

# WHAT IS THE ASSISTANCE OF COUNSEL EFFECTIVE FOR?

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The question that has been put to this conference rests on the assumption that we know what criminal defense counsel should be doing. Stephen Schulhofer's contribution to this symposium<sup>1</sup> as well as his very impressive earlier article<sup>2</sup>—both of which are the more limited objects of my remarks—also leave largely unstated the values by which the criminal justice system should be measured. But we cannot know whether an institutional structure, a process, or a rule is good or bad unless we can specify the criteria that inform such a judgment. My goals, therefore, will be to explore the range of values we might invoke for that purpose and to speculate about how these values could be advanced.

Any goal-directed social activity can be evaluated by reference to measures of input, outcome, and process.<sup>3</sup> I will begin my analysis with input measures, though I think we will be forced to conclude that they are not very helpful. The input into the criminal process consists almost entirely of labor; materiel expenditures are trivial, and though some have discussed the physical format of the courtroom,<sup>4</sup> few would argue that such capital investments play a decisive role. Labor can be measured quantitatively or qualitatively—by the amount of time expended or by the competence of the actors. Quantity is easy to calibrate but not very interesting, since there is no intrinsic value in having many people spend a great deal of time on the criminal process. And though it seems plausible that the quality of both process and outcome are related to the amount of time invested, we have no data on this empirical question. The quality of the labor force is more interesting but also much harder to assess. Input measures such as law school attended, class rank, or years of experience are of dubious value. Direct observational tests of past performance are difficult to devise and administer. And once again we have no data that would correlate input quality with process or outcome. Therefore, although research on the causal effects of different inputs would be highly desirable, until we obtain the results of such research we will have to look directly at outcome and process measures.

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1. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137 (1986).

2. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

3. See Carlson, *Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come*, 11 LAW & SOC'Y REV. 287 (1976).

4. See S. BEDFORD, *THE FACES OF JUSTICE: A TRAVELER'S REPORT* (1961).

Outcome measures also prove unrewarding, in light of our profound disagreement about the outcomes we should seek and our equally profound ignorance of how to achieve them. People who think about the criminal justice system embrace a wide variety of values, some of which are fundamentally inconsistent with others: the most *lenient* outcome for the accused; the most *severe* outcome; the ascertainment of *factual truth*; and the correct adjudication of *legal guilt or innocence*. Even within each of these broad categories there is considerable disagreement, or at least confusion. For instance, what is the precise meaning of lenience? Is it the most lenient outcome for each accused? Or is our solicitude directed only at some accused or some crimes? People seek lenience for different reasons. They may believe that penalties are too severe. Some feel that the death penalty always is unjust. Others are distressed that the United States imposes longer prison sentences and incarcerates a larger number of people per capita than almost any other nation.<sup>5</sup> Some may be concerned that those accused of crimes and those imprisoned disproportionately are poor, uneducated, unemployed, members of ethnic minorities, and young. Others may argue that we should treat "street" crime as leniently as we treat white-collar crime. Or they may contend that some of the acts we punish should not be criminal at all: for example, prostitution (for women, if not for Johns), public intoxication, or some forms of drug use or sales.

Yet if many people advocate greater lenience, this view does not command a consensus—indeed, it does not even persuade a majority. The call for "law and order" has been a recurrent theme of American politics for decades: more police, more prosecutors, more judges, the criminalization of more conduct, more capital punishment, and the imposition of more and longer prison sentences. Therefore, those who would reform the criminal justice system must choose between these two antagonistic positions and articulate their reasons for doing so. I believe that many of the debates concerning seemingly technical matters of structure, rule, and process actually express profound disagreements about how punitive we should be. We cannot resolve the question of means until we address explicitly the question of ends.

The two other outcome variables—factual truth and legal validity—are less salient to most lay people. Those accused of crimes want to get off as lightly as possible—they do not necessarily want the truth to come out, and they certainly do not want to be convicted (notwithstanding Hegel's insistence that the state owes the accused an obligation to inflict punishment). Many members of the public have been convinced by the prevailing political rhetoric that they want the accused to be punished, regardless of the precise facts or the law. It is mainly legal professionals who are preoccupied with factual and legal niceties. But even they are uncertain what these goals mean—for both the facts and the law are irretrievably indeterminate—nor do they know how such goals could be pursued.

The fascination of lawyers with process measures, which this conference

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5. See N. CHRISTIE, LIMITS TO PAIN 32 (1981).

exhibits, is partly—I think largely—attributable to our inability to agree upon, operationalize, or advance outcome measures. This second-best tactic is acceptable as long as we do not fall into the trap of conflating process and outcome, accepting the consequentialist argument that justifies adoption of a given process by reference to the outcome it promotes. If process variables are simply to function as surrogates for outcome variables, we first have to agree on what is a desirable outcome and then have to adduce convincing evidence that the process in question actually generates that outcome. For instance, trials may be preferable to bargained pleas *if* we favor more lenient outcomes and *if* trials actually produce more lenient outcomes than do bargained pleas. But then, as I argued above, our real concern is with the nature of punishment, and process is merely an incidental means to achieve the desired level of punitiveness. If leniency is our goal, we should compare processual reforms—such as a ban on plea bargaining or more preparation time for publicly funded defense counsel—with other instrumental changes that may be more effective—for instance, a legislative reduction in the level of penalties, an executive decision not to build more prisons and to close existing ones, or the appointment of more lenient judges and prosecutors. Or, of course, we might try to eliminate those conditions that produce criminal behavior.

