The Pursuit of Perfect Justice

Improving Quality in Criminal Justice Case Processing

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**Introduction: The Ideal of Perfect Justice, the Reality of Rough Justice**

Perfect justice has always seemed beyond human capacities. This is only partly because it seems impossible to assemble, accurately and objectively, all the facts that are relevant to judging the complex human interactions that bring individuals to courts. It is also beyond confident human judgment because the very ideas of crime and guilt are complex moral ideas as well as factual observations. We can do all we can to allow us to make accurate judgments of criminal responsibility by carefully defining crimes, and the facts that must bestablished to support a conviction. But behind these operational definitions of criminal responsibility lie moral intuitions. And, given human frailties, we have to doubt the quality of our moral imagination in deciding what constitutes a crime, as well as our ability to accurately determine whether a crime was committed and who did it. It is for *both* reasons – uncertainty about relevant facts, and contestability in the quality of our moral intuitions -- that we have had to settle for rough justice rather than perfect justice..

Yet, the idea that we knowingly achieve only a rough justice, and therefore might commonly do injustice to individuals, also seems untenable. What, after all, can we – those who man posts in the criminal justice system, those who write laws, and concerned citizens -- say to someone to whom we know we have done injustice? What can we say to the person who was wrongfully convicted of a crime, and served years in prison for something he did not do? What can we say to the victim of a crime who continues to live in the neighborhood with the person whom she is sure attacked her, but who could not be convicted of the crime?

What we often *do* say to those individuals who become the focus of criminal justice prosecution, or who look to the criminal justice system to right the wrong that was done them is that they ought to “trust the process.” But that exhortation often rings hollow to accused innocents, frustrated victims, and the rest of society who would like to see more perfect justice done.

**Values to be Achieved by and Reflected in Criminal Justice Processing**

To trust the process, the society as a whole, and those engaged with the process , must believe that the process is *working* at least as well as it can. Note, however, that the concept of “working” is a complex idea. What usually mean by “working” is that a particular policy or procedure is producing some substantive purpose that individuals in the society, or society as a whole, regard as important to their individual and collective material welfare. We say a medical treatment works when it cures an illness or alleviates the burden of chronic disease. We say that education works when it succeeds in teaching children to read, write and do arithmetic, and take their place as independent citizens of the society.

*Utilitarian Values: Achieving the Good for Individuals and Society*

Generally speaking this logic celebrates what philosophers would describe as utilitarian values and logic; values that concern material well-being (at either individual or social levels), and a logic that judges individual and collective action in terms of particular dimensions of material well-being . To many, this is a framework more suited to economics than to law, and more concerned about money than justice and fairness. Yet, utilitarian values and consequentialist logic have come to play an important role in individual and social evaluations of the performance of the criminal justice system. We say, for example, that an important goal of the criminal justice systems as a whole is to reduce crime -- not only because each of us might prefer (and be willing to pay for) a society that had fewer rather than more crimes, but also because we think that economic welfare as a whole would be improved if there were less crime. We also often say that the criminal justice system should seek to satisfy victims of crime: in the first instance by sharing the burden of righting the wrong that was done to them and assuring them that they will be safe in the future, and in some instances, actually paying them financial compensation to help make them whole. Less often, we say that it would be an important goal to satisfy criminal offenders, but we often compensate those who have been wrongly accused, prosecuted, or convicted with public dollars. In these ways, practical, utilitarian, and financial concerns help us define the value produced by the criminal justice system, and understand what it means for the system to work well.

*Deontological Values: Doing Right by Individuals, Assuring Right Relations in Society*

Despite the inroads of utilitarian, consequentialist, and monetary thinking about criminal justice, it is hard to carry out a serious discussion about what it means for the criminal justice system to “work” well without introducing the concept of justice as an important evaluative framework. Philosophically, the concept of justice belongs less to utilitarianism than it does to a different branch of philosophy called deontology. Deontological theories focus more on the right, the just, and the fair than on the good or the useful. If the fundamental idea of utilitarianism is that acts are judged by the value or their consequences, and the social goal is to produce the greatest good for the greatest number, the fundamental idea of deontology is that acts are judged right wrong according to their alignment with ideas about the duties we owe and rights to which we are entitled, and the social goal of society is to ensure that we live in right relationships to one another.

