

Book Note

Truth and Justice?

Virtual Justice: The Flawed Prosecution of Crime in America. By H. Richard Uviller.* *New Haven: Yale University Press, 1996.* Pp. xvii, 318. \$30.00.

I

The acquittal of O.J. Simpson in 1995 for the murder of his former wife and her friend touched off a new spate of criticisms of the American criminal justice system.¹ Recently, anything short of conviction in high-profile cases has tended to spark vociferous insistence that the acquittal or hung jury was the result not of the defendant's factual innocence (or even reasonable doubt thereof), but of the internal flaws of our criminal justice system.² Meanwhile, a number of books by well-known trial lawyers have confirmed what devotees of television courtroom dramas and disgruntled observers of recent trials have long suspected: that the criminal trial is a battle between lawyers in which each side uses all the means at its disposal to attain victory, even at the cost of obfuscating the truth.³ The frustration with our supposedly flawed criminal justice system can only be exacerbated by increasing concern over crime rates.⁴

The twin perceptions, accurate or not, that crime is on the rise while our ability to combat it through the legal system is declining give particular force

* Arthur Levitt Professor of Law, Columbia University School of Law.

1. See, e.g., Michael Lind, *Jury Dismissed*, in *POSTMORTEM: THE O.J. SIMPSON CASE 155* (Jeffrey Abramson ed., 1996); *Respect for Justice System Slides, Poll Says*, N.Y. TIMES, May 1, 1995, at B3. A civil jury found Simpson liable for wrongful death and battery. See *Verdict, Rufo v. Simpson*, No. SC031947, 1997 WL 45143, at *2 (Cal. Super. Trans. Feb. 4, 1997).

2. See, e.g., ANNE STRICK, *INJUSTICE FOR ALL 180 (1977)* (criticizing defense attorney's support of adversary system in Patricia Hearst case); *id.* at 183 (criticizing use of jury selection experts in trial of Dr. Samuel Sheppard); FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 1-6 (1994)* (criticizing adversary tactics in Rodney King trial); *id.* at 27-28 (attacking same in Menendez brothers' trial).

3. See, e.g., F. LEE BAILEY & HARVEY ARONSON, *THE DEFENSE NEVER RESTS (1971)*; ROBERT L. SHAPIRO & LARKIN WARREN, *THE SEARCH FOR JUSTICE: A DEFENSE ATTORNEY'S BRIEF ON THE OJ SIMPSON CASE (1996)*.

4. See Lori Montgomery, *Crime at a Distance: That's the Top Concern: Poll Confirms that Fear of Crime Is Out of Proportion with Most People's Reality*, AUSTIN AM.-STATESMAN, Feb. 4, 1996, at D6

to H. Richard Uviller's new book, *Virtual Justice: The Flawed Prosecution of Crime in America*. The book offers an admirably well-balanced critique of the criminal justice system, breaking away from the mold of antidefense diatribe by offering sophisticated arguments that our rules of evidence and procedure make it difficult to reach the truth.⁵ The author also proposes creative ways to reconcile the demands of the Bill of Rights with the needs of police officers and potential victims. Often, these innovative solutions make use of modern technology, such as a radio hookup that would allow for speedy issuance of constitutionally required search warrants to police officers in the field (pp. 84–87). The organization of the book tracks the criminal process from the initial investigatory stages to arrest, jury selection, and final disposition. On a more microscopic level, Uviller begins each chapter—which can be read as an essay unto itself, although the substantive quality varies widely—with a fictional account that sharpens the issues that he discusses.

II

Uviller devotes substantial space to a critique of aspects of the adversarial system, which he asserts inhibits the discovery of truth during all the stages of a criminal investigation and trial.⁶ For example, he reads *Miranda v. Arizona*⁷ as an attempt to extend the principle of the adversary system that “a suspect is never regarded as a primary source of evidence” to the essentially inquisitorial procedure of stationhouse interrogation (p. 122). Recognizing that *Miranda* tends to equalize poor defendants with their wealthier and more educated counterparts, Uviller nevertheless warns that taking it too far will eliminate evidence necessary to prove factual guilt (pp. 130–31). Uviller also questions the wisdom of *Massiah v. United States*,⁸ charging that its ban on deliberate elicitation of incriminating evidence from an accused in the absence of counsel was made by a Court “wedded to the adversary ideal” (pp. 299–300).

At trial, the ill effects of the adversary system are even more apparent. Uviller argues that the conception of law as sport is responsible for the stereotypical defense attorney excesses now familiar to the citizenry through media trial coverage (p. 156).⁹ He finds the passivity of the adversary system's judge and jury even more troubling. He argues for simpler evidentiary

5. For an example of a less scholarly critique of criminal justice, see JUDGE HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* (1996).

6. See, e.g., MARVIN E. FRANKEL, *PARTISAN JUSTICE* 87–100 (1980).

7. 384 U.S. 436 (1966).

8. 377 U.S. 201 (1964).

