McGeorge Law Review

Volume 33
Issue 4 *Symposium: Leadership Issues in Criminal Justice Policy*

Article 7

1-1-2002

Victims' Rights Reform - Where Do We Go from Here? - More than a Modest Proposal

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I. INTRODUCTION

It is hard to believe that over twenty years have passed since the Rose Garden ceremony at the White house, where President Reagan accepted the final report from his Task Force on Victims of Crime.[1] The report contained a number of modest recommendations for improving the lot of crime victims in the criminal justice process, including providing a separate courthouse waiting room for victims, training judges concerning victims' needs and interests, and allowing victims to be on-call as witnesses.[2] The report also recommended that victims of violent crimes be given the right to provide input during the sentencing phase of the trial.[3] Although this right to allocution during sentencing has now become a standard component of criminal trials in most jurisdictions, at the time it was viewed as a radical proposal that might seriously damage the integrity of the criminal justice process. This innovation was opposed not only by defense attorneys and judges but also by many district attorneys, who saw it as an erosion of their discretion to control the prosecution of criminals. After all, they argued, it was the people's interest, not the interest of the actual victim, that was being advanced by the prosecution of criminals. In retrospect, what seemed to be radical proposals that would corrupt the criminal justice process now seem to be mere nibbling around the edges of a process that is of significant importance to victims of crime.

During the past twenty years, there have been proposals for even more significant involvement of victims in the criminal justice process. For example, Professor George P. Fletcher has suggested that victims be given the right to cross-examine witnesses during the actual criminal trial and the right to veto plea bargains; both help ensure that "the purpose of the trial is to stand by the victim."[4] In his critique of Professor Fletcher's book, Professor Stephen J. Schulhofer responds to this premise as follows:

> The point that needs to be made first here is that the purpose of the criminal trial is not to stand by the victim. The purpose of the trial is to determine whether the defendant is factually and legally responsible for an offense. Indeed, the Supreme Court has sometimes implied that this truth-determining function should be virtually the *sole* task of the criminal trial.

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1. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (Dec. 1982).
2. *Id.* at 72.
3. *Id.*

> Presently, our society remains committed to a small number of devices that can sometimes interfere (mostly in modest ways) with the primary truth-seeking function of the trial. But we remain acutely aware of the costs of procedural rules that serve goals other than determining the truth, and we are rightly suspicious of efforts to burden our trial process by adding more rules of that sort.[5]

Most crime victims would certainly agree with Professor Schulhofer's conclusion that the primary purpose of the criminal trial should be to determine the truth. However, after twenty-five years of serving the interests of crime victims, I am convinced that most crime victims do not believe that the current criminal justice system does a good job of determining the truth. Few crime victims would agree with Professor Schulhofer's assertion that there are merely "a small number of devices that can sometimes interfere (mostly in modest ways) with the primary truth-seeking function of the trial."[6] Moreover, even though Professor Schulhofer seems to applaud the ability of our current criminal justice process to ascertain the truth, he later acknowledges that "[o]nly the most determined Polyanna or bar association cheerleader can continue to lavish unbridled praise on modern America's criminal trial system."[7] It is likely that if the current criminal justice system could establish the truth, crime victims would not be so eager to force themselves directly into that process. Although it is highly unlikely that crime victims want the wrong persons convicted of the crimes perpetrated against them, they nevertheless have the most direct interest in ensuring that the criminal justice system does not get in the way of establishing the guilt of the persons who in fact committed the crimes. Most victims believe in due process and the rights of the accused. In fact, it is some of those same basic rights that victims want for themselves.

Now I turn to "more than a modest proposal." I propose that a new Victims of Crime Task Force be empanelled to study the current criminal justice system. The Task Force should engage in a top-to-bottom review and should make recommendations concerning modifications to the criminal justice system that would strengthen its truth-seeking function. It should closely and critically study any part of the criminal justice system that hinders the search for truth.

