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ASCERTAINING THE TRUTH

Joseph D. Grano†

On June 28, 1991, a group of Detroit girls beat and robbed two suburban women who were attending a fireworks celebration in downtown Detroit.¹ A bystander videotaped the attack, removing any doubt about what had occurred. Two weeks ago, as I was driving home from work, I was listening on my car radio to a panel discussion on racial polarization in the Detroit area. Not surprisingly, the discussion turned to crime and the June 28th incident. I listened to an academic express a lack of surprise that such an incident had occurred. The state, she said, had been cutting programs, and it had failed to provide "alternatives" (her word, not mine) to occupy the time and interest of the young assailants. The only thing missing from this all-too-familiar academic critique was the attribution of blame to Ronald Reagan. Individual responsibility for this brutal and senseless crime? Not in the world view of this academic.

On February 8, 1990, four Detroit boys and two adult males (ages 19 and 20) tried at gunpoint to steal the car of a fifty-three year old suburbanite who was driving home. The youths had thrown a tree limb across the road to block the path of the car. When the driver attempted to speed away, sixteen year old Kermit Haynes, who said the group wanted the car to go to a party, fired his gun and killed the driver. Haynes confessed and later pleaded guilty to first degree murder. Under state law, however, fifteen and sixteen year old offenders must be sentenced as juveniles unless the prosecutor proves they should be sentenced as adults.²

In an attempt to have Haynes sentenced as an adult, the prosecutor presented the report of a psychologist who described Haynes as sadistic, amoral, and dangerous. The psychologist said Haynes showed all the signs of a psychopath, and he offered a poor prognosis even with the best efforts of the Department of Social Services.

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¹ See Dave Farrell & Vivian S. Toy, *Mayor Blasts Media For Reports on Taped Beatings*, GANNETT NEWS SERV., July 12, 1991, available in LEXIS, Nexis Library, Omni File; *Girl, 17, Gets 15 Years in Beatings*, CHI. TRIB., Aug. 23, 1991, at M3.

² MICH. COMP. LAWS §§ 769.1(3), 769.1(5), 771.14a (1991).

Another psychologist said that Haynes showed violent tendencies and that his actions in the case were intentional and premeditated. This psychologist found no indication that Haynes could be rehabilitated.

On August 28, 1991, Dalton Roberson, who is the Chief Judge of the Detroit Recorder's Court, declined to sentence Haynes as an adult, which would have meant life imprisonment without parole. Criticizing the prosecutor for not presenting an objective account of Haynes's "rehabilitative potential," Judge Roberson placed Haynes, the confessed gunman, in the custody of the Department of Social Services until he turns twenty-one. Individual responsibility for this senseless taking of human life? Clearly not in the world view of Judge Roberson.

Are these mere anecdotes? Of course. But to the ordinary citizen, these "anecdotes" frighteningly illustrate a legal system that has ceased to work, a legal system that too rarely holds individuals responsible and accountable for the evil they perpetuate. (I use the word "evil" deliberately; it is a word that we should reintroduce into our lexicon.) The driver's widow, expressing shock at Judge Roberson's action, allegedly asserted that the sentence was a "clear message that life is cheap." Unfortunately, the street-smart hoodlums of our society understand this message as well as the hapless widow.

Many lawyers and judges sanctimoniously defend our criminal injustice system as essential to individual freedom. Similarly academics, searching for anything or anyone to blame except the individual offenders, often applaud approaches that give offenders second, third, fourth, and even more chances to commit crimes. While these people defend the system, law abiding citizens desert the city's activities, restaurants, and retail merchants.³

What accounts for the persistence of the world view illustrated by the misguided academic and judge? To a large extent, I believe it is the attitude of "there but for the grace of God go I," referring unfortunately to the offender rather than the victim. This attitude has its roots in the civil rights movement of the 1960s and in the conventional liberal ideology of the time that equated the typical criminal defendant in one courtroom with the civil rights plaintiff in another. Do not misunderstand me. I am not criticizing the civil rights revolution. Conservatives may have been correct in expressing federalism concerns as a reason for opposing the civil rights legislation of the 1960s, but the deafening silence of many of yester-

