia University law professor Richard Uviller famously charged that the *Barker* test was “less than gratifying . . . [with] [t]he result . . . [being] a right debilitated, its components askew.”³¹ In his assessment of *Barker* and its immediate progeny, *Strunk v. United States* (1973), Professor Anthony Amsterdam, pre-dating part of Akhil Amar’s critique, delivered a stinging rebuke of both holdings.³² Amsterdam noted that the Court’s approach—particularly in the latter case where it held that the outcome for violating the former’s balancing test must be dismissal with prejudice—was both “incredible”³³ and “plainly unsound.”³⁴

The contention from these critics was that by making the only remedy for a speedy trial violation a complete dismissal, lower court judges would be loath to find in favor of defendants when such claims were brought, because of the inevitable, drastic outcome—unconditional release.³⁵ Interestingly, shortly after both *Barker* and *Strunk* the

evolution, see Allen, *supra* note 23, at 104 n.19; Bruce A. Green, “*Hare and Hounds:*” *The Fugitive Defendant’s Constitutional Right to be Pursued*: United States v. Diacolis, 56 BROOK. L. REV. 439, 444 n.22 (1990); Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 321 n.241 (2001–2002).

29. *Barker v. Wingo*, 407 U.S. 514, 529–32 (1972).

30. *Id.* at 531. For further discussion, see LeNaire *supra* note 23, at 223–24.

31. H. Richard Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376 (1972).

32. See Amsterdam, *supra* note 1. *But see* Amar, *Sixth Amendment*, *supra* note 1, at 650 n.38 (noting his disagreement with Amsterdam’s analysis).

33. See Amsterdam, *supra* note 1, at 534.

34. *Id.* at 538.

35. See e.g., Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1515 (2009). Starr also discusses Amsterdam’s article as well as Amar’s piece, and notes that “[s]cholars and courts have recognized that this extreme remedy dissuades trial and appellate judges from finding violations . . .” *Id.* She also goes on to quote Herman, noting that: “As Susan Herman concludes on the basis of a comprehensive review of the case law, the ‘severity of the remedy . . . has had a profound effect on the development of speedy trial jurisprudence.’ Ultimately, ‘dismissal is granted in a tiny fraction of the thousands of constitutional speedy trial claims brought every year.’” *Id.* (quoting HERMAN, *supra* note 9, at 230).

federal Speedy Trial Act (STA) of 1974 came into existence.³⁶ The STA codified a series of requirements under which a defendant's case had to move forward upon an arrest.³⁷ Yet to the ire of some observers, the federal law contained exceptions allowing judges to toll the STA's rules wherever the "ends of justice"³⁸ so demanded. Partially allaying these concerns, however, the Supreme Court in 2010 weighed in on this matter.³⁹ In a seven-to-two ruling, the Court held that the presumption would be that prosecutors could not toll the statutorily prescribed period of seventy days to bring a defendant to trial (from the date of indictment), except on those seemingly rare occasions where the ends of justice would so warrant.⁴⁰

Another sentiment found within the literature relates to the fact that there is variation among the states as to how violations of speedy trials are defined. Consider the important work of Professor Douglas Colbert who for years has charged that petty-crime defendants often are not able to make bail and thus serve long periods of time in jails awaiting their day in court.⁴¹ Because they lack the resources or do not have a

36. 18 U.S.C. § 3161–3174 (1974).

37. For example, a defendant's trial is to occur within seventy days of being indicted or from when there is a first appearance in court, whichever is the later. *Id.* at § 3161(c)(1). In addition, "information or indictment must be filed within thirty days of the arrest or the service of a summons on the defendant. The trial must begin within seventy days of the filing of the information or indictment, or within seventy days of the date the defendant first appears before a judicial officer, whichever is later." 38 GEO. L.J. ANN. REV. CRIM. PROC. 382, 389–91 (2009). *See also id.* at 393 (discussing how "[t]o provide a defendant with an adequate opportunity to prepare, a trial may not begin earlier than thirty days after the defendant first appears through counsel or expressly waives counsel and elects to proceed *pro se*, unless the defendant consents in writing to an earlier date for trial"). *See also* Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667 (1976).

38. 18 U.S.C. § 3161(h)(7)(a) (1974). For a critique of this provision, *see, e.g.*, J. Andrew Read, *Open-Ended Continuances: An End-Run around the Speedy Trial Act*, 5 GEO. MASON L. REV. 733 (1997).

39. *See* *Bloate v. United States*, 130 S. Ct. 1345 (2010).

40. *Id.* at 1352. In other words, it appears that the presumption will be in favor of not tolling the clock against the defendant, but this presumption is rebuttable "if the [trial] judge finds that 'the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial' and records those findings." *Id.* at 1355 (quoting § 3161(h)(7)(a)). As stated, the decision was 7–2, with Justice Thomas writing for the majority and Justice Alito writing a dissent (joined by Justice Breyer).

41. We are grateful to Professor Wayne A. Logan of Florida State University for alerting us to the contributions of Professor Colbert. *See e.g.*, Douglas Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653 (2006) [hereinafter Colbert, *Coming Soon*]; Douglas Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really*

right to access counsel,⁴² these individuals effectively serve as the American version of the undertrial-detainees.⁴³ Perhaps not surprisingly, then, what some have argued was a landmark ruling by the Court in 1992, where a defendant who was unaware that he had been indicted and was then arrested some eight years later was found to have had his speedy trial rights violated, to others is cold comfort given the overall lack of vigor that this provision of the Sixth Amendment has received.⁴⁴

In the comparative context, the International Covenant on Civil and Political Rights (1976), which has over one hundred seventy state signatories, includes a promise to afford defendants the right to a speedy trial.⁴⁵ In terms of specific countries and regions, the depth of the protection varies. In Canada, for example, substantive commentaries express frustration with that country's Supreme Court, which has held that a speedy trial is equivalent to a "trial within a reasonable time."⁴⁶ In Britain, as stated above, the importance placed on processing trials in a speedy manner has a long history, although there too criticism has emerged in certain cases.⁴⁷ Other European countries

Matter? The Empirical and Legal Case for the Right to Counsel at Bail, 23 CARDOZO L. REV. 1719 (2002) [hereinafter Colbert, *Do Attorneys Really Matter*]; Douglas Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998) [hereinafter Colbert, *Thirty-Five Years*].

42. Colbert, *Coming Soon*, *supra* note 41; Colbert, *Do Attorneys Really Matter*, *supra* note 41; Colbert, *Thirty-Five Years*, *supra* note 41.

43. Colbert, *Coming Soon*, *supra* note 41; Colbert, *Do Attorneys Really Matter*, *supra* note 41; Colbert, *Thirty-Five Years*, *supra* note 41. *See also* Surel Brady, *Arrest without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1 (2000).

44. *Doggett v. United States*, 505 U.S. 647 (1992).

45. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

46. *See* Carl Baar, *Court Delay Data as Social Scientific Evidence: The Supreme Court of Canada and 'Trial within a Reasonable Time'*, 19 JUST. SYS. J. 123 (1997) (discussing the Supreme Court of Canada's case law, including *R. v. Morin*, (1992) 1 S.C.R. 771 and 11(b) of the Charter of Rights and Freedoms, which codifies the right to a speedy trial.) *See also* MICHAEL A. CODE, *TRIAL WITHIN A REASONABLE TIME: A SHORT HISTORY OF THE CONTROVERSIES SURROUNDING SPEEDY TRIAL RIGHTS IN CANADA AND THE UNITED STATES* (1992).

47. *See supra* text accompanying note 23. The criticism, in particular, has been in how the government has handled terrorism-related cases, where it has not, in some matters, proceeded speedily in bringing defendants to trial. In fact, in 2004 a British House of Lords held that the government could not have an exception for terrorism-based cases. *See* Lizette Alvarez, *Britain's Highest Court Overturns Anti-Terrorism Law*, N.Y. TIMES, Dec. 16, 2004, <http://www.nytimes.com/2004/12/16/international/europe/16cnd-britain.html>. As we say in the text and footnote (*infra* note 51), however, in this study we focus on traditional criminal justice matters and not the separate issue of terrorism and national security cases.

also have variations on such a provision.⁴⁸ For example, with respect to Germany, Richard Frase and Thomas Weigand have noted that “analogous arrest and detention rules are found in both [the American and German] systems, including similar prompt-appearance and speedy trial rules designed to limit pre-conviction detention.”⁴⁹ And there has been work on the procedure of trials in Africa, Asia, and Latin America.⁵⁰

It should be noted that the literature of focus in this section has not included a review of the work done on pre-trial detention in terrorism and national security cases. Even in the United States, where the Supreme Court has held on multiple occasions that these types of detainees must be afforded due process and a formal hearing, there remains great debate within policy circles and scholarly communities as to whether these cases should be handled within the criminal justice system at all.⁵¹ For now, we sidestep this question, which we view as a separate research inquiry, and next look at how jurisprudentially, and then empirically, speedy trials have been few and far between in the world’s largest democracy, India.

48. The Hauser Global Law Program at New York University has compiled an informative bibliography on comparative criminal procedure generally. See Lyonette Louis-Jacques, *Comparative Criminal Procedure: A Bibliography*, June/July 2007, http://www.nyulawglobal.org/globalex/Comparative_Criminal_Procedure.htm. For sample of specific sources, see *Fair Trial (Right to a)*, LEGISLATIONLINE, <http://www.legislationline.org/topics/topic/8> (last visited Mar. 28, 2011); Norman Dorsen et al., *Criminal Procedure (Due Process)*, in *COMPARATIVE CONSTITUTIONALISM* 1043–1154 (Norman Dorsen et al. eds., 2003); JOHN HATCHARD ET AL., *COMPARATIVE CRIMINAL PROCEDURE* (1996).

49. See Richard S. Frase & Thomas Weigand, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?* 18 B.C. INT’L. & COMP. L. REV. 317, 353 (1995).

