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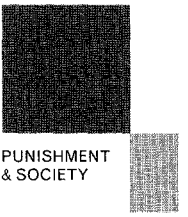

Assaults on the adversarial process

Rethinking American criminal justice

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Mean justice: A town's terror, a prosecutor's power, a betrayal of innocence, Edward Humes. New York: Simon & Schuster, 1999. ISBN 0606190570, $24.50.
Virtual justice: The flawed prosecution of crime in America, H. Richard Uviller. New Haven, CT: Yale University Press, 1996. ISBN 0300064837, $40.00.
Trials without truth: Why our system of criminal trials has become an expensive failure and what we need to do to rebuild it, William T. Pizzi. New York: New York University Press, 1999. ISBN 00019179, $18.00.

A judge friend of ours was once warned at a professional meeting about the 'coming crisis' in the criminal courts. He laughed and responded, 'The crisis arrived long ago; we're in permanent meltdown.' The authors of the three books under review here would agree, although for quite different reasons. All three of the books diagnose major failings in the American criminal justice system. The book by Humes offers an individual-level explanation – irresponsible officials whose behavior corrodes and corrupts the criminal process. The books by Uviller and Pizzi focus on structural features in the criminal process that lead to bad results even when administered by good people. All three of the books are informal. Humes, a journalist, received the Pulitzer Prize for this book, a compelling account of one 'town's terror, a prosecutor's power, and a betrayal of innocence.' The other two are passionate get-it-off-my-chest books by former prosecutors turned law professors. Although they are quite different from each other, all three books are exposés written for general audiences. None is, or purports to be, a model of even-handed scholarship.

Edward Humes' *Mean justice* explores the ways in which power in the hands of inept police and politically ambitious prosecutors can lead to systematic abuses and corruption, and to a systematic unwillingness or inability to correct obvious problems even when publicly exposed. Such corruption, he shows, damages not only innocent people who are caught in its web, but also the image of justice to which Americans proudly (if naïvely) cling. Thus it does injustice both to the community as a whole and to the lives of individual defendants and their families.

Mean justice focuses on the practices of law enforcement in Bakersfield, California, a desert city 100 miles northeast of Los Angeles, and on one particular murder case, *People v. Pat Dunn*. The author describes the investigation, charging, and prosecution of the hapless Pat Dunn for the murder of his wife, a wealthy widow he married in late middle age. Humes presents his story as something akin to a conspiracy by law enforcement to frame Dunn for the murder. Seeing an obvious motive (Dunn stood to inherit several million dollars), the police jumped to conclusions and did little investigation. Humes demonstrates that police officers neglected to follow up legitimate leads, failed to consider other suspects, and ignored contrary evidence. Although Humes claims to be providing an impartial account of all of the evidence, to us he appears to be presenting the defense in the court of public opinion and arguing for his client's innocence. If so, he does not succeed, though he makes a strong case that guilt was not established beyond a reasonable doubt.

However, Humes' book is more than a story of single mismanaged trial. He does not want us to consider the ineptness in Dunn's prosecution as an isolated miscarriage of justice. Rather, he contends that ineptness and corruption are the norm in Bakersfield, and that Dunn's case is just one of many – though the most dramatic – instances of injustice. Dunn's conviction, he suggests, was preordained given the times and the setting. To build this larger argument, the author intersperses his meticulous account of the Dunn case with numerous other accounts of groundless arrests, inept investigations, corrupt prosecutions, and timid judicial action in Bakersfield.

Many of the most egregious cases he presents involved charges of child molestation. In the 1980s Bakersfield experienced a wave of child molestation and ritual sacrifice charges similar to the McMartin scare in nearby Los Angeles a few years before (and also to the witchcraft trials in 17th-century Massachusetts). Like their predecessors in Los Angeles, Salem, and elsewhere, local officials got carried away with these claims, and in the name of protecting 'our children' undertook criminal prosecutions. If the first arrests and prosecutions were pursued with some reluctance and skepticism by the police and prosecutors, these concerns quickly evaporated as moral panic set in and law enforcement officials saw the value of fanning it. In short order, law enforcement officials could not find enough offenders, nor prosecute them swiftly enough, nor punish them harshly enough to satisfy the public's need for protection. The consequences: police officers and social workers participated in the manufacture of evidence against adults of all kinds, and encouraged children to turn in their parents and teachers and to relate stories of sexual and violent abuse in return for protection from their families. No evidence was ever found to corroborate any of these stories, but the prosecution (persecution) raged on. Almost all of those charged were eventually exonerated, but only after successful appeals (and conviction and substantial time in jail). However, a few people were protected by an occasional courageous trial court judge who braved the wrath of the community to dismiss baseless indictments.