In performing the recommended review, the new Task Force could learn much from the approaches used in the field of administrative adjudication. I spent the last thirty years focused on administrative adjudication by training adjudicators, consulting with administrative agencies, and administering hearing systems. Although many who practice in the courts may find impertinent the suggestion that the courts might learn something of value from the way administrative adjudicators approach their responsibilities, the reality is that the procedures used in administrative adjudication

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4. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS RIGHTS IN CRIMINAL TRIALS 256-57 (Addison-Wesley 1995).

5. Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 840 (1995) (footnotes omitted).

6. *Id.*

7. *Id.* at 855.

are in many respects better designed to arrive at the truth than the procedures used in courts. Most appropriate to a study by the Task Force in examining the court's truth-seeking function would be the application of the exclusionary rule, the traditional rules of evidence, various privileges, and the role of the adjudicator.

II. THE EXCLUSIONARY RULE

It would have been hard to convince the relatives of the three women murdered at Yosemite that the criminal justice system was concerned with seeking the truth had the court excluded Cary Stayner's confession because of some technical errors made by the police while informing him of his rights. Although Stayner's confession was ultimately not suppressed, the mere thought that such evidence could be hidden from a jury is enough to cause crime victims to lose their faith in the criminal justice system. It is not novel to suggest that the effectiveness of the exclusionary rule be reassessed. That debate has raged for years, with those defending it asserting that to eliminate the rule would be an attack on the integrity of the Fourth Amendment and that only the exclusionary rule can protect the constitutional provision against unlawful search and seizure. However, the undisputed fact is that the application of the exclusionary rule does get in the way of ascertaining the truth and not merely in a "modest way," as Professor Schulhofer contends.[8]

In the area of administrative adjudication, the courts recognized how seriously the application of the exclusionary rule would interfere with the truth-seeking role of the administrative tribunal and therefore concluded that the truth-seeking function of the administrative tribunal was more important than the limited deterrence that would have occurred from application of the exclusionary rule.[9] Why is the need for ascertaining the truth not of equal importance in deciding whether a person is guilty of committing a crime?

By attacking the use of the exclusionary rule, I am in no way implying that legal authorities should be allowed to violate the constitutional rights of citizens, whether innocent or guilty. Rather, the cause for concern is the ineffectiveness of the exclusionary rule in providing appropriate deterrence to law enforcement misconduct, especially in relation to innocent citizens. The only justification for a rule that so egregiously interferes with the truth-seeking purpose of a criminal trial is that it does an effective job of protecting all citizens against misconduct by the police.

When innocent citizens have their rights violated by the authorities, they have the right to complain and attempt to seek civil damages. When guilty criminals have their rights violated, they too can complain and seek civil damages, but they may also be entitled to a get-out-of-jail-free card through the application of the exclusionary rule.

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8. *Id.* at 840.

9. *See, e.g., In re* Martinez, 1 Cal. 3d 641 (1970); Governing Bd. v. Metcalf, 36 Cal. App. 3d 546 (1974).

I am unaware of any evidence that the exclusionary rule is truly effective in protecting the rights of all citizens. Perhaps the Task Force should not only address the efficacy of the exclusionary rule, but it should also explore more effective ways of providing real deterrence to police misconduct without interfering with the primary truth-seeking function of the criminal trial.

Here again, administrative adjudication may provide a possible effective alternative. States could create an administrative tribunal that would do nothing but adjudicate the issue of whether public authorities have violated the constitutional rights of citizens. In those cases in which violations are found, the tribunal would be empowered to assess damages against both the public agency and the public officials involved. Such a tribunal would gain special expertise in evaluating such claims and would provide insulation from the kind of emotional pro-police responses to which a jury might be vulnerable. The decisions of the administrative tribunal would of course be subject to appeal to the appropriate courts, but the court's review of the facts should be limited by use of a substantial evidence standard of review. Such an approach would provide equal access to an appropriate remedy for police misconduct to both law-abiders and law-breakers.

If such an administrative enforcement approach were coupled with an attempt, by statute or amendment of a state constitution, to eliminate the exclusionary rule, it is likely that the Supreme Court would take a fresh look at the constitutional necessity of the exclusionary rule.