³ See Carolyn Walkup, *Detroit Blues Dogging Downtown Operations*, NATION'S RESTATEMENT NEWS, Jan. 13, 1992 (NEXIS, OMNI) (Business has dropped more than 50% in downtown Detroit since the June 28th incident and a recent rash of carjackings.).

day's conservatives about the profoundly immoral system of Jim Crow, and their concomitant failure to search meaningfully for alternative remedies to Big Brother, account in part for the albatross that contemporary conservatism still carries around its neck. This failure is in large part responsible for liberal suspicion of conservatism's legitimate objections to racial preference policies on behalf of minorities and to the liberal ideology that permeates the criminal justice system. My argument is not with the civil rights revolution of the 1960s but rather with the distorted vision that saw, and still sees, the criminal offender not as the responsible perpetrator of an evil deed but as an unfortunate victim of a racist and oppressive society.

The view that the blame for crime lies with society rather than with the individual offender did not have much popular appeal even in the 1960s, and it has even less appeal today as crime runs rampant in our cities. Moreover, the "no responsibility" social determinists always have had to confront the rather insurmountable obstacle that the substantive criminal law is premised on a foundation of individual free will and responsibility. The common law requirement of *mens rea* aptly illustrates this free will foundation. Arguments certainly have been made in support of new deterministic defenses—drug addiction, brainwashing, battered wife syndrome, post-traumatic stress, and just plain rotten social background. The fact remains, however, that the substantive criminal law has always presumed that concepts of individual responsibility and blame are valid.

The procedural system, however, offered an attractive end run for those determined to undermine the substantive law's commitment to individual responsibility. The primary target was the basic notion that the *paramount* goal (I didn't say the *only* goal) of sound procedure should be the ascertainment of truth. Individual responsibility and accountability are not easy to achieve in a system that denigrates the importance of discovering the truth. The academics provided the underlying theory; the academics, lawyers, and judges together provided an abundance of truth-defeating procedural rules.

I am not going to review or critique the numerous truth-defeating procedural rules that plague our system. Most of us are familiar with the search and seizure exclusionary rule, with *Miranda*⁴ and *Massiah*,⁵ with the rule against prosecutorial comment on a defendant's silence,⁶ and with the effort to adopt the minority rule on

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ *Massiah v. United States*, 377 U.S. 201 (1964).

⁶ *E.g.*, *Griffin v. California*, 380 U.S. 609 (1985) (such comment violates the Self-Incrimination Clause of the Fifth Amendment.).

entrapment,⁷ which would make the defendant's guilt or innocence irrelevant. We also are familiar with liberalism's continuing, and largely successful, effort to retain these truth-defeating rules. The latest example being the organized drive, spearheaded by the often-wrong ABA, to defeat the Bush Administration's badly needed reforms in the area of habeas corpus.

To facilitate the denigration of the search for truth, the academics who advocated these rules attacked the very concept of truth. We were told, for example, that any emphasis on "truth" must be simplistic, given the "plural forms and multifaceted aspects of that beguiling concept."⁸ (I often have wondered what my mother's reaction would have been had I responded to a question about whether I locked my sister in the basement by saying, "Well, the truth is multifaceted and beguiling.") This argument against truth has followed two different tracks. The first maintains that factfinding is an uncertain process because of its dependency upon the perceptions, inferences, memory, and veracity of fallible human witnesses.⁹ In Professor Goodpaster's words, the relationship between judicial truth and "'real truth,' *whatever that might be*, is indeterminable."¹⁰ The second argument, hinted at in Goodpaster's remark, more broadly maintains that the concept of truth itself has little meaning in legal proceedings. In its most modest form, this argument contends that factual guilt and legal guilt are different concepts because the latter requires an evaluation of intent and moral blameworthiness.¹¹

I will not spend time discussing the legal system's ability to discover truth, other than to note that most commentators who denigrate the discovery of truth seem to have no trouble ascertaining when the police have violated the judicially created rules that obstruct law enforcement efforts. (Nor, might I add, do they have trouble with the concept of individual responsibility for law enforce-

⁷ For an example of the minority view on entrapment, see *United States v. Russell*, 411 U.S. 423 (1973).