50. See Louis-Jacques, *supra* note 48. Also for comparative criminal law and criminal procedure see generally CRAIG M. BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* (4th ed. 2007); JOHN HENRY MERRYMAN, DAVID S. CLARK, & JOHN O. HALEY, *THE CIVIL LAW TRADITION, EUROPE, LATIN AMERICA, AND EAST ASIA* (1994); RICHARD VOGLER, *A WORLDVIEW OF CRIMINAL JUSTICE* (2005).

51. For a set of key U.S. Supreme Court national security cases, see *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). For a concise, insightful discussion on the evolution of this area of the law, see BENJAMIN WITTES, ROBERT CHESNEY, & RABEA BENHALIM, *THE EMERGING LAW OF DETENTION: THE GUANTANAMO CASES AS LAWMAKING* (2010), available at http://www.brookings.edu/_media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf. Also outside the scope of our study is the important area of detention in immigration matters. However, for a discussion of this subject, see T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 881–924 (6th ed. 2008).

II. THE INDIAN SPEEDY TRIAL LANDSCAPE

A. *The Jurisprudence*

India achieved independence from Britain in 1947, and its constitution came into force in 1950. As noted above, the drafters did not include explicit language enshrining a defendant's right to a speedy trial.⁵² Still the notion of undertrial-prisoners being forced to serve extended periods of confinement was part of the Indian Supreme Court's discourse as early as 1952—albeit in a slightly unexpected manner. In *Lachmandas Kewalram Ahuja*, the Court held that defendants convicted under the pre-1950 criminal justice regime needed to have their rights conform to the new Constitution's fundamental guarantees.⁵³ In order to ensure their appearance at trial, however, the Court then ordered that the defendants “be retained in custody as undertrial-prisoners,”⁵⁴ while the state prepared its new case.

Indeed, in the first two decades after independence, concern for the length of time undertrial-detainees spent in prison did not seem to be a focus for the Court. On repeated occasions, the Court maintained a low threshold that the prosecution had to meet in order to justify the continued detention of undertrial-prisoners.⁵⁵ Moreover, between 1975 and 1977, when then Prime Minister Indira Gandhi suspended the Constitution and imposed Emergency Rule, the Court further buckled, caving to the government's demand specifically not to provide jailed political opponents and others with speedy trials.⁵⁶ It was only after the lifting of the Emergency Rule and Mrs. Gandhi's resounding defeat in the following elections that the Court—in a concerted effort to regain

52. See Transcript of Constituent Assembly, *supra* note 20.

53. See *Lachmandas Kewalram Ahuja v. Bombay*, (1952) S.C.R. 710.

54. *Id.*

55. See *e.g.*, *Madhu Limaye v. Magistrate*, (1971) 2 S.C.R. 711 (holding that undertrials may be detained in order to ensure that they appear in court for their eventual trial and where there may be a threat to community peace if they are released); *Ranbir, Singh Sehgal v. Punjab*, (1962) S.C.R. Supl. (1) 295 (noting that an undertrial prisoner is not necessarily exempt from being placed in solitary confinement, although the reasons for being held in solitary must not be arbitrary and must have a basis in law); *Leo Roy Frey v. Superintendent*, (1958) S.C.R. 822 (holding that a valid rebuttal to a defendant's claim of habeus corpus is for the prosecution simply to provide a “production of the order or warrant for the apprehension and detention of an undertrial”); *Kanta Prashad v. Delhi Admin.*, (1958) S.C.R. 1218.

56. See *e.g.*, GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* (1999); UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (Eastern Book Co.) (1980); RAJEEV DHAVAN, *THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES* (1977); S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* (New Delhi: Oxford University Press) (2002); Krishnan, *Scholarly Discourse*, *supra* note 18.

its legitimacy⁵⁷—began fully examining the importance of not letting the incarcerated languish behind bars.

The on-point decision in this regard came in the 1979 case of *Hussainara Khatoon v. Home Ministry*.⁵⁸ Written by arguably the most aggressive protector of individual liberties in the Court's post-Emergency period, Justice P.N. Bhagwati, the *Hussainara Khatoon* opinion established for the first time that a defendant had a fundamental right to a speedy trial under Article 21 of the Indian Constitution.⁵⁹ Fueled by media accounts of the delays and horrendous conditions of various prisons, Justice Bhagwati's ruling ordered a massive revamping in how the prison population was to be treated by the state. In the decision, the Court mandated greater access to bail, more humane living standards, and a significant reduction in time from arrest to trial.⁶⁰ Furthermore, of comparative interest, the judgment referenced U.S. criminal procedure law in key sections.⁶¹ It premised its rationale on a ruling from a year earlier, *Maneka Gandhi v. Union of India*.⁶² With Justice Bhagwati also a main architect in that case, the Court stated that from that point forward substantive due process would be formally recognized as a fundamental aspect of the liberty provision of Article 21.⁶³

57. See SATHE, *supra* note 56, at 106; Krishnan, *Scholarly Discourse*, *supra* note 18; see also Carl Baar, *Social Action Litigation in India: The Operations and Limitations on the World's Most Active Judiciary*, 19 POL'Y STUD. J. 140–50 (1990); Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and Rights of the Needy in India*, 55 HASTINGS L.J. 789, 795 (2005) [hereinafter Galanter & Krishnan, *Bread for the Poor*]; Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CAL. L. REV. 575 (2006) [hereinafter Krishnan, *Lawyering for a Cause*].

58. (1979) 3 S.C.R. 169.

59. *Id.* Professor Upendra Baxi has written one of the most detailed and analytical account of this case. As Baxi notes, in reality there were several iterations of the decision, involving six different interim orders. (At the time of his writing, “the final orders in the writ petition . . . [were] yet to emerge”). For a comprehensive review of these various interim rulings, see Upendra Baxi, *The Supreme Court Under Trial: Undertrials and the Supreme Court*, 1 S.C.C. (JOUR.) 35, 35–51 (1980). It is important to note that while Justice Bhagwati was a crusader for the undertrials in the Post-Emergency Era, he also was part of the majority in the infamous case (during the Emergency Rule) that allowed the government to wield unfettered powers, including the power to abrogate the constitution's right to life and habeas corpus provisions. See *A.D.M. Jabalpur v. Shukla*, A.I.R. 1976 S.C. 1207. We are grateful to Mr. Viplav Sharma for his insights on this important case.

60. See *supra* text accompanying note 59.

61. See *Khatoon v. Home Ministry*, (1979) 3 S.C.R. 169 (referencing the Sixth Amendment of the United States Constitution and the United States Bail Reform Act of 1966 as well as “[t]he experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D. C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases”).

62. See *Maneka Gandhi v. India*, (1978) 2 S.C.R. 621.

63. *Id.* Again, for a complete treatment of this crucial ruling, see SATHE, *supra* note 56.

In the years that followed, subsequent judgments reiterated the position set forth in *Hussainara Khatoon*. In 1980, for example, the Court prohibited the continued handcuffing of incarcerated undertrials unless there was a “clear and present danger of escape.”⁶⁴ That same year, Justice Bhagwati decried the delay and treatment of four young boys—all under the age of twelve when arrested—who had been jailed awaiting trial for over eight years.⁶⁵ Bhagwati ordered an immediate hearing. By 1981, the boys were finally acquitted of all charges with the assistance of a committed grassroots activist, Vasudha Dhagamwar.⁶⁶

There were other emotionally wrenching cases involving the abuse of juvenile undertrials that the Court sought to remedy during the 1980s.⁶⁷ During this period, the Court dealt with the ghastly blinding of undertrial-prisoners in a northern Indian jail,⁶⁸ as well as whether undertrials could have the time already spent waiting in prison count towards a sentence once rendered.⁶⁹ With respect to the latter, in 1985

64. *Shukla v. Delhi Admin.*, (1980) 3 S.C.R. 855.

65. *Pehadiya v. Bihar*, A.I.R. 1981 S.C. 939 (noting that the undertrial problem was a “crying shame upon our adjudicatory system . . .” Also note that the decision was made in December of 1980 but reported in many casebooks in 1981—thus the Supreme Court Reports citation.). For a moving, detailed account of a leading advocate who worked on behalf of the boys in this case, see VASUDHA DHAGAMWAR, *ROLE AND IMAGE OF LAW IN INDIA: THE TRIBAL EXPERIENCE* 241–258 (2006). Also see, *Bir v. Bihar*, A.I.R. 1982 S.C. 1470 (where the Court (with Justice Bhagwati again part of the panel) explicitly ruled that state high courts (in this case Bihar’s) should ensure “that there are no undertrial prisoners who are detained in jail for more than 18 months without their trial having been commenced, either before the magistrate or the court of sessions, and if there are such undertrial prisoners, the High Court will take steps for the purpose of expediting the trial of such undertrial prisoners”).

66. See DHAGAMWAR, *supra* note 65, at 248. Interestingly, Dhagamwar notes in this chapter of her book that she was inspired to champion the boys’ case after seeing the tremendous efforts taken by Justice Bhagwati in *Hussainara Khatoon*, as well as in another case, *Batra v. Delhi Administration*, (1979) 1 S.C.R. 392 (1978), where the Court there held that a prisoner who had been savagely beaten required humane treatment and immediate due process in the criminal justice system.

67. See, e.g., *Munna v. Upper Pradesh*, (1982) 3 S.C.R. 47 (accepting a writ petition and ordering further investigation of the extensive allegations of sexual abuse of juvenile undertrials); see also *Supreme Court Legal Aid Comm. v. India*, (1989) 2 S.C.R. 60 (ordering various states to collect data on the numbers of undertrial children in prison); *Suri v. Delhi Admin.*, (1988) 2 S.C.R. 234 (dealing with the inhumane conditions to which juveniles in Delhi’s Tihar Jail were exposed).