III. RULES OF EVIDENCE

A wise man once stated:

> The Anglo-Saxon law of evidence may be compared to a soundly rooted and once symmetrical tree which in the course of years has become lopsided, full of dry rot and so entangled with vines and creepers that it not only obscures the light but it is impossible to tell which are branches and which are parasites.[10]

Application of the rules of evidence can also interfere with the truth-seeking function of the criminal justice process.

What most poignantly distinguishes administrative hearings from court trials is that administrative hearings are not bound by the "formal" rules of evidence. For instance, hearsay evidence is admissible in most administrative hearings. In one decision, a court stated:

> The notion that hearsay should be admitted and given its natural probative effect is no longer novel. It is one of the principal distinguishing features of administrative procedure. The desire to escape from the rigidity of common

10. ARTHUR CHENEY TRAIN, YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT 349 (Charles Scribner's Sons 1943).

> law rules of evidence, often highly technical, with the expense, inconvenience and delay entailed in adhering thereto and the inability of the courts to expeditiously dispose of controversies arising under regulatory statutes, led to the creation of a multitude of administrative tribunals which are rapidly preempting a field once considered to be the exclusive domain of the courts. Whatever may be their shortcomings, it does not appear that the liberalization of the rules of evidence is one of them.[11]

The hearsay rule is anachronistic and often interferes with getting at the truth. The O.J. Simpson murder case is a good example of how the hearsay rule got in the way of the jury's having the necessary evidence to ascertain the truth. Applying the hearsay rule, the judge excluded portions of the victim's diary that recorded instances of domestic abuse. That information might have been helpful to the jury in trying to determine whether the defendant had a propensity for violence. The exclusion of this evidence caused such an uproar that a new exception to the hearsay rule was enacted by California's Legislature relating to diaries of domestic abuse victims.[12]

Rather than eroding the hearsay rule with adhoc measures based upon individual cases, the new Task Force should take a hard look at the hearsay rule itself. Rather than complex and rigid rules that attempt to anticipate the value of all future evidence of a certain kind, why not enact a rule that allows the judge in his or her discretion to exclude evidence based upon an examination of that evidence in the light of the specific case? Such an examination would be based upon such factors as relevance, reliability, cumulativeness, and possible prejudicial effect. Using such a standard of discretion, a judge could determine on a case-by-case basis whether a specific piece of evidence would assist or interfere with the jury's determination of the truth of what occurred. As an alternative to excluding evidence, a judge could decide to admit problematic evidence with appropriate instructions to the jury on how to evaluate the evidence.

The Task Force should review all of the formal rules of evidence to determine whether there are better ways of controlling the introduction of inappropriate evidence while at the same time not concealing important information that would assist the fact finder in ascertaining the truth.

IV. PRIVILEGES

The new Victims of Crime Task Force should also take a close look at all privileges. The number of communications subject to privileges continues to grow. By their very nature, privileges are obstacles to ascertaining the truth. That is not to say that all privileges should be eliminated, but the Task Force should take a fresh

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11. Oceanic Fisheries Co. v. Alaska Indus. Bd., 109 F. Supp. 103, 104 (1953).
12. CAL. EVID. CODE § 1370 (West Supp. 2002).

look at them to determine whether the interests being protected by a specific privilege are, in fact, weighty enough to justify its use in concealing otherwise valuable evidence. Additionally, the Task Force should address whether some privileges should be "qualified" rather than "absolute." If a privilege is qualified, the judge can review the content of the privileged communication in camera, in the context of the specific case, and determine whether the values being promoted by the privilege are outweighed by the need for the evidence in making an accurate determination of the truth.

By questioning the value of privileges, I run the risk of alienating victim advocates urging the creation of a privilege for victims' counselors. But whether a new privilege for victims' counselors should be created and whether it should be absolute or qualified should be guided by a balancing of the value of protecting the communication with the need for the information in arriving at the truth. The same test should be used in analyzing all privileges.