As in the case of utilitarian theories, there is both and individual and a collective view of deontological values. At the individual level, the question is whether an obligation was justly imposed on me, and whether my rights were protected in that process. At the social level, the question is whether offenders were called to account for their offenses, and their rights protected in the process of calling them to account.

The difference between these philosophical systems is often described in terms of one system that is focused on practical ends, and the means that could be effective in producing those ends, while the other is focused on process that constrains practical actors seeking to produce valuable material ends to respect the rights of individuals. This contrast between the ethical systems is commonly captured by the question of whether the ends justify the means – with the ends often some practical objective like reducing crime, and the means some action that pushed against the constraints of a rights to liberty and privacy.

*Treating the Good and the Just as Dimensions of Value to Be Achieved by and Reflected in Criminal Justice Case Processing*

But this formulation does not really get the problem right. After all, justice can be viewed as an intrinsically valuable *end* as well as constraint on efficiency and effectiveness in the means used to produce justice. And we can think about how to improve justice through the use of utilitarian reasoning that focuses on how we might use technical advances in the means relied on by the justice system to improve the quality of justice. Similarly, it might prove practically valuable to accept some important constraints on actions taken in the criminal justice system that come at the expense of procedural protections if honoring the rights and interests protected by the procedures increases society’s overall support for the criminal justice system, and its willingness to co-operate with the system, and allow it rather than private justice to do the work of controlling crime. So, instead of seeing these different philosophical systems as competing with one another, or as one being dominant and the other subordinate, it might be best to think about them as philosophical ideas that nominate particular dimensions of value that we might like to see realized through and in the operations of the criminal justice system.

Table 1 attempts to identify key “public values” at stake in the operations of the criminal justice system. It puts the utilitarian values associated with achieving “the good” (satisfying victims and offenders, and reducing crime efficiently and effectively) alongside the deontological values associated with doing “the just” (e.g. calling offenders to account, and protecting the rights of those accused).

Table 1:

**Values in Criminal Justice Case Processing**

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| --- | --- | --- |
|  | *Utilitarian Values:**The Good* | *Deontological Values:**The Just and Fair* |
| Experienced/Judged at *Individual* Level | Victim is Satisfied/Feels More SecureOffender receives decent treatment and is Reconciled to Judgment | Victim Receives JusticeOffenders Rights Protected |
| Experienced/Judged at *Social* Level | Crime is ReducedSecurity is AdvancedFinancial Costs Minimized | Offenders Called to AccountIndividual Rights Secured |

This gives us four dimensions of public value to be concerned about in the design, evaluation, and improvement of criminal justice case processing:

* it has to achieve the good at the individual level by satisfying individual victims and reconciling offenders to their duties;
* it has to achieve the good at the social level by reducing crime at low cost;
* it has to call offenders to account and protect their rights at the individual level, and
* it has to do justice to both victims and offenders as the society best understands justice at the time the case is being processed.

*Substantive Accuracy (and No Bias) in Determinations of Guilt and Innocence*

Aligned with each of these values – achieving the good (for individuals and society) and doing justice (for individuals and society) is another key concept: the concept of substantive accuracy in the determination of guild and innocence. As noted above, determinations of guilt and innocence are not only, and maybe not even principally, matters of fact. They are complex moral judgments. But, the complex moral judgments called adjudications of guilt and innocence are supposed to be based on facts; ideally facts that can be comprehensively and objectively gathered, and organized in a framework that allows a judge or jury to make not only a consistent decision about guilt or innocence, but also an accurate one. By an accurate decision we mean one that accurately distinguishes the guilty from the innocent, and does not err either by judging factually innocent people to be guilty, or factually guilty people to be innocent. Thus, an additional virtue of the process would be its reliability in distinguishing guilt from innocence.