68. See *Yadav v. Bihar*, (1982) 3 S.C.R. 533.

69. The Court, for instance, initially said no. See *Kartar Singh v. Haryana*, (1983) 1 S.C.R. 445, where the Court argued that because the defendant’s sentence was for life, counting the undertrial waiting period towards such a sentence would make no sense. *But see* *Sethi v. Bihar*,

the Court answered affirmatively, holding that even defendants sentenced to life imprisonment could receive such an “offset.”⁷⁰

Over the past two decades, the Court has furthered its commitment to enhancing the rights of the undertrials. In a landmark 1994 case, the Court ruled that for those undertrial-defendants accused of narcotics violations who had spent “half [the time] of the maximum punishment provided for the offence,”⁷¹ “any further deprivation of personal liberty would be violative of the fundamental right visualized by Article 21.”⁷²

Two years later, in two cases, the Court reiterated time limits for incarceration of undertrials.⁷³ The Court, in *Shri Rama Murthy v. State of Karnataka*, noted that given that the state had 193,240 people incarcerated—of which 137,838 were undertrials—justice would best be served by simply releasing the undertrials.⁷⁴

In the 2000s, the jurisprudence of the Indian Supreme Court has continued to emphasize the need to protect undertrial-prisoners’ rights.⁷⁵ While there has been the occasional case where the Court has opposed an undertrial-prisoner’s petition,⁷⁶ these instances have been

A.I.R. 1982 S.C. 339 (noting in an obscure line in the case that under “Section 428 of the CrPC 1973 that the period during which an accused has been in jail as an under-trial prisoner should be taken into account for the purpose of computing the period of the sentence . . .”). Two years later the Supreme Court overturned *Singh*. See *infra* note 70.

70. *Bhagirath v. Delhi Admin.*, (1985) 3 S.C.R. 743. Practically, this issue would arise in those situations where a defendant was sentenced to life but had a possibility of parole.

71. *Supreme Court Legal Aid Comm. v. India*, (1994) Supp. 4 S.C.R. 386.

72. *Id.* For two even more current cases re-stating this principle, see *Maharashtra v. Ali*, (2001) 3 S.C.R. 600; *Saxena v. India*, (2008) 63 A.C.C. 115.

73. See *Upadhyay v. Andhra Pradesh*, (1996) 3 S.C.C. 422; *Common Cause v. India*, (1996) Supp. 2 S.C.R. 196. *But c.f.* *Rao v. Karnataka*, (2002) 3 S.C.R. 68 (overruling the *Common Cause* decision, noting that judges have to determine what a speedy trial is in terms of the “facts and circumstances of the case before them”).

74. *Shri Rama Murthy v. Karnataka*, A.I.R. 1997 S.C. 1739. Note, while this decision was handed down in 1997, the data that the Court was working off of was from statistics taken in 1993.

75. See, e.g., *Parekh v. Cent. Bureau of Investigations*, (2009) 15 S.C.R. 1105 (reiterating the principle that time served as an undertrial should count towards any formal sentence received); *Upadhyay v. Andhra Pradesh*, A.I.R. 2006 S.C. 1946 (decrying the horrid situation of children who are dependent on their mothers—who are undertrial-prisoners—having to stay in prison with their parent simply as a means of surviving); *Sanjay Alias Bablu Alias Keja v. Gujarat*, (2002) 10 S.C.C. 403 (granting of release, on bail, to undertrial prisoner who had been languishing since 1998 awaiting trial); *Maharashtra v. Mubarak Ali*, (2001) 3 S.C.R. 600 (holding that the undertrial prisoner, under section 428, can have his time served counted towards two separate criminal sentences imposed upon him). For further cases during the 2000s that deal with the Court’s jurisprudence on the undertrials, see Appendix 1.

76. See, e.g., *Sarkar v. Ranjan*, A.I.R. 2005 S.C. 972. Here the Court had shown hostility towards an undertrial prisoner who has disobeyed internal prison rules, noting that “[t]he

few in the post-Emergency era. Yet, with all of these favorable judicial pronouncements, the question then becomes: have these rulings translated into tangible results? We examine this question in the next section.

B. *The Empirics*

According to the latest 2010 data from the Indian government, there are roughly 430,000 people incarcerated in the country, with a startling 70% (300,000) who are undertrial-prisoners.⁷⁷ These figures are in the aggregate, so in order to contextualize this information consider the most recent disaggregated data (from the Ministry of Home Affairs) from the end of 2007. This information reveals that the total number of undertrial-prisoners in the twenty-eight states and seven union territories (UTs) then was 250,727.⁷⁸ Given the government's most recent 2010 data, that number has grown by nearly an astonishing 50,000 people in just over two years. This fact alone intimates that the Supreme Court's various judgments have simply not been executed. Further, over one-third of the 2007 undertrial-population (88,312) was illiterate. And when combined with those with less than a tenth grade education, that percentage skyrocketed to approximately 80% (196,954) of the entire 2007 undertrial-population.⁷⁹

Next, consider additional data from the end of 2007. What this information displays is that a disproportionate percentage of scheduled castes, scheduled tribes, and other backward classes (OBCs) made-up the undertrial-population, with nearly two-thirds of the total number of undertrials coming from one of these three communities.⁸⁰

fundamental right of an undertrial prisoner under Article 21 of the Constitution is not absolute." *Id.* at ¶ 21.

77. See *92,000 Undertrial Prisoners Released Across India*, *supra* note 13.

78. The data come from the Indian government's Ministry of Home Affairs and are compiled by IndiaStat.com, a sophisticated web service. *State-wise Demographic Particulars of Undertrial Prisoners in Jails in India*, INDIASTAT.COM, <http://www.indiastat.com/crimeandlaw/6/whatsnew.aspx> [hereinafter *State-wise Demographic Particulars*]. Unfortunately, the Ministry's most recent disaggregated on-line data is from the end of 2007. The Indian government also has a body known as the National Crime Records Bureau. However, the most recent on-line disaggregated data available there is from 2006; thus we rely on the former source here for this study.

79. *State-wise Demographic Particulars*, *supra* note 78.

80. In particular, the data show that 63% of the total number of prisoners is from Scheduled Castes, Scheduled Tribes, and OBCs. The breakdown in number is: for Scheduled Castes, 54,324/241,413; Scheduled Tribes, 29,941/241,413; OBCs: 68,115/241,413. (Note also that the total number of undertrials, 241,413, is lower than the total number of undertrials from footnote 78, which was 250,727. Presumably this difference is because there are unreported statistics in the

These three groups, whose classifications are officially denoted and recognized in India, have long been formally identified by the government as deserving constitutional and statutory protection as well as affirmative public benefits, due to the historic, socio-economic, political, and religious discrimination they have faced.⁸¹

Moreover, from a state-by-state perspective (excluding the union territories), in all but five states (Goa, Himachal Pradesh, Jammu & Kashmir, Karnataka, and West Bengal) at least 50% of the 2007 undertrial totals, respectively, are from scheduled castes, scheduled tribes, or OBCs. Of course, that there may be variation among and within these groups, politically and socio-economically, in their respective states is obvious. But, according to a highly respected observer who closely tracks this data and is intimately familiar with the undertrial problem in India, there is a palpable sense among lawyers, rights activists, and government officials that lower castes are unfairly targeted by the criminal justice system.⁸²

There are other Home Ministry data (again from end-2007) worth discussing, as well. For example, the criminal justice system is in large part guided by what is known as the Indian Penal Code (IPC), which defines misdemeanors and felonies and prescribes their respective penalties. This body of laws had a long history,⁸³ but interestingly for our purposes, by more than a two-to-one margin, there are more undertrial-prisoners facing murder charges (54,245 defendants) than any other crime. (The next highest number is over 24,623, and they are those facing theft charges).⁸⁴

Supplementing the IPC are various local and state criminal laws, as well as special laws that have been passed by the central government. Here, the largest number of end-2007 undertrial-prisoners held under

former (namely from Delhi, where the difference between 250,727 and 241,413 is 9,314, which is the exact number of undertrials listed for Delhi.) For information on the data, see text accompanying *supra* note 78. See also *State-wise Demographic Particulars of Undertrial Prisoners in Jails of India—(Caste Data) (2007)*, INDIASTAT.COM, (On file with author).

81. For a classic treatment on the issue of law and caste in India, see MARC GALANTER, *COMPETING EQUALITIES: LAW AND BACKWARD CLASSES IN INDIA* (1984). Of course, this subject has been discussed extensively in the literature. For a recent, up-to-date bibliography on the subject of caste, see TIMOTHY LUBIN, DONALD R. DAVIS & JAYANTH K. KRISHNAN, *HINDUISM AND LAW* (2010).

82. Interview with Civil Society Official (anonymity requested) (May 17, 2010) (on file with author).

83. For a discussion of this issue, see generally HARI OM MARATHA, *LAW OF SPEEDY TRIAL: JUSTICE DELAYED IS JUSTICE DENIED* (2008).

84. See *State-wise Number of Undertrial Prisoners by Type of IPC Offences in India, Part I, II, and III (2007)*, INDIASTAT.COM (on file with author).

these statutes are those who face drug charges under the Narcotic Drugs and Psychotropic Substances (NDPS) Act (11,108).⁸⁵ Next, there are nearly 10,000 individuals accused of violating the country's Arms Act, followed by over 6,000 charged under the existing Excise Act.⁸⁶

Finally, consider that of the 250,727 undertrial-prisoners from end-2007, 103,624 had been waiting for a trial for three months or fewer, and another 52,476 had been waiting up to six months. At the other end of the spectrum, there were 1,891 inmates who had spent more than five years in detention, which is .008% of the total undertrial-population.⁸⁷

At first glance, these figures might be ones that defenders would use to rebut the frequent criticisms made of India's criminal justice system. The argument might be that although it is never good to have people spending even one day more in prison than necessary, that 62% of the undertrial-population is doing so for no more than six months defies the stereotype that the Indian penal process is a proverbial black hole. Moreover, that only a miniscule percentage is detained for more than five years—while, again, troubling—is not nearly as high a number as what is often portrayed. In August 2010, the Chief Justice of India vigorously made this point, adding that “all trial judges have done an excellent job in maintaining a high disposal of cases.”⁸⁸

In fact, these data deserve greater scrutiny. For one thing, there is no

85. See *State-wise Number of Undertrial Prisoners by Type of Offences under Special and Local Laws (SLL) in India, Part I, Part II, Part III (2007)*, INDIASTAT.COM (on file with author).