9. Other commentators have recognized that the adversary system tends to conceive of the lawyer's role as that of champion and warrior, thereby enforcing the adversary ethic. See, e.g., Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 *WIS. WOMEN'S L.J.* 225 (1995).

rules that place more discretion in the hands of the trial judge (p. 240). He also contends that the adversary system makes it hard for jurors to discern the truth (pp. 251–65). Jurors' difficulty in evaluating the plausibility of testimonial evidence is exacerbated by the structured manner in which such testimony is presented in the adversary system. Uviller's solution to the problem of finding truth amid this confusion is revealed in the final chapter, where he suggests as alternative to the adversarial system a quasi-inquisitorial model allowing the judge to supervise the investigation, to direct courtroom case presentation, and to participate in factfinding (p. 304). Combined with "some adversary elements—such as vigorous confrontation and diligent adverse counsel" (p. 294), the new system could provide more accurate factfinding while also protecting the rights of the accused (p. 293).

III

The shadow behind *Virtual Justice* is "true justice" (p. xiv), a term Uviller never precisely defines. He apparently uses it to mean accurate factfinding, assuming that "historic reality" (p. xiv) is necessarily identical to justice. But the concept of justice may include dignitary values, and the subjects of criminal investigation are not merely means to an end. Uviller generally claims to prefer literal to virtual justice, but he at times appears to reverse this preference: He says tantalizingly that plea bargaining is, in his view, constitutionally questionable but that case pressure requires it¹⁰ and that the "virtual justice" of plea bargaining "works better than the authentic model" (p. 199). What then is true justice if virtual justice may "work better"? For all the complaints Uviller makes about "virtual justice" replacing "literal justice," he does not fully explore what true justice is and whether it is attainable within the structure of law.

While Uviller seeks to assure his reader that his substantive proposals fit within the legal framework set up by Supreme Court decisions, he sometimes glosses over the question of whether the reasons behind these rulings lie solely in the search for factual accuracy. Occasionally, Uviller appears to acknowledge that the principles on which the decisions stand should take precedence over the potential aids to truthfinding that would be preferable under his analysis.¹¹ Yet while proposing reform of the adversary system, he

10. The thesis that case pressure drives plea bargaining is not universally accepted. *See, e.g.*, MILTON HEUMANN, ADAPTING TO PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 32 (1978).

11. For example, although he criticizes the exclusionary rule as a confusing and overly complicated bar to truthfinding, Uviller also recognizes that the right of the citizenry to be secure from unreasonable searches and seizures demands respect. He therefore proposes to facilitate the acquisition of a warrant before a search, rather than to do away with the warrant rule altogether (pp. 24–26).

accepts without question that its unique goal is to get at the facts.¹²

As a result, Uviller follows a modern trend that tends to view factual accuracy as the overwhelming goal of criminal procedure, a view that can be described in his own parlance as equating "literal" with "justice."¹³ Procedural safeguards arguably protect dignitary rights by ensuring that the defendant can help determine his own fate: that he is not adjudged guilty by an impersonal system. The danger of a nonadversarial system is the bureaucratization of adjudication, whose most extreme manifestation is a Kafkaesque world in which citizens unable to participate in the making of their own fate are summarily executed by bland bureaucrats.¹⁴

The antidote to this dystopia is a principle of due process that mandates the provision of reasons.¹⁵ The dignitary rights protected by the adversary system allow the defendant to participate in determining his own fate. If he chooses not to speak in his own defense, he cannot be forced to do so. He retains the opportunity to confront the witnesses against him, even if the cause of factual accuracy would be better served by having the judge investigate the credibility of the witnesses. Certainly these rights can be waived, as when the defendant chooses to plead guilty; otherwise, the state would be depriving him of the ability to direct his own defense. But for these rights to retain any viability, the defendant must have the opportunity to participate in his own trial.

12. Mirjan Damaška has suggested that nonadversarial systems of adjudication work to implement state policy while the adversary system serves to resolve conflict. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 88 (1986). The two systems are thus not true alternatives for achieving the same prime objective. See STRIER, *supra* note 2, at 211. Louis Seidman has pointed out that criminal procedure must be evaluated in the context of substantive criminal law goals. See Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437 (1980) (arguing that Burger Court's ostensible insistence on accurate factual determinations of guilt mask continuing "use [of] the criminal justice system as a tool for social engineering, even when this pursuit of broad social goals conflicts with the need to reach factually reliable judgments in reliable cases"). In other words, before Uviller articulates his preference for a less adversarial adjudicatory model, he needs to provide a theory of the substantive goal.

13. See *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) (subjecting admission at trial of involuntary confession to harmless-error analysis). The Court noted that the harmless error is "essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Id.* at 308 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). The dissent argued that the admission of a coerced confession violated due process "without regard for the truth or falsity of the confession . . . and even though there is ample evidence aside from the confession to support the conviction." *Id.* at 288; see also Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 889-95 (1995); Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 107-16 (1996). While much in criminal procedure has become constitutionalized, see Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 487-501 (1992), courts are increasingly willing to find that breaches of these constitutional imperatives constitute only harmless error, see Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 152-53, 156 (1991); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 86-88 (1988).

