The Future of the Adversary System

Stephen J. Schulhofer

The American legal system is plagued by too many trials, too much adversarial behavior and indeed, too much law. These themes, repeated over and over in popular journals and reinforced by the pronouncements of former Chief Justice Warren Burger, Harvard University President Derek Bok, and a succession of Attorneys General and A.B.A. presidents, have now attained the status of received wisdom. But the premises underlying these claims are controversial, uncertain, and in some respects demonstrably untrue. I want to comment briefly on these broad claims and then consider more specifically their application to the criminal justice system, where concern about excessively adversarial behavior is most strikingly out of touch with reality. In criminal justice we already have a system dominated by cooperative, non-adversarial relationships, and in nearly all cases dispositions mutually satisfactory to the parties are achieved by negotiation or by a form of mediation under the informal auspices of a judge. What we need in criminal justice is not more cooperation but a return to formal, vigorously adversarial procedures.

Hyperlexis?

The colorful claim that we are suffering from "hyperlexis"—too much law!—assumes a yardstick that could indicate the "quantity" of law we ought to have. It is probably true that there are vastly more statutes and administrative regulations applicable to business behavior currently than there were at any time in our past. It is also true that technological processes, industrial machinery, and everyday products have vastly greater potential for causing individual or social injury than ever before. And there has been a vast increase in knowledge about the causes of injuries, about the noxious effects of unrestrained air and water pollution, and about technologies for preventing these harms. We are an ever larger, more complex and more interdependent society. We need more law. Of course, regulation is costly, and sometimes its goals can be achieved more efficiently by free market processes (enhanced and protected by laws). Sometimes we have the wrong laws. At the same time, there still remain areas in which we do not have enough law.

A Litigation Explosion?

Because we have so much more law, and so much more knowledge about the causes of individual injuries, one would expect to see a vast increase in the amount of litigation. The surprising fact is that the alleged litigation "explosion" is to a great extent a myth. Impressions about the burgeoning volume of litigation have been fueled by federal court statistics, which do show a substantial increase in case filings and in appeals over the past several decades, and by sensational press coverage of a handful of unusually complex cases. But the federal courts, though prominent in the eyes of elite lawyers and bar association presidents, actually handle only a minute share of our overall volume of litigation.

Viewed in historical perspective, federal court civil case filings have risen dramatically since World War II, but on a per capita basis they are not significantly higher now than at some points in the past, the 1930s, for example. For the state courts, which

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handle the bulk of our litigation, information is less complete; but the available data show rather modest increases in the recent past, with overall levels of civil case filings per capita comparable to, or even lower than, those prevailing in the nineteenth and early twentieth centuries. The great majority of civil cases that are filed do not in any event receive formal processing in an adversarial trial. Most cases are voluntarily withdrawn after the parties reach a negotiated settlement, and many of the remainder are submitted to the court for entry of a decree without substantial contest, as in most divorce cases for example.

Although it always has been true that very few civil cases eventuate in contested trials, the available evidence indicates that during the period of the so-called litigation explosion, trials have actually been decreasing. In the federal courts, the percentage of civil cases that go to trial has fallen from 15 percent in 1940 to only 6 percent in 1980. In some cities, such as Chicago and San Francisco, civil filings have increased, but the number of civil jury trials held is actually lower now than it was in the 1960s. Court studies show that judges spend more and more of their time on routine case administration and on conferences designed to encourage settlement. There is probably more conciliation, mediation, and negotiation than ever before. The sensational “big” cases notwithstanding, there is no evidence of a tide of increasingly adversarial litigation. Even Derek Bok, who chided the law schools and the legal profession for not devoting sufficient attention to the “gentler arts of reconciliation and accommodation,” has also conceded that “[c]ontrary to popular belief, it is not clear that we are a madly litigious society.... [O]ur volume of litigated cases is not demonstrably larger in relation to our total population than that of other western nations.”

Is Criminal Justice Overly Adversarial?

In the criminal justice system, the patterns of informality, negotiation, and compromise are even more pronounced. In virtually every American jurisdiction, large numbers of cases are dismissed or diverted without formal adjudication, and of the remaining cases, the vast majority—up to 90 percent in most jurisdictions—are resolved by guilty plea. Among the less serious cases, guilty plea rates are even higher. In New York City, more than 99 percent of the misdemeanor cases end in guilty pleas. Study after study has documented the prevalence of flexible norms and informal relationships that govern the disposition of the daily courtroom workload. Although there are elements of adversarial opposition in the interactions of prosecutors and defense attorneys, the dominant fact is that these “opponents,” working together day to day, with a perceived need to preserve the stability and predictability of their relationships, develop common standards of evaluation, come to believe that they know what a case is “worth,” and seek rapid means to find the common ground that will permit them to move on to the next case on their lengthy lists.