Humes shows how those officials most willing to exploit this moral panic rapidly advanced in their careers, while those who were skeptical about or opposed to the actions saw their careers grind to a halt. And he notes that at the time of his writing, several years after the panic had subsided and the convictions had been overturned, no one in either the police department or the prosecutor's office had acknowledged any problems with their practices. Furthermore, neither the local grand jury nor the state's attorney

general's office stepped in to deal with the scandal. Rather, those officials who precipitated it continue in office, defending their corrupt practices and manufacturing elaborate smokescreens to hide their incompetence and malice. This is the larger context in which Humes examines the investigation, trial, conviction, and sentencing of Patrick Dunn for the murder of his wife.

As much as he believes in the innocence of many of those he writes about, Humes' study does not hinge on the actual innocence of defendants. Rather his principal point is that the Constitution guarantees fair treatment for everyone, innocent and guilty alike. He makes this point well by highlighting the discriminatory nature of the imposition of capital punishment for convicted (and obviously guilty) killers; class and race determine who will and will not be capitally charged. However, he persuasively contends, the corrupt practices of law enforcement are all the more horrifying when the targets are innocent, and callous disregard for innocence (by law enforcement and by the public) is a threat to democracy. The preservation of order comes at too high a price if we make this sacrifice.

Although less dramatic in its focus and less chilling in its accounts, Richard Uviller's book, *Virtual justice*, is in fact a more thorough-going indictment of the American criminal justice system. The author, a former federal prosecutor, argues that our criminal justice system has evolved into such a complex web of procedures that it can only provide virtual justice, an elaborate form with no content, rather than substantively real justice. Uviller points to various rules that impose artificial constructs on the notion of truth in the courtroom and within the entire context of the criminal case. Some of these constructs sometimes work to the detriment of law enforcement (and thus of victims and of the public), such as the insanity defense and the exclusionary rule, and some to the detriment of criminal defendants, such as the preference for eyewitness identifications and the embarrassingly low threshold for competence of counsel. The result is a system of rules that gives the impression of bending over backward to be fair, painstakingly careful, and even-handed, but which in fact generates a tangle that transforms what should be a dignified process into a tawdry game or worse. No one, Uviller emphasizes, stands to benefit from such a criminal justice system.

Unlike Humes (who focuses on the practices of law enforcement officials), Uviller is not especially concerned about corrupt police officers or callous prosecutors. He would certainly concede that they make things worse, but his point is that things are terrible with even the best personnel. His focus is on the rules that cloak the criminal justice system in legitimacy but actually mask deep problems for enforcement. This is a familiar charge, but Uviller's book is valuable because it is a comprehensive indictment of the entire 'virtual justice system.' Many other scholars have pointed to the defects of particular rules, e.g. relying on eyewitness identification, excluding evidence simply to teach police officers lessons, and the like, but to our knowledge no other prominent American law professor (as opposed to, say, a radical criminologist) has issued such a sustained, stinging, and sweeping indictment of the entire system of criminal procedure in the United States. (And it is refreshing to see this done in a book by a law professor which has not a single footnote or reference.)

Still, when you get down to it, despite his attack on the entire system and his expressed desire to beef up the quality of defense counsel, Uviller envisions a system that fits comfortably within Packer's Crime Control Model: fewer and simpler rules, greater

deference to authority, firmer justice, more concern with the maintenance of order. Some of his suggestions go beyond the usual list of ideas: he proposes to get guns off the street by sending police into troublesome neighborhoods to conduct massive and unexpected warrantless stops and searches. Who cares if the arrests do not – or cannot – result in criminal prosecutions? Guns will be confiscated and out of the hands of bad guys. Uviller also wants to eliminate the requirement for written affidavits in support of warrants and to replace them with telephone authorization in order to speed up the warrant process.