Substantive accuracy (defined in this particular way) is critical to the success of the system in both deontological and justice frames. If justice requires giving each individual their due -- that offenders are properly called to account, and innocent individuals are acquitted -- then the justice of the system depends critically on our ability to distinguish the truly guilty from the truly innocent. If guilty people are wrongly judged to be innocent, there is a failure of justice to call offenders to account. If innocent people are wrongly found to be guilty, then there is a failure to protect the rights and liberty interests of the accused. These factual errors become errors in the quality of justice being administered for individuals and for the society at large.

Similarly, substantive accuracy is important in the system’s capacity to be efficient and effective, as well as just. We often assume that the criminal justice system achieves its crime reducing effect in society through deterrence, incapacitation, and rehabilitation. It should be obvious that substantive errors in identifying criminal offenders will reduce the impact, and therefore the crime reduction value of these mechanisms. If we fail to call the real offenders to account, then deterrence and incapacitation will be undermined. If we sanction innocent people, then the imagined deterrence will do little good, and create a great deal of bitterness.

The fact that substantive accuracy in criminal justice case processing is critically important to its ability both to do justice, and to reduce crime creates a serious problem for the ambition to produce perfect justice. The reason is that it is hard to develop the evidence that can consistently lead to accurate judgments of guilt and innocence. As noted above, the uncertainty lies partly in the quality of our moral imagination about what acts should be treated as crimes for both utilitarian and deontological reasons. It also lies in the defining the elements of the crime – the particular facts that have to be proven to find a person guilty. But perhaps the greatest difficulty lies in comprehensively and objectively gathering the facts relevant to a particular criminal incident.

Different particular crimes leave different bits of evidence behind, ensuring that not all crimes will have the same evidentiary profile. Different particular crimes will be investigated and supported by victims and witnesses in different ways leading to further inconsistencies between any particular crime and the evidence at hand. The evidence at hand will be processed and stored more or less accurately. Some evidence may go missing. Other evidence will be purposely concealed. And some evidence will be kept from the process of adjudication because it was illegally gathered.

Given these observations, what emerges as a “case” to be adjudicated will not have a consistent relationship to the real underlying facts. That means that the process of making inferences about guilt or innocence from the particular facts in the case is neither consistent, nor necessarily accurate. The judgments are far from arbitrary, but they are a lot less than perfectly accurate.

There is a technical way of talking about this problem that is cast in language that is far from the language of criminal justice. But exploring the problem from this vantage point may help us a little. Predictably, to get some technical clarity, we have to make some assumptions – usually not justified by the messiness of the real world.

In this case, our first assumption is, in many ways the most fundamental, but also the most contested. Let’s assume that whether a particular individual is guilty or innocent of a particular crime is a real fact. As noted repeatedly, we recognize that this is a moral construct. We also understand all the difficulties we have in specifying and gathering the relevant fact. But still, given a legal definition of a crime and its elements, and given comprehensive and objectively developed facts, we might assume it would be possible to decide whether an individual was or was not guilty of a crime.

The second assumption is that guilt or innocence can be judged more or less accurately by reviewing the facts of the case against the statutory definition of a crime through a process designed to calm passions, drive out bias, allow for the facts of the case to be developed and contested in an adversarial process.

It is here that it becomes possible to represent the problem of perfect justice in an abstract, technical way. Figure 2 starts with a horizontal axis that measures both the strength and direction of an established case that is being processed. This ranges from exculpating through a case that is very weak, through a case that approaches but does not pass the test of reasonable doubt, to a case that passes the threshold of reasonable doubt. That such an axis exists is fundamental to the idea that we ask a judge or jury to decide on guilt or innocence primarily by looking at the case as a whole.

Next we have to rely on our first assumption, and some other assumptions about the relationship between what is observed as the strength and direction of case on one hand, and the actual state of guilt or innocence on the other. To show that, we have to imagine that we have an actual sample of offenders and cases for which we know both the strength of the case against them, and their actual built or innocence. Presumably, given the vagaries of the way that cases are built from actual facts, there is some variation in the strength of the cases for the innocent and the guilty offenders.