The new Task Force should also address the question of why a jury or a judge should not be allowed to draw an adverse inference from the refusal of a criminal defendant to testify in his or her defense. California Supreme Court's Chief Justice, Roger Traynor, a leading liberal jurist of the 1960s, stated:

> [I]t cannot be overemphasized that whether or not the court or prosecutor comments on the defendant's failure to testify, the jury will draw adverse inferences therefrom. It will expect the defendant to present all the evidence he can to escape conviction, and it will naturally infer that his failure to explain or deny evidence against him when the facts are peculiarly within his knowledge arises from his inability to do so. "Such an inference is natural and irresistible. It will be drawn by honest jurymen and no instruction will prevent it."[13]

Why should courts continue to be required to preclude prosecutors from commenting upon and juries from using the failure of a defendant to testify in his or her defense?

In relation to an administrative hearing, the United States Supreme Court held that prison authorities could draw an adverse inference from the prisoner's refusal to testify during a prison disciplinary hearing.[14] If truth seeking is the primary purpose of a criminal trial, why should an adjudicator be precluded from making logical inferences from a defendant's refusal to testify?

V. ROLE OF THE JUDGE

The new Task Force should also address the role of the judge in our criminal justice process. If seeking the truth is the primary purpose of criminal trials, why is the role of the judge limited to that of an umpire? Judges supposedly are the most

13. People v. Modesto, 62 Cal.2d 436, 452 (1965) (quoting Parker v. State, 39 A. 651, 654 (N.J. 1898)).
14. Baxter v. Palmigiano, 425 U.S. 308, 320 (1976).

intelligent, skilled, and experienced legal professionals in the process; nevertheless we do not allow them to actively participate in developing the record.

The role of the adjudicator marks another significant difference between most administrative hearings and court trials. In many administrative hearings, the adversary hearing model of seeking justice simply will not work. In some hearings, one party to the dispute is not even present during the hearing.[15] In other cases, only one side is represented. In many administrative hearings, non-attorney advocates of varying degrees of competence attempt to represent parties. Administrative adjudicators cannot count on all necessary evidence being adduced by competent advocates on both sides. The adjudicators are therefore required to play an active role in developing the evidence necessary to make the correct rulings. Justice Brennan referred to this approach as the administrative adjudicator's "duty of inquiry."[16]

Similarly, the Institute for Administrative Justice at McGeorge School of Law has taught thousands of administrative adjudicators to use what it calls the "truth seeker" model of adjudication. The "truth seeker" model applies to all administrative adjudications no matter what the level of representation. If neither party is represented by an attorney, the adjudicator has an affirmative duty to develop the evidence that he or she will need to make the correct decision. If both sides are represented by attorneys, the degree of active participation by the adjudicator is reduced, but not totally eliminated. If the attorneys fail to ask an important question of a witness, the adjudicator is expected to ask the question. If a crucial witness is not called by the attorneys, the adjudicator is expected to call the witness. In this way, it is hoped that the adjudicator can remedy any shortcomings of the adversary hearing approach on a case-by-case basis.

In the author's experience, the level of representation in many criminal trials falls short of that necessary to ensure the complete development of the evidence. Overworked district attorneys and public defenders with impossible case loads cannot provide the kind of representation necessary, under the adversary hearing model, to develop a full and complete record upon which to determine the truth. Why not empower the judge in a criminal trial to do what is regularly expected of administrative adjudicators: to ask questions and take other measures necessary to produce a record from which truth can be divined. Of course, as with the administrative adjudicator, the judge must be required not to advocate for either side, but merely to develop the information necessary to make an informed decision.

California law provides hearing officers who conduct special education hearings with certain enumerated powers that they can exercise to ensure the development of a complete record upon which to base a decision.[17] Similar express powers could be

15. The agency that conducts more hearings than any other in the United States is the Social Security Administration. Normally, no one appears in Social Security hearings to represent the agency's initial decision. Typically, only the administrative law judge, the claimant, and, in some cases, the claimant's representative appear at the hearings.

16. Heckler v. Campbell, 461 U.S. 458, 471 (1983) (Brennan J., concurring).

17. CAL. EDUC. CODE § 56505.1 (West Supp. 2002).

granted to judges in criminal trials. The powers given the hearing officer apply whether the parties are equally represented or not. These powers are explained in the subsections that follow.