By issuing such a stinging indictment of the existing system and by suggesting reforms such as these, Uviller reveals himself as a contemporary New Yorker, Mayor Giuliani's type of guy. But his experience as a federal prosecutor may color too many of his judgments. His understanding of the criminal process on-the-ground appears to be skewed by this experience. For example, in his chapter about prosecutors, Uviller describes his frustration with the overly complicated procedures needed to co-ordinate wiretaps in order to investigate a terrorist cell. While his argument may be convincing, this problem is not illustrative of the issues that face the overwhelming majority of law enforcement officials in their everyday crime fighting duties. This is not to say that the experience of federal prosecutors is not relevant, but they do operate in a rather rarefied atmosphere. Too often, these reviewers think, the author envisions problems faced by federal prosecutors and thus neglects the context in which the vast majority of crimes are investigated and prosecuted. One wishes he had applied his concerns more consistently to the sorts of cases and problems that Humes confronted in Bakersfield. Would he still be so willing to embrace expedited, simplified procedures? To defer so easily to authority? Humes understands the problems in Bakersfield to be an unwillingness or inability to do things carefully, to go by the rules. Uviller understands the problems to be the overabundance of such rules. It would have been nice to see Uviller address the sorts of issues raised by Humes.

In these two books, once again we see the tension Herbert Packer distilled so neatly in his two models. As extreme examples, neither may add much that is new to discussions of the criminal process. Still, these are important and worthwhile studies. Humes describes pervasive ineptness, incompetence, and worse in a large city in California, a state known for its tradition of good government and civic-mindedness, and finds that the component parts of the adversary process failed to work as the Due Process Model expects they should. Uviller's book vigorously attacks the Due Process Model itself, arguing that it is in fact the source of the problem. In its stead, he would construct a more streamlined alternative that would do a better job at crime control. One wonders how a more crime control-oriented system would deal with the sorts of pathologies Humes describes. Perhaps it would have more aggressive supervision at the state level, which would lead the attorney general to police the process. Uviller's well-intentioned prosecutors might not need this oversight, but Humes convinces us that at least for some communities, even in a state generally known for good government, some strong controls on law enforcement are needed.

William Pizzi's *Trials without truth* shares the other two authors' views that the American criminal process is flawed in the extreme, but like Uviller and unlike Humes, he leans toward the crime control end of Packer's continuum. Like Uviller, he too is a former federal prosecutor, and he shares the concern that the complicated rules have 'gotten out of hand.' However, his diagnosis and indictment of the American criminal

trial system focuses almost entirely on the use and abuse of the rights accorded to criminal defendants under American law. He argues that defendants are – literally – getting away with murder (and rape, and robbery, and assault, etc.), not because of failings in the administration of justice, but because our laws provide for this result. But his is not the usual argument that there are too many 'pro-defendant' rules. Rather, he attacks the value of rules more generally.

Indeed, his book may be considered an attack on what he sees as an American obsession with rules, and Americans' preference for allowing questions about rule adherence to stop the action. He draws about as many examples from sports as from criminal trials. He contrasts, unfavorably, the obsession with rules and their consequences (stopping the action) in American football, with a more relaxed view of rules in European soccer, where violations do not stop the action. He then compares these sports examples with the way rules function in criminal trials. The fetishized use of rules undermines meaningful competition in American football in much the same way that rules meant to protect the rights of criminal defendants distort the truth-seeking functions of the criminal trial. In both cases, he argues, we should look to Europe for reforms, not necessarily to displace football with soccer and the adversary process with the inquisitorial process, but for ideas on how to relax our fixation on rules in order to develop a system that better focuses on the substance of outcomes.

At the heart of *Trials without truth* is the contention that justice in the USA should strive to promote truth, and that policies and rules must be evaluated according to their truth-seeking effectiveness. Any policy or rule which does not increase the production of truth in the courtroom is, therefore, contrary to justice and should be eliminated or modified. In writing only about the truth-seeking function of criminal trials, the author fails to mention that the American justice system was founded on two competing values: the discovery of truth and the need to keep government within recognized lines. As Packer and others have noted, these values are typically in tension in our system, as various rules promote one at the expense of the other. By ignoring the 'restrain authority' value, Pizzi can easily criticize many American procedural requirements because they get in the way of finding truth.