Figure 3 shows the variable strength of the cases as they are seen in court for defendants who are actually innocent. In this representation we are assuming that the strength of the cases is fairly well correlated with actual innocence. The strength of the cases has some variability with some cases being exculpatory and others being strong, and approaching the reasonable doubt standard, but none cross over the standard. If courts decided the matter on the reasonable doubt standard, the courts would not wrongfully convict any innocent defendants.

Figure 4 shows the variable strength of the cases for the guilty offenders. As in the case of the innocent defendants, there is variability in the strength of the cases (which we can observe) for the guilty offenders, but the strength of the case is doing the work of pointing towards the guilty parties. Most of those who are guilty have strong cases against them, and many are stronger than the reasonable doubt standard. If courts used the reasonable doubt standard, they would properly convict many defendants, but at least some guilty offenders would go free. By setting the reasonable doubt standard very high, we managed to avoid falsely convicting any innocent persons, and we succeeded in convicting many of those who were guilty, but we made errors in allowing many guilty offenders to be wrongly acquitted. This reflects the common view that we think it is far better that a guilty man walk free than that we falsely convict an innocent person.

If the system worked as indicated in Figures 2, 3, and 4, many would be happy with the system. The ones that would not be happy would be those who were victims of the crimes committed by those falsely released, and those in the wider society who wanted to make sure that all guilty folks got locked up, and who thought that everyone who had a reasonably strong case against them was probably guilty.

But the situation could be much worse than this. Suppose the strength of the observed case was less highly correlated with the real underlying guilt or innocence. In that case, the distributions of the case strength observed for guilty and innocent would be much wider. Even worse, they would begin to overlap. And it is possible that some innocents would have cases against them that met the reasonable doubt standard, and that many of the guilty persons would have only weak, or perhaps exculpating cases against them. Figure 5 outlines this possibility. In this case, the number of errors we would make of both types – the number of innocents we would falsely convict, and the number of guilty we would falsely prosecute would both go up as an absolute number, and as a share of all cases. We could shift the frequency of the different kinds of errors by increasing the reasonable doubt standard (if we wanted to reduce the error of convicting innocents), or reducing the reasonable doubt standard (if we wanted to reduce the error of letting guilty go free), but we could not eliminate the errors. The reason we face this challenge is only partly linked to the important question of where we set the standard for finding guilt; it is also linked to the fact that cases as they are developed are weakly correlated with the actual underlying state of guilt or innocence. This problem is compounded, of course, is the cases are constructed badly, or with deliberate prejudice on way or another.

We actually do not really know which of these worlds we currently inhabit: one where the strength of the case observed in the courtroom is reasonably well correlated with actual guilt and innocence, with a standard for conviction set so high that we convict few innocents, and only let a few guilty go; or one where the strength of the case is quite imperfectly correlated with actual guilt or innocence and the standard we have set for judging guilt is resulting in many innocents being wrongly convicted, and many guilty to go free. Importantly, the development of DNA testing allowed us to improve our estimates of actual guilt or innocence for some cases, and thus opened a window on the connection between the way we constructed and decided cases in the past, and actual guilt and innocence. And what we found was not wholly unexpected: that we did make errors, and that the cases as they were developed were unreliable guides to actual guilt and innocence. We have gone on to learn about the weaknesses of other methods we have traditionally relied on to build cases for prosecution. In short, the system of justice may be rougher than we thought, and further from the ideal of perfect justice which should remain our goal.

**Moving Towards Perfect Justice Through Advances in Our Rough Justice System**

The fact that we have been living with a system of rough justice for many years should not be an excuse for accepting that as the best we can do. We should, instead, be trying to move steadily towards more perfect justice. That path may be guided by improvements in our moral imaginations about what is worth calling a crime. But the path may also be pursued through technical improvements of various kinds that prove useful in less biased, more consistent, more accurate judgments made by the system. The technical improvements could be improvements in the technical methods we use to detect offenses and reliably attribute the offenses to offenders: for example, the use of video surveillance, voice recordings, fingerprints, blood, DNA, hair, and so forth. The technical improvements could also be improvements in the electronically supported managerial processes that have helped organizations that need consistency, reliability and accuracy in their operations to achieve such results even when relying on occasionally inattentive or careless individual workers; such as total quality management systems in commercial manufacturing and service organizations, , error reduction systems in medicine, and extensive electronic monitoring and redundancy in the operations of nuclear power plants and airplanes.