I will assume, however, that we actually are interested in processual measures for their own sake rather than for their presumed consequences; we believe that there are deontological grounds for preferring some processes to others. I can think of several such grounds. One would be a preference for the adversary process. Certainly many lawyers are strongly wedded to it. The problem is that they have considerable difficulty offering persuasive justifications for their attachment.<sup>6</sup> I am excluding here (because I discussed them above) consequentialist arguments that the adversary process promotes the ascertainment of truth, more faithful adherence to legal rules, or more lenient outcomes. In any case, the empirical basis for such claims is extremely weak. Yet there seems little else that could justify adversariness except a love of battle or pleasure in rhetorical display.

A second processual value would be a preference for adjudication over negotiation. This preference, which appears to underlie Professor Schulhofer's argument, is not the same as a commitment to the adversary process. Negotiation can be just as adversarial as adjudication<sup>7</sup> (though Schulhofer seems to suggest, empirically, that adjudication tends to be more adversarial; normatively, that this is to its credit). Again, we must exclude consequentialist justifications. For instance, Schulhofer argues that lawyers prepare more carefully for trial than for negotiation. If this were to justify a preference for the former, we not only would have to be convinced of its em-

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6. See Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* (D. Luban ed. 1983); Simon, *The Ideology of Advocacy*, 1978 *WIS. L. REV.* 29; White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 *U. CHI. L. REV.* 849 (1983).

7. See Menkel-Meadow, *Toward Another View of Legal Negotiations: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754 (1984).

pirical validity but also would have to agree either that preparation is desirable in itself or that it is causally related to some other goal we share, such as more lenient dispositions, the ascertainment of factual truth, or the production of legally correct decisions. Perhaps the preference for adjudication is based on the belief that judges make better decisions than prosecutors and defense lawyers. But such a position simply generates more questions. If a bench trial is good, is a jury trial better or worse? The constitutional right to trial by jury suggests it is better. If a short trial is better than none at all, is a long trial better still? If so, how much better—since its benefits must be weighed against the social and economic costs? If a decision by a trial judge is good, is review by an appellate judge better? Does this superiority increase or decrease with successive appeals? Finally, even if we take the preference for formal adjudication to its logical extreme, we must not forget that decisions of prosecutors and defense counsel, relatively unconstrained by legal rules, strongly influence the outcomes of both trials and appeals. And the decisions by police prior to trial and by prison officials, parole boards, and probation officers after conviction are the product of even greater discretion.

A preference for adjudication over negotiation also must be reconciled with the prevalence of negotiation throughout social life. Negotiation is the core of all economic behavior and the lifeblood of politics. It is deeply imbedded in the law. In fact, we know that the vast majority of civil controversies are resolved by negotiated settlements.<sup>8</sup> Why, then, should negotiation be outlawed in the criminal process? The reason cannot be the disparity in resources between the state and the accused, for this disparity often is as great or greater between parties in civil disputes. Furthermore, if this were the reason, how could participation in a trial eliminate the effects of this inequality? Nor can the reason be the severity of the penalty. Though some penal sanctions are more severe than the consequences of some civil suits, the reverse often is true as well. Our legal system does not even view the adjudication of criminal charges as an absolute: we allow defendants to plead guilty, although other countries insist on trials even against defendants' wishes, at least in serious cases.

The remaining criteria for evaluating criminal process are even less satisfactory. We might use economic measures, such as cost or speed, but it is not clear who cares about such considerations or why they do so. Certainly the accused is prepared to sacrifice cost and speed for a more favorable outcome. Indeed, if we cared only about minimizing cost and speed we could allow the arresting officer to fix the penalty on the spot, or even administer the sentence. Since almost everyone would find this shortcut abhorrent, it is clear that we weigh economic considerations against other values. We therefore must spec-

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8. See H. ROSS, SETTLED OUT OF COURT (1970); D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD & Y. BRITTAN, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 93-125 (1984); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

ify what these are. Finally, we might prefer a process that best respects the defendant's autonomy and involves her most thoroughly in the disposition of her charges. But it is not clear that this is the primary object of the defendant herself. Nor is it obvious that trials are preferable to negotiated outcomes in this respect.