86. *Id.* For an insightful, although critical review of an essay on this subject, where the reviewer highlights how statistics on undertrials must include special laws, which we do, see Bikram Jeet Batra, *A Weak Look at Judicial Reforms*, INDIA TOGETHER (2007), <http://www.indiatogether.org/2007/may/rvw-judreform.htm> (last visited Mar. 28, 2011) (critiquing Debashis Chakraborty, Arnab Kumar Hazra, & Pavel Chakraborty, *Crime Deterrence and the Need for Reforms: An Analysis of Indian States*, in *JUDICIAL REFORMS IN INDIA: ISSUES AND ASPECTS* (Arnab Kumar Hazra & Bibek Debroy eds., 2007)).

87. See *State-wise Number of Undertrial Prisoners by Period of Detention in India, Part I and Part II (2007)*, INDIASTAT.COM (on file with author).

88. See *Litigation Statistics Debate Continue: All India Seminar on Judicial Reforms Looks at Real Statistics and Real Numbers*, BAR & BENCH, Aug. 2, 2010, <http://barandbench.com/brief/2/882/litigation-statistics-debate-continue-all-india-seminar-on-judicial-reforms-looks-at-real-statistics-and-real-numbers654425> (with the Chief Justice further noting: “For years I have been listening to speaker after speaker . . . slamming the judiciary for mounting arrears. They must know [in India, for statistics purposes] filing of a case today becomes a pending case tomorrow. But, is that an arrear? Statistics reveal that 60% of the cases pending in trial courts were less than one year old. So, if we take a realistic look at the arrears and exclude those pending for just one year, then the arrears are only one crore [i.e. 10,000,000] cases,” rather than the 30,000,000 that is frequently cited).

information on what types of charges the 62%, detained-for-under-six-month group, are facing. Otherwise put, this time frame matters little to the person who is being held for a crime that carries a maximum sentence of thirty days but remains incarcerated for five months. Similarly, for the 1,891 prisoners awaiting trial for more than five years, the question must be asked: who are these people? As stated above, there are over 52,000 people currently facing murder charges. Might all 1,891 of these people be murder-defendants? (Perhaps—and if they are indeed guilty that may serve as some odd form of Machiavellian rationalization justifying their current status. But *a priori* how do we know beyond a reasonable doubt that they are guilty?) And what about the other 50,000 murder-charged defendants; where are they in the process? What about the people who are charged with much less serious offences; might they be included within this 1,891 figure?⁸⁹

Finally, there are a host of other questions presented and issues unresolved. For instance, how many of these undertrial-prisoners have received a bail hearing? Typically, when an arrest of an individual is made, that person must be produced in front of a magistrate within twenty-four hours.⁹⁰ At that time a determination will be made on bail. Regardless of the bail decision, the police are supposed to continue to investigate further in order to determine whether a formal “charge-sheet”⁹¹ should be filed with prosecutors, who then will assess whether to proceed to trial. What the data do not tell us is if the statistics include or exclude those who have been denied bail but who have yet to be “charge-sheeted.” In other words, if the figures from the government only represent defendants who have formally received word from prosecutors that they (the defendants) will be tried—and there are indeed non-“charge-sheeted” individuals languishing behind bars—then there is a serious undercounting of the inmate population.⁹²

Ultimately, these empirics starkly illustrate the undertrial situation in India, with the preceding questions highlighting how the scenario may

89. Given the number of such cases the Supreme Court alone has heard in the past, the answer seems to be, disturbingly, yes. For a review of these cases, *see supra* Part II.A.

90. *See FAQ's About Arrest/Bail*, MAHARASHTRA STATE POLICE, <http://mahapolice.gov.in/mahapolice/jsp/temp/arrestfaq.jsp> (last visited Mar. 13, 2011) (detailing procedures in Maharashtra under country's criminal procedure code).

91. *See id.*

92. *See* LAW COMMISSION OF INDIA, SEVENTY-EIGHTH REPORT: CONGESTION OF UNDER-TRIAL PRISONERS IN JAILS 5 (1979), <http://lawcommissionofindia.nic.in/51-100/Report78.pdf> (defining “undertrial prisoners in a wide sense even to include persons who are in judicial custody on remand during investigation”) [hereinafter LAW COMMISSION OF INDIA].

be even worse than the data suggest. Obviously we are not alone in recognizing this dilemma. In the next section we review and evaluate the various initiatives that have been made over the years to address India's inmate predicament, and thereafter we add our own set of proposals to the debate.

III. WHAT HAS BEEN DONE? PROPOSALS AND REFORM INITIATIVES

Support for providing speedy trials for defendants within the Indian criminal justice process is not new. The late professor, Jagmohan Singh, authored the most detailed, scholarly, and empirically rich book on the undertrial situation to date.⁹³ Singh focused his analysis exclusively on the experiences of the northern Indian state of Kashmir.⁹⁴ The opening chapter of his study interestingly describes how as early as ancient Hindu times, adjudicators, or those who were known as the "law givers were not only concerned with [the] frequent granting of adjournments [i.e. continuances], but also with the time period for which an adjournment could be granted."⁹⁵ Singh then goes on to argue that in ancient India, as well as subsequently in the Islamic Mughal period (particularly between the 16th–18th centuries), the providing of speedy trials was "held in high esteem"⁹⁶ by the various rulers of the day.⁹⁷ Yet, towards the end of the Mughal dynasty, the criminal justice process became "lax, sluggish, corrupt, crude archaic, inhumane and over-burden[ed],"⁹⁸ and it was this system that the British inherited during the mid to late 1700s.⁹⁹

As Singh and others have discussed, initially the British, through the East India Company, sought to alter certain aspects of the existing

93. See JAGMOHAN SINGH, *RIGHT TO SPEEDY JUSTICE FOR UNDERTRIAL PRISONERS* (1997).

94. *Id.* Note, while in the West, Kashmir is the frequently used name to describe the state; its official name is Jammu & Kashmir.

95. See *id.* at 20.

96. See *id.* at 29.

97. Note, while there is little actual empirical evidence to confirm this type of view, there is jurisprudential literature that discusses the trial process in those ancient days, as well as the substantive equity of the laws themselves. See generally ROBERT LINGAT, *LES SOURCES DU DROIT DANS LE SYSTÈME TRADITIONNEL DE L'INDE [THE CLASSICAL LAW OF INDIA]* 67, 219–22 (J. Duncan M. Derret trans., Munshiram Manoharlal Publ's First Indian Ed. 1993) (1973) (discussion of laws favoring certain groups over others (e.g., Brahmins) in ancient India); 3 P. V. KANE, *HISTORY OF DHARMAŚĀSTRA* 246–410 (1946); VARDHAMANA UPADHYAYA, *DANDAVIVEKA* (Bhabatosh Bhattacharya trans., Asiatic Society Bibliotheca Indica 301, 1973).

98. See SINGH, *supra* note 93, at 30.

99. See *id.*

Muslim law that governed the region.¹⁰⁰ Attempts were then made to regularize and professionalize police conduct; and there were reforms by Lord Hastings and Lord Cornwallis to create more independence for the courts and outlets for appeal.¹⁰¹ But by the end of the 18th century delays continued to plague the criminal courts.¹⁰² A lack of a uniform set of criminal laws throughout the colony, less-than-competent adjudicators, corruption, and insufficient defense counsel were some of the contributing factors.¹⁰³ Largely to address these problems, the second half of the 19th century saw the passage of the Indian Penal Code (1862) and the Indian Criminal Procedure Code (1882).¹⁰⁴ The British established a series of Law Commissions to study how best to ensure that defendants would have their day in court.¹⁰⁵

Throughout the 20th century, and during the first decade of the 21st, there have been various proposals offered to address the backlog in criminal trials. For example, “the first comprehensive study of prison problems was made by the Indian Jails Committee of 1919–1920.”¹⁰⁶ Relating to the undertrials, in particular, the Committee urged the Crown to sequester these individuals from the convicted and reiterated the need to provide them with preliminary hearings and a trial in a timely fashion.¹⁰⁷ In several subsequent investigations by the colonial regime and then the post-independence state,¹⁰⁸ similar recommenda-

100. *See id.* at 31.

101. *See id.* at 31–32.

102. *See id.* at 33–34. Note that these delays were also problems created by the British in their insertion of numerous interlocutory appeals into the procedure codes. In part, the British did this because some of the lower courts were staffed with Indians, and the British government wanted to ensure that potentially adverse rulings from these local judges could be appealed to its own highest court, the Privy Council, in London. Interlocutory appeals, in other words, served as a check by the colonial rulers over how Indians were administering justice within the courts. *See* Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007). There will be a discussion of this point *infra* Part IV.

103. *See* SINGH, *supra* note 93, at 31–36.

104. *See id.* at 34.

105. *See id.* at 35–36. *See also* SURENDRA KUMAR PACHAURI, PRISONERS AND HUMAN RIGHTS 77–83 (1999).

106. *See* LAW COMMISSION OF INDIA, *supra* note 92, at 3; *see also* MITCHELL P. ROTH, PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA 133 (2006); R.K. SAXENA, COMMONWEALTH HUMAN RIGHTS INITIATIVE, PRISON VISITING SYSTEMS IN INDIA: COMMUNITY INTERVENTION INTO PRISONS 1–2 (2005), http://humanrightsinitiative.org/publications/prisons/prisons_visiting_system_in%20India.pdf.

107. *See* LAW COMMISSION OF INDIA, *supra* note 92, at 3 (outlining Indian Jails Committee Report). *See generally* F.A. BARKER, THE MODERN PRISON SYSTEM OF INDIA, A REPORT TO THE DEPARTMENT: THE PROGRESS OF PRISON REFORM IN INDIA DURING THE TWENTY YEARS FOLLOWING THE PUBLICATION OF THE REPORT OF THE 1919–1920 INDIAN JAILS COMMITTEE (1944).