I am here at John’s behest as an advocate for taking seriously the notion the skilled introduction of technological advances in both the methods that are used to establish facts (both incriminating and exculpating) in criminal procedures, and those that are used by managers in processing systems that demand high levels of consistency, accuracy, and reliability in their operations might be used to improve not only the efficiency and effectiveness of the criminal justice system (the natural language to use in describing technical gains), but also in terms of the justice and fairness of the criminal justice case processing system (a language that is used much less frequently when we talk about the value of technical and managerial gain, but is not less apt in this context.). .To create space for a useful discussion of the challenge of improving justice through managerial and technical means rather than strictly legal means, we have to take three steps.

First, it seems important that we re-examine and re-consider the role of the protections provided by “procedural justice” in our efforts to approach the ideal of perfect justice. This re-consideration is important not to reduce or even change existing procedural protections, but to remember the reasons that we have such protections, re-affirm our commitment to them, and develop the processes that could ensure that the rights to these procedural protections are reliably secured. The big issues here are whether we value due process protections as a reliable technical means for creating substantive accuracy in cases, or because we want to give special protections to the rights of the accused, or because in the pursuit of providing special protections to the rights of the accused, we are prepared to bias the operations of the system as a whole in a way that makes fewer false convictions at the expense of more false exonerations.

Second, it seems important that we develop a better understanding about how advances in forensic science and quality control management systems can strengthen both the efficiency and effectiveness of the system, and the reliability with which justice is done. The big issues here are learning more about both the strengths and weaknesses of the technical bases we use for indentifying and prosecuting offenders; and figuring out how best to build a “culture of justice” among the organizations engaged in criminal justice case processing – including both the clinical labs that produce the forensic information, and the more law offices that struggle to develop, try, and adjudicate cases according to legal and ethical principles.

Finally, it seems important that we join these two different parts of the analysis to be sure that concerns about due process, forensic accuracy, and management systems to reduce errors in operations are joined together in a complementary effort to push the frontier of our current rough justice outward towards a more perfect justice rather than compete with one another as competing ideas about the definition of more perfect justice, or as alternative paths towards improvement.

Figure 6 presents a picture of a justice system, guided in the past by human experience and tradition to the creation of procedural justice system that moved as far as it seemed humanly possible to achieve perfect justice, but inevitably stopped short of that goal by human limitations, and ended up producing a “rough justice system” with which we are currently living.



Figure 6 also shows the potential influence of technical advances that could carry us either to more accurate determinations of guilt or innocence, or to more consistent use of the processes and techniques designed to produce both procedural and substantive justice more reliably than we now do, or both. Our task today is to explore how much potential lies along those technical pathways, and how they might be effectively implemented.

One way to organize our thoughts is to introduce one last bit of technical apparatus that might be useful in charting our course. Figure 7 presents a diagram we have often used at the HKS to help leaders and managers of public institutions chart a path forward to improvement in performance. The basic idea is that to improve, one has to have an idea of what values one is trying to accomplish, what operational capacities one would need to achieve those ends, and the sources one could tap that would provide social legitimacy and financial support for the effort.



We can link this figure to the one before by seeing the forces of tradition and law on one hand, and the forces of science on the other as alternative wells a public innovator could tap to imagine and legitimate some desired changes in operational capacity. The other parts of this figure -- the established mechanisms of procedural justice, and they ways in which they might be transformed or altered by emerging technologies to create more substantive accuracy, and more consistent use of both the old and the new methods of handling cases – as the operational capacity to be altered.

Viewed in this light, it seems that three strategic questions present themselves: first, do we think it is possible or likely that emerging technologies can improve the overall justice and efficiency and effectiveness of the system; second, to what extent will that increase the overall public legitimacy of the system, and third, where will the leadership and drive come from in making these changes?