Judges often facilitate this process. Surveys reveal that roughly one out of three criminal trial judges regularly attends plea bargaining sessions and most of these judges participate in the negotiations. In the majority of criminal cases, however, prosecution and defense are quite able to reach a mutually satisfactory settlement without any facilitation or encouragement from formal institutions or outside parties. Indeed, in some (though not all) jurisdictions, court culture may generate such settlements in enormous numbers, even when legal rules attempt to discourage or forbid them. Since negotiation and mediation already dominate the disposition process, recent proposals to establish a required program of mediation in criminal cases would simply add an additional stage to the case processing system and, perhaps, an additional bureaucracy, without in any way altering the substance of American criminal justice.

Neighborhood Justice?

Many of the current proposals to avoid formal criminal adjudication draw their inspiration from programs for decentralization and informalization that have been in vogue since the mid 1960s. “Neighborhood justice centers” for the resolution of criminal complaints by informal mediation have sprung up across the United States, and more than one hundred of them are now in operation. What we have learned about the operation of these centers does not afford much basis for an optimistic assessment of their potential. Although complainants often describe themselves as satisfied with their experience, satisfaction levels are not dramatically different for complainants who take their cases to court. In any event, it is far from clear whether any of the small gains in satisfaction levels would be permanent (once mediation programs became established and more routinized) or would be worth the effort and expense entailed in running such programs.

An even more fundamental problem is that the limited successes of neighborhood justice centers have been achieved in only a very small, unrepresentative subset of the overall criminal caseload. Most of these programs deal only with minor misdemeanor charges, typically complaints that would not in any event lead to adversarial court trials. Efforts to extend mediation to a wider spectrum of cases have been notably unsuccessful. A major reason is simply the refusal of respondents to cooperate. A San Fran-

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Footnotes:

3Data in this and the next paragraph are drawn from the extensive discussion in Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society, 31 U. C. L. A. L. Rev. 4 (1983).

The upshot is that even for relatively minor criminal matters, neighborhood mediation can handle only a portion of the cases now processed in courts, and it is by no means clear that it can do so more cheaply, more quickly, or more effectively than such existing court processes as pretrial diversion, discretionary or negotiated dismissals, plea bargaining and indeed even formal adjudication.

There is no evidence that neighborhood mediation . . . has been more successful than adjudication in reaching the underlying causes of conflict.

The Limits of Mediation

Whatever the role accorded to mediation, some form of involuntary, coercive decision-making process will remain essential. Should we invite the victim of a brutal assault or rape to sit down with her attacker and seek to resolve their “disagreement”? Should we invite the homeowner to work out his differences with a midnight burglar? Mediation is utterly inappropriate in such cases, and we would only insult and alienate the victims of these crimes if we were to suggest it.7

Critics of the adversary system appear to assume that involuntary adjudication can be relegated to a subsidiary role, as a back-up procedure for exceptional cases. In fact, a coercive decision-making mechanism is necessarily of central importance to any system for the resolution of criminal charges. In the great majority of cases, even the minor ones, those who are accused will simply refuse to participate or will refuse to accept any plausible “solution” to the controversy, unless the prospect of an imposed solution is lurking in the background. This remains true even when the dis-

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pute is among close acquaintances. Most homicides and serious assaults involve victims who are relatives or close associates of the offender; despite the interpersonal nature of the "dispute," mediation is normally out of the question. Indeed, whenever the accused faces significant restrictions on his or her freedom (probation or incarceration), we can hardly expect truly voluntary participation, and in any event, we would not want to permit negotiated or mediated solutions in which those accused could buy (or threaten) their way out of the sanctions that public protection demands. Again for such cases, involuntary, coercively imposed decisions are unavoidable.

Coercive decision-making is no less important where we observe that large numbers of dispositions occur through plea bargains to which both parties consent. These dispositions are consensual in name only, for the terms of the decision that would be imposed without consent directly condition the terms which the accused is "willing" to accept. Much as one might like to promote shared interests and values, a spirit of cooperation and the like, the person charged with serious criminal conduct ought to face unpleasant consequences if he has committed the acts alleged. His interests will not be, and should not be, harmonious with those of the complainant or those of the public officials responsible for determining his future. Hence any criminal justice system must be built upon some mechanism for imposing unpleasant consequences on unwilling recipients.

**Arbitration instead of Adjudication?**

To deal with the need for some coercive decision-making mechanism, one scholar recently proposed replacing adjudication by arbitration. The suggestion reflected the kinds of misunderstandings about the adversary system that permeate much of contemporary discourse. Contrary to this writer's claim, there is no reliable evidence that substantial numbers of attorneys resort to "fabrication" of the facts. Such conduct is clearly and explicitly forbidden by the rules of professional responsibility, and I believe that violations of this prohibition are quite rare. To the extent that such illegalities occur, we have no reason to think that they would be less common in arbitration than they are in court trials.