108. *See* LAW COMMISSION OF INDIA, *supra* note 92, at 3–4 (listing the different investigations).

tions were promoted.¹⁰⁹

In 1979, a highly respected four-member governmental law commission prescribed numerous suggestions regarding the “congestion of undertrial-prisoners in jails.”¹¹⁰ Then in 1983, another government-commissioned panel, the Mulla Committee, devoted a chapter of its three-year study on Indian prisons to the situation of “undertrials and other un-convicted prisoners.”¹¹¹ Further, there have been several directives for improving the undertrial predicament by the Indian National Human Rights Commission, a governmentally created body established in 1993 that has as part of its mandate the goal of ensuring that all detainees in custody are treated humanely and in accordance with the law.¹¹²

Within each of these undertrial reports, it is striking to see how many points are reiterations of points made in predecessor committees. Found in these various government papers are the following common threads:

- increasing the number of judges in the criminal courts in order to reduce overburdened, delay-ridden dockets;¹¹³
- enhancing the technological and infrastructural facilities of the courts themselves in order to make the courtroom process more efficient;¹¹⁴

109. See ROTH, *supra* note 106, at 133–34. It is important to note here that these commissioned reports and enacted-statutes typically focused on defendants who had already been convicted, with the argument being that if the criminal justice system overall were improved so too would the plight of the undertrial population. See LAW COMMISSION OF INDIA, *supra* note 92.

110. See LAW COMMISSION OF INDIA, *supra* note 92, at 1. An important predecessor to this committee was the 77th Law Commission, which too studied the Indian penal system, albeit comparatively less so with respect to the specific issue of undertrials. This report is cited extensively in the Seventy-Eighth Report. See *id. passim*. Note also, importantly, that a review of the commissions’ work is discussed by the CHRI. See R. SREEKUMAR, COMMONWEALTH HUMAN RIGHTS INITIATIVE, ACCESS TO JUSTICE FOR UNDERTRIAL PRISONERS: PROBLEMS AND SOLUTIONS 5–9 (2002), <http://www.humanrightsinitiative.org/artres/Access%20to%20Justice%20for%20Undertial%20Prisoners.pdf>. We will be covering the important contributions of this organization in the next section.

111. See GOV’T OF INDIA, MINISTRY OF HOME AFFAIRS, ALL INDIA COMM. ON JAIL REFORMS 1980–83, REPORT para. 12.17.1 (1983); see also SREEKUMAR, *supra* note 110, at 5.

112. See FAQ’s About NHRC, NAT’L HUMAN RIGHTS COMM’N, <http://nhrc.nic.in/faq.htm> (last visited Mar. 13, 2011) (noting one of its key charges is to “visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection [and] to study the living condition of the inmates and make recommendations thereon”).

113. See LAW COMMISSION OF INDIA, *supra* note 92, at 12; SREEKUMAR, *supra* note 110, at 6.

114. See LAW COMMISSION OF INDIA, *supra* note 92, at 12–13; SREEKUMAR, *supra* note 110, at 5–7.

- promoting greater integrity by the police while concurrently encouraging the police to accelerate the investigation process so that cases do not languish and evidence is not neglected from being collected;¹¹⁵
- maintaining the continuity of criminal cases from one judge to another when the presiding judge is transferred mid-case (as is common in a civil service-based judicial system) to a different court;¹¹⁶
- discontinuing the frequent judicial practice of granting the government unnecessary adjournments;¹¹⁷
- expanding the bail-opportunities for defendants charged with less serious crimes;¹¹⁸ and
- segregating undertrial-prisoners from those who have already been convicted.¹¹⁹

In an ideal world, the implementation of the above recommendations would help to alleviate the plight of the undertrial dilemma in India. In our view, the fact that a number of these proposals have failed to translate into actual policy changes—despite being repeatedly advocated over the past many decades—highlights a lack of political will, insufficient devotion of resources to make such substantive alterations, and no uniform enforcement of those few initiatives that have been codified. Such problems are all too familiar to those who study the Indian legal system.

Yet one recent initiative, from the current Indian Law Minister, Veerappa Moily, has indeed broken from the traditional mold by decisively implementing a results-oriented policy. In early 2010, Moily announced that his office would begin ordering the release of those undertrial-prisoners charged with petty crimes who had been incarcerated roughly for one-half of the time that a formal sentence would have brought were there a conviction.¹²⁰ Within six months, he stated his

115. See LAW COMMISSION OF INDIA, *supra* note 92, at 13; SREEKUMAR, *supra* note 110, at 5–6.

116. See LAW COMMISSION OF INDIA, *supra* note 92, at 14.

117. See *Id.* at 16; SREEKUMAR, *supra* note 110, at 5–6.

118. See LAW COMMISSION OF INDIA, *supra* note 92, at 17–22; SREEKUMAR, *supra* note 110, at 7. One point that is emphasized by the Seventy-Eighth Law Commission is that there needs to be an expansion of the surety principle for less-serious offenders. In other words, in these cases bail ought to be provided, *but* as the Commission discusses, where the defendant fails to appear, its argument is that the defendant should be found automatically guilty of an offense—a sweeping conclusion indeed. See LAW COMMISSION OF INDIA, *supra* note 92, at 21–23.

119. See LAW COMMISSION OF INDIA, *supra* note 92, at 25; SREEKUMAR, *supra* note 110, at 5.

120. See Vaibhav Vats, *136,217 Prisoners, in for Petty Crimes, Have Been Set Free in a Drive that Ends in a Few Days. Will Freedom Reform Them? Or Will They Come Right Back to Jail?*, TEHELKA, July 31, 2010, http://www.tehelka.com/story_main46.asp?filename=Ne310710undertrial.asp.

objective was to reduce the 300,000 undertrial population by two-thirds.¹²¹ And indeed, as of July 2010, as indicated by Table 1 (which includes for some table-cells only approximated figures provided by the data-source), a sizable number of undertrial prisoners appear to have been released as part of Moily's initiative.¹²² This is a move in the right direction.

TABLE 1.¹²³

States with Most Released Undertrials	
Uttar Pradesh	52,843
Orissa	19,350
Andhra Pradesh	>14,000
Delhi	13,526
Maharashtra	10,956
Madhya Pradesh	10,183
Assam	5,226
Haryana	4,983
Punjab	4,926
Karnataka	4,738
Jharkhand	4,320
Gujarat	4,311
Kerala	3,775
Jammu & Kashmir	1,476
Total for other states not disaggregated	45,387
Total number of undertrials government claims have been released	>200,000

121. See Gyanant Singh, *Moily Promises to Free Two Lakh Undertrials*, INDIA TODAY, Jan. 26, 2010, <http://indiatoday.intoday.in/site/Story/80972/India/Moily+promises+to+free+2+lakh+undertrials.html>; see also *Number of Undertrials to Be Reduced by 2/3: Moily*, THAIINDIAN NEWS, Jan. 25, 2010, http://www.thaindian.com/newsportal/uncategorized/number-of-undertrials-to-be-reduced-by-23rd-moily-lead_100309563.html.

122. See Dhananjay Mahapatra, *Moily's Mission Undertrial: Over Two Lakh Released from Jails*, TIMES OF INDIA, July 23, 2010, http://articles.timesofindia.indiatimes.com/2010-07-23/india/28311017_1_lakh-undertrials-overcrowded-jails-early-release.

123. *Id.* Note, the data on Andhra Pradesh is only provided as "over 14,000." *Id.* Similarly, the total number of released is only provided as "over 2 lakh." *Id.* (One lakh in India is the equivalent

Still, despite the Law Minister's encouraging engagement, there are nevertheless unresolved issues that remain regarding his plan. For example, how many of these individuals have actually been freed completely? How many are simply out on bail? For those out on bail, do they have counsel or other means of representation? What was the process for determining whether a detainee could be released? For those who were not released but remain in prison awaiting their day in court, how much longer until their trial dates? And perhaps most importantly, assuming that the number of undertrials continues to fall, what next? Are measures in place to ensure that such unacceptable excesses do not re-occur?

In order to supplement the above-mentioned proposals with details that might help structurally improve the undertrial problem—and in the process answer the above queries—in the next and final section, we draw upon the few empirically rigorous, qualitative studies that exist as well as interview data collected during the summer of 2010. We then offer certain remedies that add more specificity to the broad, parametrical recommendations of previous government commissions.

IV. WHAT CAN AND SHOULD BE DONE? PRELIMINARY OBSERVATIONS

The Commonwealth Human Rights Initiative (CHRI) is a leader in extensively analyzing the perils facing undertrial-prisoners. Many of its reports on this subject are now a decade old (although it maintains an active website with links to ongoing prison studies more generally).¹²⁴ Still, its previous proposals remain relevant. To be sure, CHRI gives due deference to the above-cited government commissions and their recommendations.¹²⁵ However, the organization advances the dialogue by both privileging certain solutions over others and by adding needed substance.

For example, while of course agreeing that undertrial-detainees ought not be left to languish indefinitely, the CHRI also calls for a number of particular measures to ensure that the criminal process moves forward in a timely manner. First, it proposes implementing greater use of technology as a means of addressing the lack and

of 100,000.) Thus, to compute the number for the cell "Total for other states not disaggregated," we used the rounded numbers of 14,000 and 200,000 respectively to arrive at 45,387.

124. See COMMONWEALTH HUMAN RIGHTS INITIATIVE, <http://www.humanrightsinitiative.org> (last visited Mar. 14, 2011) (follow "Prison Reforms" hyperlink).

125. See SREEKUMAR, *supra* note 110, at 5–9 (thoroughly summarizing past recommendations).

overcrowding of jails within the country.¹²⁶ Recent data indicate that there are some 1,340 jails available throughout India to house the 430,000 individuals currently being incarcerated.¹²⁷ Based on the government's statistics from 2007, the problem of overcrowding in jails is apparent. Table 2 shows the troubling situation.