A. *Question Witnesses*

While it is common practice for administrative adjudicators to ask questions of witnesses *after* questioning by the parties or their representatives, the law in California was amended to provide that the hearing officer can ask questions *before* anyone else has.[18] In Social Security hearings, the administrative law judge or hearing officer typically asks his or her questions before anyone else, including cases in which the claimant is represented. This approach is especially important where the parties or their representatives do not know how to ask questions or are not sure what is or is not relevant. Many adjudicators who use this practice believe that it makes for a much more orderly and complete record.

It has been the author's experience that even when both sides of a dispute are well represented, sometimes neither attorney will ask a key question of the witness. One may know that the answer to the question will be contrary to the interests of his or her client, and the other attorney may not be sure of the answer and is therefore hesitant to ask the question. In such a case, it is expected that the hearing adjudicator will ask the key question, not because the adjudicator is trying to advance the cause of either side, but because an answer to the question is necessary in getting at the truth.

Our criminal trials should be more than games. If a question needs to be asked and answered to determine the truth and neither side asks the question, the judge should do so.[19] The alternative is to possibly lead the jury to an incorrect conclusion. Some would insist that the remedy for a representative's failure to ask a key question is a malpractice lawsuit by the injured party against the negligent attorney. Is that really a satisfactory remedy? Criminal defendants often have difficulty suing their attorneys, and victims of crime would not have standing to sue a derelict district attorney for malpractice. Why not expect the best qualified, most neutral person in the trial—the judge—to ask appropriate questions in order to develop a complete record upon which a correct judgment can be rendered? Of course, there are hazards to having judges ask questions. However, if judges are properly trained and conditioned not to ask leading questions and not to inadvertently send inappropriate messages to the jury, increasing the involvement of the judge in questioning witnesses can increase the likelihood that jury or the judge will arrive at the truth.

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18. *Id.* § 56505.1(a).

19. It is interesting to note that one of the criminal justice reforms urged by Professor Fletcher was to allow the members of the jury to submit questions to the judge. If the judge felt the questions were appropriate, he would ask the question of the witness. While this sounds like a valid method of expanding the truth-seeking nature of the criminal trial, why not let the judge ask questions on his or her own when the question is necessary in the search for the truth? *See* FLETCHER, *supra* note 4, at 253-54.

B. *Call Witnesses*

The law in California allows special education hearing officers to call witnesses who they believe will assist them in arriving at the truth.[20] In the adversarial process, sometimes neither side wants to call a particular witness who may have critical information. On occasion, in special education hearings, neither side calls as a witness the student's teacher, the person who has had more experience with the child in an educational setting than anyone else. The school authorities may be afraid that the teacher will not completely support their position, while the parents may see the teacher as an adverse witness who might provide testimony damaging to their position. The result under the strict adversary hearing model would be a decision rendered in the absence of some of the best evidence available. In the "truth seeker" model of adjudication, the hearing officer can request, or even subpoena, the teacher as a witness. Surely, the same thing happens in criminal trials: an important witness is not called by either side for what both sides think are good reasons. Why shouldn't judges be given the authority and responsibility to call and question such witnesses when necessary to facilitate their search for the truth?

C. *Order Independent Evaluations*

In special education hearings in California, most disputes involve conflicting expert opinions (usually of psychologists) concerning the child's disability, its affect on the child's ability to learn, and the appropriate educational program for the child. Under California law, the special education hearing officer has the authority to order an independent evaluation of the child when the hearing officer believes that the evaluations performed by the parties were not appropriate or complete.[21] The hearing officer may then call the independent expert as a witness in the hearing.

It is not uncommon for a judge in a criminal trial to order an independent evaluation of a defendant pleading not guilty by reason of insanity.[22] Why not broaden the authority of the court to order independent evaluations under any circumstances in which the judge believes that such an evaluation will assist the jury or court in ascertaining the truth concerning a matter that requires the testimony of an expert witness?