The value incoherence sketched above suggests the impossibility of answering the more immediate question of whether the promise of effective assistance of counsel for the indigent criminal defendant has been fulfilled. Instead, it strongly urges us to focus our attention on the ultimate goals of the criminal justice system. But for the moment let me accept the insufficiently justified proposition that an adversary trial is the most desirable process. What are the principal obstacles to its attainment? The first, and perhaps the most profound, is the unwillingness of our society to spend enough money on justice. It often is said that Americans are extraordinarily litigious and squander vast resources on the law. Recent empirical research has shown that this is untrue with respect to civil litigation.<sup>9</sup> The claim is even less true with respect to the criminal process. For instance, the ratio of judges to lawyers is lower in the United States than in most Continental European countries.<sup>10</sup> Consequently, we place enormous burdens on counsel, both prosecution and defense. But whereas prosecution is a respected, well-rewarded lifetime career in most European countries, it generally is no more than a stepping stone to private practice, politics, or the judiciary in the United States, and for some it is just a dead end. In addition, both public defenders and court-appointed defense counsel in the United States receive inadequate pay and even less respect.

What really requires explanation is not government parsimony but the fact that the state spends any money at all on prosecution and punishment. These tasks originally were the responsibility of the victim. In this era of privatization, they once again may become an individual burden. For almost a decade, most western governments have sought to reduce their nonmilitary budgets. Inevitably, such shrinkage has a disproportionate effect on services that benefit the poor. Like welfare or public housing, the criminal process deals almost exclusively with poor people. But whereas other social services are seen by the public as directed toward the "deserving" poor, at least in part, the criminal process handles a deeply stigmatized population. Therefore, although the public may endorse expenditures that expand the repressive apparatus, for instance, by increasing the police force or prison capacity, they are extremely reluctant to spend money on humanizing the criminal process.<sup>11</sup>

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9. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 33 UCLA L. REV. 4 (1985).

10. See Abel, *Comparative Sociology of Legal Professions: A Preliminary Analysis*, 1985 AM. B. FOUND. RESEARCH J. 1.

11. For a discussion of how legal representation helps to construct a caste of the poor, see Katz, *Caste, Class, and Counsel for the Poor*, 1985 AM. B. FOUND. RESEARCH J. 251.

In order to build a more powerful constituency for expenditures to enhance the quality of the criminal process we would have to "desegregate" crime. Prosecutorial resources would have to be diverted from street crime to white-collar crime. And we would have to equalize the position of all accused, assigning public defenders or court-appointed counsel to all defendants and prohibiting corporate executives from retaining private defense counsel—obviously a political impossibility.<sup>12</sup> But in the absence of such a reform, the only sources of political pressure for an increased criminal justice budget are the accused themselves, who readily can be ignored, and legal professionals, who are obviously and narrowly self-interested.

There are structural as well as economic obstacles to realizing the goal of an adversary trial. The principal actors in the criminal process—judge, prosecutor, and defense counsel—confront incentives that reward speed, routinization, and the disposition of as many cases as possible. To create countervailing incentives for quality, deliberation, and the fullest possible exploration of all factual and legal issues would be difficult, if not impossible. But even were this possible, it is not clear that a fully adversary trial in every case would be an attractive result. Do we really want to eliminate all possibilities for bargaining or reciprocity? Is the mechanical application of rules (if that is a meaningful concept) always desirable?<sup>13</sup>

The dilemmas I have explored above are not unique to the criminal justice system. Rather, they are endemic to our society. In every sphere of social life we participate in creating an environment that produces undesirable behavior. Then, instead of changing the structural conditions that generate such behavior, we turn around and condemn it, usually by declaring it to be unlawful. Thus, the competitive pursuit of profit compels entrepreneurs to disregard safety—and we respond with tort liability.<sup>14</sup> The emergence of a distinct legal profession inevitably leads to a divergence between the interests of lawyers and clients—and we respond with ethical rules commanding total fidelity to client interests.<sup>15</sup> We demand that our police use the most effective means to arrest and help convict criminals—and when they do so we respond by declaring their tactics illegal.<sup>16</sup> In each case, law offers a merely symbolic response to a structural problem of our own making. The same is true in the criminal justice system. Because our society seeks to punish as many accused as harshly

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12. See Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW & POL'Y Q. 5 (1979). For an analysis of private legal defense of white-collar crime, see K. MANN, *DEFENDING WHITE-COLLAR CRIME* (1985).

13. Elsewhere I have argued that the poor may gain a strategic advantage by invoking rules. Abel, *The Contradictions of Informal Justice*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* (R. Abel ed. 1982). But that does not make rule-governed systems ultimately desirable.

14. See Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 189 (1981); Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982).

15. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981).

16. See J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 204-29 (1966).

as possible with the least expenditure of public resources, we deny indigent criminal defendants effective assistance of counsel and subject them to a process that makes a mockery of the adversary trial—and then proclaim our fidelity to the ideal of due process in sporadic and ineffective appellate reviews. We should take little comfort in devising rules and institutions that purport to protect defendants as long as punishment remains our overriding goal.