TABLE 2.¹²⁸
CAPACITY IN JAILS, POPULATION OF INMATES AND OCCUPANCY RATE IN STATES/UNION TERRITORIES AT THE END OF 2007

SL. NO.	STATE/UNION TERRITORIES	AVAILABLE CAPACITY	INMATE POPULATION	OCCUPANCY RATE # (2007) [PERCENTAGES OVER]	OCCUPANCY RATE # (2006) [PERCENTAGES OVER]
1	ANDHRA PRADESH	12710	15045	118.4	124.2
2	ARUNACHAL PRADESH*	-	-	-	-
3	ASSAM	6357	8705	136.9	134.3
4	BIHAR	29598	39638	133.9	180.8
5	CHHATTISGARH	5407	10451	193.3	195.5
6	GOA	356	366	102.8	106.7
7	GUJARAT	6519	11842	181.7	206.9
8	HARYANA	10482	13093	124.9	119.8
9	HIMACHAL PRADESH	1131	1435	126.9	133.1
10	JAMMU & KASHMIR	3050	2299	75.4	73.2
11	JHARKHAND	10738	17936	167.0	183.2
12	KARNATAKA	12144	13052	107.5	107.7
13	KERALA	3765	6742	179.1	129.5
14	MADHYA PRADESH	20448	32712	160.0	158.0
15	MAHARASHTRA	20901	25892	123.9	128.1

126. *Id.* at 5-7, 12-13.

127. *See Facts and Figures*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, http://www.humanrightsinitiative.org/index.php?option=com_content&view=article&id=109&Itemid=122 (last visited Mar. 14, 2011).

128. *Prison Statistics India 2007*, NAT'L CRIMES RECORD BUREAU, GOV'T OF INDIA, <http://ncrb.nic.in/PSI2007/Full/Prison2007Final.pdf>.

DELAY IN PROCESS, DENIAL OF JUSTICE

TABLE 2.
CONTINUED

SL. NO.	STATE/UNION TERRITORIES	AVAILABLE CAPACITY	INMATE POPULATION	OCCUPANCY RATE # (2007) [PERCENTAGES OVER]	OCCUPANCY RATE # (2006) [PERCENTAGES OVER]
16	MANIPUR	970	444	45.8	37.2
17	MEGHALAYA	530	665	125.5	119.4
18	MIZORAM	1163	941	80.9	68.9
19	NAGALAND	1290	501	38.8	55.2
20	ORISSA	10603	15368	144.9	160.5
21	PUNJAB	11742	15972	136.0	134.1
22	RAJASTHAN	17554	14687	83.7	79.7
23	SIKKIM	196	226	115.3	186.0
24	TAMILNADU	20321	16599	81.7	106.6
25	TRIPURA	1065	1317	123.7	128.6
26	UTTAR PRADESH	37843	76180	201.3	184.8
27	UTTARAKHAND	2139	2709	126.6	155.3
28	WEST BENGAL	20222	18598	92.0	92.2
	TOTAL (STATES)	269244	363415	135.0	140.2
29	A & N ISLANDS	309	413	133.7	112.0
30	CHANDIGARH	1000	501	50.1	43.8
31	D & N HAVELI	60	28	46.7	55.0
32	DAMAN & DIU	120	66	55.0	45.0
33	DELHI	6250	11605	185.7	214.4
34	LAKSHADWEEP	16	22	137.5	0.0
35	PONDICHERRY	305	346	113.4	102.3
	TOTAL (UTs)	8060	12981	161.1	180.0
	TOTAL (ALL-INDIA)	277304	376396	135.7	141.4

* Jails do not exist in this state.

As the data indicate, in the vast majority of states and union territories the prison population within most of the jails far exceeds the holding capacity. In places like Uttar Pradesh, Chhattisgarh, and Delhi, the jails are astoundingly overcrowded, by 201.3%, 193.3%, and 185.7% respectively. The availability of needed courtrooms to try defendants is

also woefully inadequate, as past research has shown.¹²⁹ Further, there are a sheer lack of vehicles and personnel to transport the incarcerated from the jails to the courts.¹³⁰ For these reasons, the CHRI has strongly advocated the use of technology to process currently held undertrials.¹³¹ This might occur via video conferencing, whereby proceedings could take place “between jails and courts”¹³² in as expeditious a manner as possible.

Second, the CHRI also supports the creation of a statutorily based committee devoted solely to monitoring these detainees’ rights.¹³³ The committee would be comprised of a local judge, a prosecutor, a police officer and two other law enforcement officials.¹³⁴ The committee’s sole charge would consist of overseeing the prisoners’ well-being and facilitating their cases through the criminal justice process. Encouragingly, there is preliminary evidence of such a body having been created and successfully operating in the southern state of Tamil Nadu.¹³⁵

A third initiative would be to have judges travel to the jails and adjudicate proceedings within the confines of the undertrials’ cells. Such “jail-adalats” have been instituted in various parts of the country, and there is writing on their performance.¹³⁶ We hasten to mention two caveats that ought to accompany such hearings, however. First, the manner in which these proceedings take place should be closely

129. For a discussion of this point, see Galanter & Krishnan, *Bread for the Poor*, *supra* note 57. It is also important to consider Nick Robinson, *Too Many Cases*, FRONTLINE, Jan. 3–16, 2009, <http://www.frontline.in/fl2601/stories/20090116260108100.htm> (arguing that, at least at the Supreme Court level, adding more judges to reduce the backlogs of cases are “makeshift solutions,” and that it is instead “acceptance rates, and more importantly the type of cases the court is accepting, that create its current backlog and character”). This point deserves serious consideration, again for the Supreme Court, and likely the upper judiciary overall. Whether changes within the lower judiciary of how cases are taken in and handled once they are in the system would appreciably lower the backlog—compared to, say, adding more judges—is an interesting empirical question to which we do not know the answer with certainty. However, given that sessions courts are the courts of first instance in many criminal matters, it seems likely that adding more judges and courtrooms would readily assist in alleviating the current undertrial problem.

130. *See* SREEKUMAR, *supra* note 110, at 3, 12.

131. *Id.* at 5–7, 12–13.

132. *Id.* at 5.

133. *Id.*

134. *Id.* Our proposal would add members of the criminal defense bar and NGO-lawyers, as well.

135. *Id.* at 6.

136. *See e.g.*, PRITI BHARADWAJ, COMMONWEALTH HUMAN RIGHTS INITIATIVE (CHRI), LIBERTY AT THE COST OF INNOCENCE: A REPORT ON JAIL ADALATS IN INDIA (2009), http://www.humanrightsinitiative.org/publications/prisons/liberty_at_the_cost_of_innocence.pdf.

monitored. Past research on other forms of alternative dispute mechanisms in the Indian context casts questions on the predictability, fairness, and even-handedness in which justice is adjudicated.¹³⁷ The second related concern is the extent to which undertrial-prisoners are cajoled into taking guilty pleas in exchange for being released from incarceration.¹³⁸ For defendants who accept such a condition, does the stigma of being found guilty travel back with these individuals to their respective communities? More research is needed to understand whether Indian undertrial-defendants who are released encounter such problems.¹³⁹

This need for greater information leads us to build upon the work of the CHRI and others to provide our set of recommendations on the undertrial problem in India. In part, these points reflect the findings collected from those who have present-day experiences within the trenches of India's criminal justice process. They also emphasize that much remains unknown about the status of undertrial-prisoners, and how any future proposal must be based on rigorously conducted empirical research.

One important question revolves around the issue of corruption and the extent to which undertrial-prisoners are arrested and detained because of it. That corruption is an endemic problem within Indian society (particularly among the police) has long been documented by scholars, civil society organizations, and the government itself.¹⁴⁰ As these studies have recognized, tracking, proving, and eradicating corruption from daily life in India are enormous challenges, especially in a society where the disparities in wealth are so stark.¹⁴¹ The findings resoundingly confirm that corruption is a main impediment to the

137. See BHARADWAJ, *supra* note 136; see also Galanter & Krishnan, *Bread for the Poor*, *supra* note 57. For general literature on this subject of alternative dispute resolution forums, see MAARTEN BAVINCK, *MARINE RESOURCE MANAGEMENT: CONFLICT AND REGULATION IN THE FISHERIES OF THE COROMANDEL COAST* (2002); MOOG, *supra* note 19; ANIRUDH KRISHNA, *ACTIVE SOCIAL CAPITAL: TRACING THE ROOTS OF DEVELOPMENT AND DEMOCRACY* (2002); PREM CHOUDHRY, *Caste Panchayats and the Policing of Marriage in Haryana: Enforcing Kinship and Territorial Exogamy*, 38 CONTRIBUTIONS TO INDIAN SOC. 1–41 (2004); Robert S. Moog, *Conflict and Compromise: The Politics of Lok Adalats in Varanasi District*, 25 L. & SOC'Y REV. 545 (1991).

138. See BHARADWAJ, *supra* note 136. One U.S.-based scholar who works on such important norm-based questions is Professor Josh Bowers. For a sample of his work in this area, see Josh Bowers, *Legal Guilt, Normative Innocence, and the Decision not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

139. For a discussion of this point, see BHARADWAJ, *supra* note 136.

140. See, e.g., *supra* text accompanying note 18.

141. *Id.*

country's development. Indeed, it is also a key factor exacerbating the perpetuation of undertrial-prisoners within the criminal justice process in three specific ways.

First, police at the local levels in India often engage in the practice of street-sweeps, arrests of individuals for petty misdemeanor violations.¹⁴² Subsequently, it is not uncommon for those being detained to be asked to pay a bribe, "*karcha-pani*,"¹⁴³ to have their arrests waived. Given that many of these arrestees are unable to pay the bribe, they sit in jail.

Second, corruption manifests itself in how the undertrial-prisoner is treated while incarcerated.¹⁴⁴ As two separate officials remarked, regardless of whether the inmate is a petty offender or a more serious one, there is a simple rule of thumb. Those who can provide prison officials with benefits, such as bribes paid for by supporters on the outside, have

142. Interview with high-level government official who served for years as a local police officer before working his way up to the highest levels of law enforcement within India (May 19, 2010) (anonymity requested). Note, with respect to street-sweeps in the United States, the Supreme Court, in the early 1970s, substantively began scaling-back police powers to engage in this type of conduct. *See, e.g.*, *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (voiding a city anti-loitering law for vagueness). However, procedurally, the Court has increased the police's powers to search and take into custody individuals, particularly where there is probable cause. *See, e.g.*, *Atwater v. Lagos Vista*, 532 U.S. 318 (2001). Once again, we thank Professor Wayne Logan for illustrating to us this important bifurcated approach that the Court has followed.