14. See FRANZ KAFKA, *THE TRIAL* 228-29 (Willa & Edwin Muir trans., Schocken Books 1984) (1925).

15. See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 177-80 (1985).

It is, of course, all too easy to fall into the circular argument that anything less than the protections we currently have would undermine the dignity of the individual. Uviller may assume that such constitutionally protected aspects of criminal procedure exist simply to promote the truthfinding function of the judicial process.¹⁶ Although it is clear that the Framers regarded the safeguards enumerated in the Fifth and Sixth Amendments as important rights, this does not explain *why* they are rights. Is it because they promote truth, and it would be inherently unfair to impose criminal sanctions against a defendant whose guilt was determined through methods subject to a high probability of factual inaccuracy, or because they are inherently dignitary rights? Although Uviller recognizes these tensions, he does not explore them fully.

Nor does Uviller explain how his reforms would fit into a system delivering true justice. He proposes that adversary elements such as "vigorous confrontation and diligent adverse counsel" (p. 294) would prevent the inquisitorial system from trampling the rights of defendants in a politically volatile case, but it is hard to imagine a system featuring vigorous confrontation and diligent adverse counsel that would not conflict with the judge-centered model that Uviller defends. Uviller assumes that these vestiges of the adversary model are necessary only in politically volatile cases. He views the values potentially trampled as only those of accurate factfinding.

Even if one assumes that the paramount goal of the criminal justice system is factual accuracy, one must develop a more sophisticated definition of truth before concluding that the adversary system impedes its discovery.¹⁷ In his earlier work, Uviller recognized a number of finer distinctions. Uviller's insistence that the discovery of truth is the primary goal of the system ignores a distinction that he himself has enunciated between instrumental and ultimate truths.¹⁸ Monroe Freedman has argued that to achieve one ultimate truth, the acquittal of an innocent defendant, an attorney might have to undermine the credibility of a witness he believes to be telling the instrumental truth.¹⁹ That is, the lawyer might have to discredit truthful testimony because even honest witnesses can give circumstantial evidence that could lead to the conviction of an innocent defendant. Uviller himself once suggested that a lawyer's doing

16. See Amar & Lettow, *supra* note 13, at 922–24 ("Truth is a preeminent criminal procedure value in the Bill of Rights."); Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063 (1975) (discussing dual function of adversary system as serving interests of state both in discovering truth and in dignitary rights of individual); Tom Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1376–77, 1380–81 (1991) (noting that Self-Incrimination and Double Jeopardy Clauses may be understood both as "truth-furthering" devices and as "truth-impairing" dignitary guarantees).

17. For discussion of possible refinements, see Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1103–04 (1975); and Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 11–13 (1978).

18. See H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1077–79 (1975).

19. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer*, 64 MICH. L. REV. 1469, 1474–75 (1966).

so would be acceptable.²⁰ In an adversary process, it is much more likely that instrumental truths might be made to appear false in order to promote the ultimate truth; in the inquisitorial trial, where the judge asks most of the questions, the ultimate truth may be subordinated to instrumental truths.

Uviller also neglects the argument that not all factual inaccuracies are equal. For example, many people believe that a false conviction is considerably worse than a false acquittal.²¹ Assuming an imperfect world in which both mistakes occasionally will be made, the goal would then become to ensure not only that false convictions are rarer than false acquittals but also that an optimal proportion between the two errors is produced. The characteristics of the adversary system that Uviller sees as impeding truth may serve to maintain this desirable relationship.²² Of course, Uviller might respond that the adversary system strikes the wrong balance between the two types of mistakes. This response might require adjustment of the procedural law, but in general the adversary system is more successful than the inquisitorial system in making sure that false acquittals greatly outnumber false convictions.

Uviller's book presents us with the intriguing suggestion that we can achieve "literal justice" if only we have the resolve to reject "virtual justice." Rather than showing what literal justice is and how it is attainable, however, the book demonstrates that literal justice, at least as conceived by the author, simply does not exist. Here the title of Uviller's book becomes richly ironic: The term "virtual," in the jargon of late twentieth-century technology, refers to an illusion so perfect that it is indistinguishable from reality.²³ Similarly, the virtual justice that Uviller portrays may be the closest we can get to literal justice—and as he himself suggests, it often works better than literal justice. In that sense, we might say that virtual justice is a goal we do not seek but whose accomplishment we happily embrace.

—Jessie K. Liu

20. See Uviller, *supra* note 18, at 1078.

21. See Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 4 (1990) ("In the Anglo-American tradition, the social cost of factual error against the defendant (a 'false positive') is deemed greater than the social cost of factual error against the government (a 'false negative').").

22. Professor Tom Stacy points out that because no system can completely eliminate errors, any conception of accuracy must also address how errors should be allocated. An innocence-weighted model sees false convictions as worse than false acquittals, while a guilt-weighted model takes the opposite view. A conception of accuracy must also decide the relative importance of error-avoidance and error-allocation; for example, one might be willing to accept ten errors if only two of those are false convictions, but only eight errors if four of those are false convictions. See Stacy, *supra* note 16, at 1406–07.

23. Cf. 19 OXFORD ENGLISH DICTIONARY 674 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).