Conversely, the attorney-client privilege, the privilege against self-incrimination, and perhaps many of the other procedural safeguards which we now associate with trials will and should remain a part of any decision-making process for criminal cases, whether it be called arbitration, adjudication, or something else.

**Cooperation or Conflict?**

Apart from cosmetic and terminological differences, an arbitration system is likely to be every bit as adversarial (or non-adversarial) as the pre-existing trial process, unless there is fundamental change in the nature of the interests at stake or in the spirit with which the parties approach the dispute. In fact, some scholars, in accord with the tenor of proposals by former Chief Justice Burger, President Bok and others, do suggest a basic change of spirit, in which the decision-making system would be based on cooperation rather than conflict.

Unfortunately, to proclaim a change in philosophy, as these authorities have done, is an insufficient and ultimately counterproductive approach to the problem. In the criminal justice system, at least, conflict does not result from an abstract philosophical choice or even from emphasis on acquisitiveness, competition, and free-market economics in the wider culture. Conflict in criminal cases results from the plain fact that the interests of the public and of the guilty offender are irreconcilably opposed. And those interests will necessarily remain opposed, so long as society continues to perceive the need to incarcerate criminal offenders. Every effort to ignore or paper over this reality—including the juvenile court movement, the involuntary commitment programs for the retarded and the mentally ill, and the rehabilitative model for "treating" criminal offenders—has founded on the unavoidable fact that involuntary confinement is almost never benevolent from the viewpoint of the inmate. To proclaim a system based on cooperation, parens patriae, and the long-term interests of the defendant is simply to mask conflict and to invite the abuses that excessive discretion and unchecked power have produced over and over in allegedly "benign" programs.

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Since conflicting interests are inherent in any criminal justice process that serves society's needs for deterrence and social protection, the truly troubling features of American criminal justice are not its adversarial aspects (which are largely superficial or mythological) but rather its heavy emphasis on plea bargaining and related forms of cooperation between prosecution and defense. Where, as in nearly all American jurisdictions, prosecutors are expected to dispose of large numbers of cases each day, by offering concessions sufficiently attractive to induce cooperation by the defense, the public interest in accurate determinations of guilt and in adequate punishment of those who are guilty is necessarily at risk. A system that designated a "mediator" to elicit cooperative attitudes would suffer precisely the same vice.

To be sure, by muting or abandoning the adversary system, as cities have done in neighborhood justice centers or in their plea bargaining practices, an appearance of harmony and efficiency can be created. Attorneys, judges, mediators, and other professionals or quasi-professionals cooperate to manage and expedite the flow of cases, and the process seems to function smoothly. But beneath the surface, the organizational needs of the case disposition system and the personal goals of the participants limit the pursuit of public interests and at the same time impair the efforts by defense counsel to protect the rights of the accused.

In a properly functioning adversary system the situation is essentially the reverse. On the surface neither harmony nor efficiency is very much in evidence. "The essence of the adversary system is challenge,...a constant, searching and creative questioning of official decisions and assertions of authority at all stages."9 The constant probing and questioning seem disruptive and inefficient. Indeed, intensive probing and questioning by the defense often seem utterly unnecessary. As I have written else-

where: "adversary behavior deliberately seeks to sow doubt—doubt about the facts, doubt about the law, doubt about the propriety and legitimacy of punishment, doubt about the probity and fairness of constituted authority at every level. These doubts must, in the nature of things, prove unfounded a good deal of the time."10

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Under these circumstances, the behavior encouraged by the adversary system is bound to seem, on the surface, unjustified and even incomprehensible. It is too easy to forget that if prosecutorial abuses and oversights are indeed infrequent, one of the major reasons for this state of affairs is the vigorous opposition that is constantly in the adversary system. As an Attorney General's Commission wrote more than twenty years ago: "[A] system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and the larger interests of the community....[T]he loss in vitality of the adversary system...significantly endangers the basic interests of a free community."11

Sadly, we have already experienced in American criminal justice a major blow to the vitality of the adversary system. Plea bargaining, long sanctioned by low-visibility practices in most urban courts, has now received the approval and encouragement of the United States Supreme Court. By deploying the threats and inducements that plea bargaining makes available, we have already produced a criminal justice system in which the great majority of convicted defendants willingly accept their punishment, or even welcome it as a "good deal." Criticism of highly adversarial attorneys and proposals to encourage even more mediation and conciliation will only aggravate this situation. We may pride ourselves on the atmosphere of harmony and cooperation that is so prevalent in criminal justice, but conflict between the vital interests of the individual and the community can only be hidden, not eliminated. It is time to eliminate plea bargaining, to condemn all the misleadingly attractive forms of "cooperation" between prosecution and defense, and to restore a genuine adversary system in which guilt is accurately determined, and appropriate punishment is reliably fixed, in visible, public, vigorously contested criminal trials.

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11U.S. Attorney General's Commission, supra note 9, at 11.

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