143. *Id.* Also, this term, *karcha-pani*, literally translated means "water money," and is used mainly in the north and in Mumbai we were told.

144. Interview with high-level government official who served for years as a local police officer before working his way up to the highest levels of law enforcement within India (May 19, 2010) (anonymity requested). Also, we note that there is a difference in India between what is called "police custody" and "judicial custody." As the CHRI explains, "[a]ny detention in police custody for longer than 24 hours must be authorised by a magistrate. The detainee must be released on bail unless the investigation cannot be completed in 24 hours and the officer has grounds that an 'accusation is well founded.' In that case the officer can extend police custody detention (without charge) for up to fifteen days (Section 167, Code of Criminal Procedure). A magistrate has the power to authorise the detention of the accused beyond fifteen days if "adequate grounds" exist for doing so. The maximum extension is for a period of up to 60 days in judicial custody (or 90 days when the potential prison sentence ranges from 10 years to the death penalty), after which the person must be released on bail (Section 167(2)(a) Code of Criminal Procedure). Under Section 173(2) of the Code of Criminal Procedure, police must file a charge sheet with the particulars of the charge without delay—if the charge sheet is not filed before the end of the extended detention period, the detained must be released on bail." *See COMMONWEALTH HUMAN RIGHTS INITIATIVE, INDIA: COUNTRY REPORT: ANTI-TERRORISM LAWS AND POLICING*, (Mar. 1, 2007), http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_india_anti_terrorism_policing_country_report2007.pdf.

an easier time in jail.¹⁴⁵

Third, corruption is related to the extent to which the police scrutinize the merits of an undertrial-prisoner's case. During the detention period, the police investigation often is thought to be dependent upon how much money is transferred by the defendant, or his supporters, to the inquiring law enforcement officials.¹⁴⁶

Of course, these are not the only ways in which corruption emerges. As we were told by one of the country's highest-ranking law enforcement officials—with nearly thirty years of experience—at almost every stage of the process elements of corruption can be found.¹⁴⁷ Perhaps most disconcerting, he noted, is how and why certain undertrial cases are allowed to proceed to trial while others are left to languish for years, if not decades.¹⁴⁸ Despite the aforementioned difficulties of studying and eradicating corruption from this system, our view is that this issue has to be addressed if the situation for undertrial-prisoners is ever to improve.

There are ways to remove the undue power of the police and prison-personnel so that the possibility of corrupt practices is lowered. One measure would be to reduce the number of “unnecessary or unjustified”¹⁴⁹ arrests that officers make on a routine basis. Past studies, including government studies, have noted that as high as “60% of all

145. Interview with high-level government official who served for years as a local police officer before working his way up to the highest levels of law enforcement within India (May 19, 2010) (anonymity requested). This individual, in fact, related a very disturbing, but, he noted, common, occurrence in Indian jails. Namely, there was a case he had recently learned about where an infamous businessman had been detained for two weeks in a country in the Middle East. Every night, according to the detainee, he had been raped by other inmates. Upon his release to Indian officials who immediately placed this person in custody and flew with him back to India, he cried on much of the return journey thanking his Indian police escorts and stating that he knew that because of his resources (and his ability to buy off prison guards) that he would never have been treated in such a manner and was confident that his subsequent incarceration within an India jail would be much more humane. For a separate discussion of rapes in Indian prisons, see SREEKUMAR, *supra* note 110, at 1–2; Interview with lawyer and leading civil society activist who works on prison issues (May 17, 2010) (anonymity requested) (confirming this same point).

146. Interview with high-level government official who served for years as a local police officer before working his way up to the highest levels of law enforcement within India (May 19, 2010) (anonymity requested); Interview with lawyer and leading civil society activist who works on prison issues (May 17, 2010) (anonymity requested) (confirming this same point).

147. Interview with high-level government official who served for years as a local police officer before working his way up to the highest levels of law enforcement within India (May 19, 2010) (anonymity requested).

148. *Id.*

149. See Batra, *supra* note 86.

arrests”¹⁵⁰ need never have occurred.¹⁵¹ To assist in this reduction, there could be a review of offenses that are currently deemed criminal that should, according to experts, be *per se* “bailable”¹⁵² or altogether de-criminalized.¹⁵³ In addition, there could be an expansion of offenses that Indian penal law classifies as “compoundable.”¹⁵⁴ Compoundable crimes trace their roots back to old English common law and are defined as those in which an aggrieved party may—without prosecutorial input—relieve a guilty party of punishment upon the latter’s payment to the former of a liability fee.¹⁵⁵ Various jurisdictions around the world have long abandoned this practice. Indian penal law, however, continues to recognize compoundable offenses. Given this reality, and the reality of the country’s undertrial situation, a possible proposal is to reclassify the number of petty offenses that are currently non-compoundable into those that are compoundable. Such a move would have to be closely monitored to determine whether it would make any real difference in reducing the number of undertrial-prisoners,¹⁵⁶ but to alleviate the dire straits of the status quo, all options should be on the table. These options include creatively considering how best to reduce the number of people being held and awaiting trials for offenses that the private law might more efficiently resolve.¹⁵⁷

There are two other steps that should be considered by policy-

150. *Id.*

151. *Id.*

152. This is a term used within Indian criminal law and is found, for example, repeatedly in the Law Commission of India, Seventy-Eighth Report. See LAW COMMISSION OF INDIA, *supra* note 92. One crime, in particular, that is thought to clog the courts (and concomitantly the jails, because of the people who are charged) is that which involves the bouncing of checks. One of the authors (Krishnan) interviewed a highly respected government lawyer (May 20, 2010), who definitively proclaimed that these matters constituted a significant proportion of the backlog and thought that it should be a “no-brainer” in terms of not keeping check-bouncers behind bars. And indeed the Supreme Court has agreed, noting in 2007, check bouncing cases are indeed compoundable (see subsequent discussion in this paragraph) under the Negotiable Instruments Act. *Vinay Devanna Nayak v. Ryot Seva Sahakari Bank Ltd.*, A.I.R. 2008 S.C. 716.

153. See LAW COMMISSION OF INDIA, *supra* note 92, at 17–19; SREEKUMAR, *supra* note 110, at 7.

154. See *Vinay Devanna Nayak*, *supra* note 152; LAW COMMISSION OF INDIA, *supra* note 92, at 17–19; SREEKUMAR, *supra* note 110, at 7.

155. For a discussion of the meaning compoundable crimes and how they are treated in India, see the Supreme Court’s discussion in *Vinay Devanna Nayak*, *supra* note 152.

156. After all, one question that arises is what happens if an undertrial prisoner cannot afford to pay the aggrieved party. Given that it is thought that many of the undertrials are indeed socio-economically disadvantaged, perhaps expanding the number of compoundable offenses would only have only a marginal impact.

157. See also SREEKUMAR, *supra* note 110, at 7.

makers, each which relates to the functioning of the Indian legal profession. On both sides of Indian law—civil and criminal—the respective procedural codes allow for tactics of delay to be employed by lawyers. Empirical work shows that there is a cadre of delay-lawyers who proudly specialize in prolonging cases within the court system.¹⁵⁸ In the Indian criminal law context, prosecutors regularly are thought to manipulate the procedure code's different interlocutory appeals provisions to keep cases at bay for long periods of time. Where prosecutors are unable to produce necessary evidence or witnesses, or where they discover other holes in their case, it is not uncommon for them to file adjournment motions so that they can pursue an interlocutory appeal, often on a minor issue, to buy more time.¹⁵⁹

We believe that this practice cannot continue. Reforming the appeals process on the civil justice side has proven to be difficult and has drawn strong opposition from the bar mainly because many lawyers' fees are determined by the frequency in which they appear in court. Cutting appeals thus means reducing their revenue. For prosecutors, who are not paid in such a manner but instead are salaried, this same type of issue should not arise. Although, because promotions in prosecutors' offices can be based on convictions, and since promotions result in higher salaries, if delays can serve to benefit a prosecutor's case, then conceivably remuneration would be tied to this tactic. If this is true, the objective must be to change the incentive-structure—and more broadly the culture—within prosecutors' offices so that such delays can be eliminated.

The other shift that needs to occur involves increasing pro bono legal services, particularly by lawyers working in India's fast-growing, wealthy, private law firm sector. The financial boom within this segment of the Indian legal profession is well known.¹⁶⁰ Elite lawyers working in top firms in places like Mumbai, Delhi, Bangalore, and

158. See Galanter & Krishnan, *Bread for the Poor*, *supra* note 57; MOOG, *supra* note 19; Krishnan, *Lawyering for a Cause*, *supra* note 57 at 590–91 (2006); Jayanth K. Krishnan, *Transgressive Cause Lawyering in the Developing World*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* (Austin Sarat & Stuart Scheingold eds., 2005) [hereinafter Krishnan, *Transgressive Cause Lawyering*].

159. Indeed even on the defense side, lawyers are thought to engage in delay, especially where strong prosecution witnesses are ready to testify against the accused. The conventional wisdom here is that, particularly for powerful defendants, lawyers will move for continuances (adjournments) to give their clients and their clients' (often nefarious) contacts time to intimidate these prosecution witnesses.

160. See Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 *GEO. J. LEGAL ETHICS* 57 (2010).

Hyderabad are among the richest legal professionals in the world.¹⁶¹ Many of the best law school graduates intensely vie for positions in these offices, and with foreign law firms currently barred from practicing in India, lucrative foreign clients routinely turn to Indian lawyers to perform legal services.¹⁶² As such, the profits these Indian firms turn range, as one observer has noted, “from high to astronomical.”¹⁶³

Unfortunately, however, the success of these law firms, particularly post-liberalization in the early 1990s, has not translated into a commitment of pro bono legal services for the underprivileged. Yes, of course, there are exceptions, and occasionally there are charitable contributions made by law firm lawyers towards important social justice causes. By and large, though, there simply is no real, substantive culture of pro bono legal services—particularly on behalf of those such as undertrial-prisoners—existing within the Indian law firm sector.¹⁶⁴ Why there is such an absence and how there can be a transformation of the status quo are questions that deserve full inquiries unto themselves which we leave for another day.¹⁶⁵ If real improvements are to occur for the undertrial population, there have to be both structural and attitudinal changes from the various stakeholders that make up the Indian legal profession, including from those who are prospering today within the country’s most lucrative law firms.