Like Uviller, Pizzi writes for a general audience, in a breezy style, with few footnotes (though with a helpful list of additional readings at the end of the book) and generally without data. Although this adds to the advantage of quick readability, it has disadvantages as well. At times his discussion reads like a cocktail party diatribe by a disgruntled citizen; too often the author presents only one side of an issue and yet presents that side as if it were a balanced and comprehensive analysis. For example, the author regards *Miranda* rules as truth-impeding, and suggests that we should eliminate this impediment to the use of defendants' statements. In so arguing, he ignores the persuasive social science evidence collected in the past several decades that documents police officers' uncanny ability to work around *Miranda*'s guidelines, or to use *Miranda* to their own advantage. Nor does he weigh seriously the arguments in favor of the exclusionary rule. More generally his book is a comprehensive indictment of several features of the American criminal justice system: weak judges, irresponsible juries, exclusionary rules. Rather than taking a balanced look at each of these institutions or practices, he tends to contrast the grubby reality of American practice with an idealized but unarticulated vision of a European, inquisitorial model.

This approach is odd since elsewhere Pizzi (Pizzi, 1993) has warned against comparing the American criminal justice system against those in Europe because the cultures and legal systems are so different. Yet here, he comes dangerously close to ignoring his own earlier advice. Much of his analysis is couched in an implicit preference for European practices (i.e. he prefers the rules, and the approach to rules, in soccer to those in American football etc.). Pizzi even includes a chapter comparing the criminal justice systems of Germany, the Netherlands, and Norway (as well as the fewer rights enjoyed by defendants in England) with the American system, and arguing that those systems are superior to the American system. His description and analysis of these other systems, however, are both thin and almost entirely restricted to doctrinal analysis. He does not provide systematic data to compare how both sets of systems function 'in action.' Rather, he tends to contrast American practice with European theory. Thus, for instance, he contrasts pervasive plea bargaining in the United States with its absence in European nations, and cites doctrine rather than practice for the latter. One need not be a defender of either American theory or practice, to argue that this type of analysis subjects the American system to an unfair comparison – the harsh reality of American law-in-action versus the niceties of European-style theory or law-on-the-books. And although the comparisons with Norway and the Netherlands are not without use, one wonders what might be made of a comparison with Italy, which, given its political culture of individualism and resistance to governmental authority, might serve as a more useful comparison with the USA than Norway or the Netherlands.

Both Pizzi and Uviller place much of the blame for the USA's unwieldy rule-based system upon the role of juries. They argue that the jury system has led to a vast network of rules to ensure that the jury hears only relevant, non-prejudicial information in deciding a defendant's guilt; the jurors need this rule filter because we cannot trust them to distinguish the wheat from the chaff. Eliminate the jury, these authors claim, let the judge decide the issues, and we can get rid of all of these truth-impeding rules. This might be true, but then again it might not be. One wishes that they had confronted the arguments of Mirjan Damaska and his critics on this point. Or perhaps they should have considered Israel, a country with an adversarial system and no jury, but which is nevertheless encumbered with bewildering rules of evidence and criminal procedure, or Italy, with its inquisitorial system but endless delay, its tendency to impose sanctions via pretrial detention, and its statutory inducements to plea bargain. And of course there is the troublesome Sixth Amendment.

Uviller and Pizzi might have anchored their discussions in more systematic frameworks, perhaps the one elaborated by Mirjan Damaska (1986) in his small but magisterial book, *The faces of justice and state authority*. In this book, Damaska shows the ways in which a society's legal system is grounded in and reflects its larger political culture. Damaska's book is descriptive and analytical, but its implicit message for those interested in criticism and comparisons is that if political culture shapes the legal and judicial process, reforms in that process should emerge within the context of that culture. Pizzi and Uviller come dangerously close to ignoring this admonition, and Pizzi may be guilty of comparing American reality to European theory, an all-too-familiar problem in many implicitly casual critical comparisons.

At a minimum, one wishes both authors had come to grips with a deeper understanding of the foundations of the adversary system and had aimed their criticisms at