⁸ H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction To Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1076 (1975).

⁹ *Id.*, at 1079; Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 654 (1986).

¹⁰ Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 133 (1987) (emphasis added).

¹¹ See, e.g., Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, 78 MICH. L. REV. 463, 476-77 (1980) (but including questions pertaining to the defendant's intent as relevant to the inquiry into factual guilt); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-98 (1983) (this time including questions of intent as relevant to the moral evaluation of the defendant's conduct); Goodpaster, *supra* note 10, at 130-33 (denying that fact and law can be radically separated); Saltzburg, *supra* note 9, at 654; Uviller, *supra* note 8, at 1076.

ment officers.) I want to focus on the frontal attack on truth as a concept, an attack led by people such as Professor Stephen Saltzburg. Professor Saltzburg has asserted that "an estimate of the results attained through evaluations of the facts in light of governing substantive principles will be neither true nor false."¹²

Professor H. Richard Uviller has offered this example to illustrate both that factual and legal guilt are conceptually different and that "truth" is not an appropriate concept to apply to verdicts in many criminal cases:

Did the victim, moments before the defendant shot him, point a six-inch blade at the defendant and say, "I'll kill you," or did he show a two-inch knife and say, "Don't come a step closer"? That is a simple issue of factual truth, and it is quite different from the question: did the defendant act in self-defense?¹³

True enough, a homicide is justified by self-defense only when the perpetrator reasonably believes that killing is necessary to protect himself from imminent death or serious bodily injury. Moreover, evaluating the reasonableness of the defendant's fear cannot be equated with ascertaining who brandished what weapon or said what to whom. Nevertheless, I would submit that a normative judgment appropriately can be deemed "incorrect" when it rests on an incorrect factual assessment.

I should first say as an aside that the majority of criminal verdicts probably do not require such normative judgments but rather turn on factual issues. However, even in cases involving a normative judgment, such as some cases of self-defense, a verdict still can be described as correct or incorrect. Whether it is correct or incorrect will depend upon the accuracy of the underlying factual determinations.

Assume that a jury in Uviller's example makes its normative decision before deciding on the facts and concludes that it will acquit the defendant on the first version of the facts but convict on the second. Since reasonable people may disagree over the definition of reasonable, the jury's normative judgment, if within the bounds of reasonable disagreement, defines the correct and just verdict for each hypothetical version of the facts. The jury's actual verdict, however, can be "correct" only if the jury accurately ascertains the actual facts. Thus, if the jury mistakenly decides that the first factual version is true, it will render an erroneous and unjust acquittal; if it mistakenly decides that the second version is true, it will render an erroneous and unjust conviction.

¹² Saltzburg, *supra* note 9, at 654.

¹³ Uviller, *supra* note 8, at 1076.

In the example, the jury's normative judgment is not subject to assessment in terms of its truth, but factual truth is a necessary condition of a correct and just normative judgment. My point holds true even if jury nullification is factored into the analysis. Suppose, for example, that a jury is willing to nullify a draft card burning law as applied to a conscientious objector but not as applied to someone simply trying to evade the draft. If such a jury, perhaps because a trustworthy confession is excluded from evidence, unwittingly acquits a defendant who is not a conscientious objector, its act of nullification will be neither correct nor just.

To conclude, our criminal justice system—indeed, our whole society—desperately needs to rediscover the importance of individual responsibility for evil acts. One important and *necessary* step to this goal, I submit, would be the clear repudiation of arguments that deny either the existence or importance of objective truth in the administration of criminal justice. This would be important for its own sake, but I think it also would help in reducing the crime rate. This latter point, however, is an argument for another day.