D. *Order the Experts to Talk to Each Other*

One of the most innovative powers given to special education hearing officers is the authority to require the competing experts to discuss the case with each other on

20. CAL EDUC. CODE § 56505.1(d).
21. *Id.* § 56505.1(e).
22. CAL. PEN. CODE § 1027 (West 1985).

the record.[23] This approach can be used to supplement the traditional way of separately questioning each expert witness or can be used as an alternative. In many cases, the experts' opinions concerning a child are so different that the hearing officer wonders if the experts are talking about the same child. But most experts subscribe to certain professional standards that provide a framework for arriving at accurate expert opinions. In my experience, having the experts talk to each other on the record has resulted in one of two outcomes. In some cases, the experts will gradually move toward a consensus as they discuss with each other their separate approaches to reaching their opinions. While the experts may not reach complete agreement, the adjudicator at least has a better idea of the basis for the remaining differences. In other cases, one or both experts appear to be unwilling to even consider the validity of any opinion but their own. They appear to be "hired guns" who were retained as witnesses to provide specific testimony rather than to formulate a true, impartial professional opinion. With either outcome, the exchange between the competing experts can be quite helpful to the hearing officer in arriving at the correct decision.

The examples above identify just some of the innovative ways that our criminal justice system can be modified to achieve the accepted goal of the process—to get at the truth.

VI. VICTIMS INVOLVEMENT IN THE CRIMINAL JUSTICE PROCESS

As mentioned earlier, there have been a number of proposals over the years to provide victims with rights to participate in various aspects of the criminal justice process, from allocution at sentencing to active involvement in the guilt phase of the criminal trial. The new Victims of Crime Task Force should analyze these proposals in the same way that it should examine all current elements of the criminal justice process. Each element or proposal should be classified in one of three categories that follow.

A. Procedures that Advance the Search for Truth

If it is concluded that an existing or proposed procedure advances the search for truth in the criminal justice process, the Task Force should recommend that the procedure be included in the reformed criminal justice process unless there are substantial reasons militating against its inclusion. For instance, if a procedure is deemed to advance the cause of truth in a minimal way but its inclusion would consume an enormous amount of time, it might not be appropriate to recommend its inclusion. However, if the procedure provides substantial assistance in the search for truth, its shortcomings must be significant to exclude it from the proposed system.

23. *See* CAL. EDUC. CODE § 56505.1(b) (requiring the consent of both parties prior to the discussion between competing experts).

B. Procedures that Inhibit the Search for Truth

If a procedure is deemed to inhibit the search for truth, it should presumptively be excluded from the criminal justice system unless its inclusion is supported by a significant countervailing public policy. Again, the degree that a procedure inhibits the search for truth must be weighed against the importance of the public policy supporting its inclusion.

C. Procedures that Neither Advance Nor Inhibit the Search for Truth

If a procedure has no effect one way or the other on the truth-seeking goal of the criminal justice process, its inclusion or exclusion should be determined by balancing the benefit and the burden of its inclusion. This is important because some of the proposals relating to victims' participation in the criminal justice process may be justified because they benefit the victim, not because they have a significant effect, either positively of negatively, in arriving at the truth. A similar problem can be found in the right of the victim to be heard at the time of sentencing. The exercise of this right may provide little assistance to the court in determining the truth, but it may provide great benefits to the individual victim. Therefore, unless the right to allocution causes a significant burden on the criminal justice process, it should be retained in the Task Force recommendations for reform of that process.

VII. CONCLUSION

While this presentation has only scratched the surface, the new Victims of Crime Task Force should look at all elements of the criminal justice process and make recommendations that, if adopted, would enhance the likelihood that truth would be the end product of the criminal trial. The Task Force should then make its findings available to all policymakers, both state and national, and assist them in pursuing those recommendations. Some recommendations may necessitate a change of federal or state statute, and some may require amendments to federal or state constitutions. Many, if not most of the recommendations, will most likely be opposed by judges, criminal defense attorneys, and maybe even prosecutors. But one of the benefits of the development of the victims' rights movement is that there is now a powerful constituency for those most directly affected by crime—the victims. And even if crime victims find it hard to persuade Congress or state legislatures, there are always states like California, which has been a pioneer in the field of victims' rights where the people have the right through initiatives to directly enact changes to the law or amendments to the Constitution.

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