the deeper structure, including culture, in which the Anglo-American legal process is anchored. There is no doubt that American adversarial legalism has expanded to new extremes in the last half-century, and that American criminal courts in the big cities are facing disaster. But to rail about it, to pile example after example of horror stories, over it, or to wistfully look to European procedural successes or to Rambo-like quick fixes is no substitute for careful analysis of the legal foundations of these problems. For instance, each of the authors could have provided a more subtle analysis and discussion of a variety of practices within the United States. Stephen Schulhofer (1984) has produced two magnificent studies of a large city's (Philadelphia) criminal justice system that uses bench trials rather than plea bargains to dispose of cases with dispatch, and to show that dispatch is not inconsistent with fairness. Practices in that city appear to produce much (though not all) of what both Uviller and Pizzi would want a trial process to accomplish. Professor Uviller's frustrations with the federal system notwithstanding, it operates tolerably well when compared to the chaos in most state-based systems. Finally, both authors might reasonably have reflected on a wonderful study, *Felony Arrests*, by New York City's Vera Institute of Justice, published in the 1970s. The authors of that study emphasize a point that is obvious but nevertheless often overlooked when criticizing the American criminal process: it is a dumping ground for a variety of complicated and confusing problems. For instance, they point out that a great many criminal cases involve people who know each other quite well, and that the particular 'crime' for which someone has been arrested and prosecuted is in fact only one incident in a complex history of conflict and confrontation. Such cases, they argue, though containing all the elements of a 'real' criminal offense, are often thought of by all those involved – the victim, the arresting officer, the defense attorney, the prosecutor, judge, probation officer, and the like – as a 'technical' rather than 'real' crime and thus are handled differently. Much of the chaos and seeming chaos of the criminal process stem from this single fact. Perhaps Uviller's appeal for greater discretion would help officials manage these problems, but a move toward European-like full prosecution and restricted discretion such as Pizzi seems to favor would not. These are but some of the issues that one wishes the authors had begun to explore in some detail.

But to wish for this type of analysis may be to insist that the authors had written different books, and perhaps it is a point that is not fair for reviewers to make at all. However, given their current formulations, we suspect that none of these books is likely to change anyone's mind. Each of them presents archetypes readily familiar to everyone in this media-conscious age. Humes' book is a contemporary adult western. The situation cries out for Gary Cooper or Jimmy Stewart, or perhaps the Lone Ranger, to ride into town to teach sternly the locals how to own up to their responsibilities. Instead the good folks continue to look the other way while officials exploit the legitimate fear of crime for personal gain. Uviller at times appears to want to unleash Rambo, or perhaps just (vintage) Mayor Giuliani, to set things right. And Pizzi wants us to love soccer; if we could only relax about rules and their violations, he suggests, we could have a different attitude toward criminal procedure.

If we sound a bit skeptical, we are. We are leery of contrasting grubby reality against an idealized alternative and then pressing for this alternative, as these authors (and particularly Uviller and Pizzi) seem to want. It can have less than salutary consequences. Consider the move for sentencing reform that began some 25 years ago. The movement

was fueled in part by several popular books that attacked 'lawlessness' in sentencing and called for widespread reform. These books tended to contrast the lawlessness of sentencing with an idealized picture of structured, principled sentencing. Twenty-five years later we have 'truth in sentencing,' determinate sentencing, sentencing guidelines, and the like, as well as a quadrupling of the prison population. We also have, by a great many accounts, an increase and not a decrease in disparity of outcomes, especially along racial lines. Uviller's and Pizzi's books remind us of these earlier books attacking the evils of the existing sentencing systems and contrasting them with the promises of an idealized alternative. If so, the experience in the aftermath of the reforms brought about by these popular attacks on sentencing in the 1960s and 1970s should be kept in mind as these books, and especially Uviller's and Pizzi's, are read. Indeed, we are tempted to urge readers – especially those who read this journal – to understand these books in the context of the cultural politics of law and order.

Over the past few years, Katherine Beckett, David Garland, Stuart Scheingold, Jonathan Simon, Tom Tyler and others have reminded us that much of the discussion about sentencing 'reform' and appropriate punishments must be understood in terms of governing through crime, the exploitation of personal insecurity for political gain, and symbolic politics. They remind us that one of the reasons that this and other 'reform' messages are so salient is that they strike a chord during periods of rapid social change which heighten a sense of personal insecurity in a substantial portion of the population. If so, this may be the case with Uviller's and Pizzi's books: they are simple and powerful criticisms of what admittedly is a mess; they pose simple and appealing changes. They envision dramatically different alternatives. Their style and approach is reminiscent of the criticisms of 'lawless' sentencing that appeared 25 years ago. If our comparison is apt, Uviller's and Pizzi's books may be the harbinger of a steady stream of such criticisms that culminates in 'truth in procedure' and 'truth in evidence' reforms (though abolition of the jury system may prove to be beyond their reach). If this is the case, one hopes that the results are more salutary than those of the so-called sentencing reforms that have been so widely embraced in the United States in recent years.

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