V. CONCLUSION

We began this article with a discussion of how the main remedy for

161. *Id.*

162. *Id.*

163. Interview with prominent Indian lawyer who actually supports market liberalization (June 4, 2008) (anonymity requested).

164. Note there have been pro bono legal services provided by Indian courtroom advocates and non-governmental organizations. For a discussion of this point, see Krishnan, *Lawyer for a Cause*, *supra* note 57, Krishnan, *Transgressive Cause Lawyering*, *supra* note 158.

165. The lead author of this study is currently engaged in researching this subject, but one additional point needs to be made. Some will wonder whether law firm lawyers in India are capable of engaging in the difficulties that accompany everyday courtroom criminal litigation. There is an assumption that because these law firm lawyers are working on transactional matters, they may not be equipped to handle anything else. This perception, however, is countered by the fact that in many of these law firms, the lawyers do practice in litigation. Indeed, several of the well-known firms have dedicated litigation departments. Moreover, in addition to the sheer number of extra lawyers that the law firms can provide, they also have the ability to offer much-needed resources to assist undertrial-prisoners with their cases; and thus we believe that there would be a benefit to having these law firm practitioners involved in such a pro bono manner.

those who fail to receive a speedy trial in the United States is “dismissal with prejudice.” As we explained, there are scholars, like Akhil Amar, who argue that such an outcome should be rethought in the American context. Monetary damages are one alternative put forth, as is conditional release on bail. In India, the latter has also been advanced, whereas the former has not made its way into the discussion, likely because of the financial toll it would have on this still developing nation-state. Perhaps more importantly, however, the fact remains that for those Indian undertrial-prisoners who have been released because they did not receive a speedy trial, we do not know whether they were granted dismissals with prejudice, or if many of them continue to await prosecution. Even for the recent 2010 undertrials released by Law Minister Moily’s plan the empirical reality is that we simply have too little data on the status of these individuals.

Ascertaining this vital information is only one of the several overwhelming challenges facing the Indian criminal justice system, and thus sustained, long-term change is unlikely in the near future. Consider, for example, the government’s recently passed set of amendments to the Code of Criminal Procedure. Among the new provisions in the law include tightening the circumstances under which the police can make arrests,¹⁶⁶ increasing the number of bailable and compoundable offenses,¹⁶⁷ and using video technology during the detention process¹⁶⁸—all proposals we presented above. The reaction, however, from defenders of the status quo has been swift. Some have said that the police now will be hamstrung in their investigative powers.¹⁶⁹ Others have noted that the amendments dilute the deterrence effect on potential criminals.¹⁷⁰ Some lawyers and public officials have even

166. See The Code of Criminal Procedure (Amendment) Act, 2008, No. 5, Acts of Parliament, 2009, available at <http://www.taxindiaonline.com/RC2/pdfdocs/Crpc.pdf>.

167. *Id.*

168. *Id.*

169. See Jug Suraiya, *Free-for-All-Crime*, TIMES OF INDIA, Jan. 21, 2009, <http://timesofindia.indiatimes.com/articleshow/4009417.cms>. This article and a detailed summary of the debate can be found in, Tarunabh Khaitan, *Defending the New Arrest Law: Responding to Critiques by Lawyers and Feminists*, LAW & OTHER THINGS, (Jan. 29, 2009, 12:08 PM), <http://lawandotherthings.blogspot.com/2009/01/defending-new-arrest-law-responding-to.html>. Note also that technology-use has been called for by the Chief Justice of India in the serving of notices to defendants. He has argued that email notices should be used by the courts as a means of facilitating this process. See *To Reduce Delays SC Will Send Notice on Email*, TIMES OF INDIA, July 27, 2010, <http://timesofindia.indiaimes.com/india/To-reduce-delays-SC-will-send-notice-on-email/articleshow/6221007.cms>.

170. See Suraiya, *supra* note 169; Khaitan, *supra* note 169.

gone on strike to express their dismay in the changes.¹⁷¹

Criminal law scholar, Tarunabh Khaitan, has provided an insightful analysis of these amendments and the responses. As he notes, the motives, particularly by the opposing lawyers, have been questionable from the start.¹⁷² As already mentioned, many Indian litigators are paid per court appearance. With the possible reduction in the number of arrests as a result of the amendments, there is an unstated assumption among these lawyers that their fees will correspondingly decline. However, as Khaitan explains, there will still be work for these lawyers in court. Under the proposed changes it will be on behalf of those sitting in jails who, under the new amendments, should not be.¹⁷³ Regardless, Khaitan, like us, is less-than-sanguine about the impact the amendments will have on the penal process, observing that they likely “appear set to join the ranks”¹⁷⁴ of:

“Acts duly passed by Parliament but not brought into force by the government . . . Rather sad for undertrial prisoners, who would have been the main beneficiaries of these amendments.”¹⁷⁵

Thus, this is the situation in which undertrial-prisoners find themselves. Indeed, in this article, we have supported various past proposals and made recommendations of our own. These include, for example, greater use of technology to expedite the proceedings for undertrial prisoners and the establishment of independent committees to monitor how quickly undertrial cases are adjudicated. In addition, we support courtroom mobility, whereby judges would travel to the jails currently holding undertrial detainees in order to accelerate the pre-trial process. More systemically, recognizing, confronting, and finding thoughtful measures to eradicate the many ways corruption permeates the criminal system is of critical importance if real changes are to be seen. And then there is the responsibility of the legal profession itself to play a more substantive role in ensuring that self-serving

171. See Suraiya, *supra* note 169; Khaitan, *supra* note 169.

172. See Khaitan, *supra* note 169; see also Tarunabh Khaitan, *Arresting Facts*, INDIAN EXPRESS, Jan. 17, 2009, <http://www.indianexpress.com/news/arresting-facts/411767/0>.

173. See Khaitan, *supra* note 169; see also Tarunabh Khaitan, *Judicial Notice of Unenforced Legislation*, LAW & OTHER THINGS, (Feb. 13, 2009, 5:05 AM), <http://lawandotherthings.blogspot.com/2009/02/judicial-notice-of-unenforced.html> [hereinafter Khaitan, *Judicial Notice*].

174. See Khaitan, *Judicial Notice*, *supra* note 173.

175. *Id.*

delays are eliminated and that a greater culture of *pro bono* legal services gains wider acceptance within the bar.

The stark reality is that in addition to top-down legislation that attempts to mandate reforms, there must be a major cultural and attitudinal transformation of views in Indian society towards these incarcerated individuals. Further, there needs to be systematic consideration of the tremendous costs imposed on society by continuing to permit such an inefficient penal process.¹⁷⁶ Finally, as scholars and policy-makers continue to research ways to improve the undertrial dilemma, there must be greater scrutiny of the personnel working within the criminal justice system. Who are these prosecutors? Who are the defense lawyers? How adequate are the legal services they are providing? And, what type of training and professionalism do these legal actors receive?

As a final note on the state of Indian legal community, there is a real sense among attuned observers that a large percentage of the country's 900-plus law schools has failed to produce adequate lawyers.¹⁷⁷ If this is the case, and lower level criminal courts are being staffed with underqualified people, then attacking the undertrial problem may require working in conjunction with those seeking to improve the quality of legal education in India. Again, this is an issue requiring empirical study. It is a reminder that institutions are only as good as the people within them; and that when it comes to a country's criminal justice

176. There are a host of costs that include: costs to run these filled-undertrial prisons; time, money, and energy of the various legal and judicial staff to attend to undertrial cases; time, money, and energy that these individuals could devote to other pressing matters were it not for this undertrial-burden, and the like.

177. See Kian Ganz, *The Power of One*, 57 LEGALLY INDIA, July 16, 2010, <http://www.legallyindia.com/201007161108/Newsletters/the-power-of-one-issue-57> (noting the Solicitor General, Gopal Subramaniam's, plan "of introducing ethics rules for lawyers and effectively closing down more than 80 per cent of India's 913 law schools"). Also, according to a highly respected lawyer with whom we corresponded and who appears regularly in a lower district court in Delhi, these problems associated with Indian legal education have also resulted in a dearth of quality judges in the district courts. As he notes, "with the present system in India, a law graduate can sit for judicial examinations, immediately after passing out of the law school. The number of persons falling in this category is increasing by the day. These individuals, who are fresh from law schools, and have very little or no practical knowledge of the working of laws and the legal system . . . often are clueless about various aspects of their job, and are therefore unable to decide cases expeditiously. Grant of frequent adjournments is one aspect of this, which ultimately contributes to backlog of cases, and ultimately to denial of the right to speedy trial. I am not saying that all the newly appointed judges are like this, but this is a serious problem, which is voiced by a vast number of lawyers in India." Correspondence with Lawyer (anonymity provided upon request) (August 28, 2010) (on file with author).

system in particular—where liberty, freedom, and fairness are all at stake—this point must never be forgotten.

APPENDIX I
ADDITIONAL UNDERTRIAL CASES FROM 2000 ON,
FROM FOOTNOTE 75, ABOVE.

1. T.K. Gopal & Gopi v. State of Karnataka, 2000 A.I.R. 1669
2. Laxman Naskar v. State of W.B. and Another, 2000 A.I.R.
3. State of Himachal Pradesh v. Surinder Mohan and Others, 2000 A.I.R. 1862
4. State of Andhra Pradesh v. Challa Ramkrishna Reddy, 2000 A.I.R. 2083
5. Seeta Hemchandra Shahittal and Another v. State of Maharashtra, 2001 A.I.R. 1248
6. T.T. Antony v. State of Kerala, 2001 A.I.R. 2637
7. State of Rajasthan v. Maharaj Singh and Another, 2004 A.I.R. 4205
8. Jamshed N. Guzdar v. State of Maharashtra, 2005 A.I.R. 862
9. Jasbir Singh v. State of Punjab, 2006 (7) Suppl. S.C.R. 174