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Further Reflections

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As Professor Hazard's commentary suggests, we have some areas of agreement. First, we agree that there are some trial courts which are, in Professor Hazard's words, "brutal production lines."[1] Second, Professor Hazard and I share concerns about how to minimize the pain and the wrongs that judges, whether out of haste or hostility, sometimes impose upon individuals and upon society as a whole. We agree (again, in Professor Hazard's words) that "[t]here ought to be some review of trial judges to prevent them from becoming autocratic or otherwise behaving badly. The sorry history of human experience is that judges if unreviewable will indeed act autocratically, or with haste, sloth, indifference, distraction, ignorance, bias, malevolence, or vengeance."[2]

Thereafter, however, Professor Hazard and I part company. First, Professor Hazard frames his remarks about my comments as if my only topic were the scope of federal habeas corpus review of state criminal convictions. While I do refer to state courts, criminal cases, and habeas corpus as examples, neither the article published in this symposium nor a previous work,[3] which discussed many related topics, is limited to the question of what weight federal courts should accord prior state court judgments of conviction. Rather, I am concerned with the general topic of preclusion. I believe that the underlying value judgments to be made—about power distribution, economy, and a host of other issues—are parallel whether the example is federal habeas corpus or the right of appeal within a unitary system. I am as much interested in how to determine whether a federal court of appeals should give preclusive effect to a federal district court's judgment as I am in the question of whether a district court should give preclusive effect to a state court judgment.

As a consequence of his misperception about the reach of my argument, Professor Hazard devotes his criticism to discussing the quality of adjudication in state criminal court trials and the role of federal post-conviction review in responding to (as Professor Hazard puts it) the "brutal production lines" in "most state criminal

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1 Hazard, *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 649 (1985).

2 *Id.* at 650.

3 Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984).

seems to have misunderstood my views. Rather than address my concern that most first tier decisionmakers (in administrative agencies, state court, and even, to some extent, in the federal trial courts) have overwhelming numbers of cases, inadequate resources and poor working conditions, Professor Hazard chooses to characterize my commentary as concluding that all state courts are "bad."[5]

Thereafter, he implicitly accuses me of seeking unattainable goals for federal and state court judges. Professor Hazard argues that no legal work-products[6] would meet the standards of law school faculties. However, as Professor Hazard clearly understands, judges are cloaked with the power of the state, and their orders alter our lives profoundly. Further, as Professor Hazard acknowledges, "such people [judges] regularly fail."[7] Professor Hazard seems to view such failures as random events and concludes that the failures are "not remediable, except in occasional exemplary instances."[8]

I am both more pessimistic and optimistic than Professor Hazard. I am more pessimistic because I believe that the failure rate is substantial—that, while there are individual miscarriages of justice, many of the problems are systemic and need to be addressed at that level. I am more optimistic because, although I comprehend the enormity of the difficulty, I believe in the possibility of remedy; for example, I believe that it is plausible in some cases to prefer the deliberative decisionmaking of three persons, with time for contemplation, to that of one person who has little time or energy, even for momentary reflection.

From Professor Hazard's comments, it appears that he is himself fundamentally ambivalent about the question of review. As noted above, he is concerned about autocratic judicial power and therefore argues that at least appeal should be available. Yet, Professor Hazard claims that most appeals are of little value. "More words and more law, but no more facts."[9] There are two problems with this view. First, Professor Hazard is wrong—at least in the arena in which he chooses to focus, post-conviction review. There are cases in which new information can come to light only by virtue of collateral factfinding. For example, to establish many ineffective assistance of counsel claims, information is needed beyond the record of the trial or sentencing courts. The question (in part) is what

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4 Hazard, *supra* note 1, at 649.
5 *Id.* at 507.
6 *Id.* at 650.
7 *Id.*
8 *Id.*
9 *Id.* at 651.

a competent attorney could have done.[10] In most instances, such facts cannot be developed until collateral proceedings are commenced,[11] at which time "more facts" are indeed developed. Furthermore, in civil cases, reviewing courts conclude with some frequency that insufficient factual information has been developed in a first round and therefore remand cases to lower courts to develop a more comprehensive record. Professor Hazard's assumption of "more words and more law, but no more facts" is predicated upon the not always accurate assumption of a competent first round. Second, Professor Hazard appears to be in the unhappy position of advocating some review but believing it by and large worthless. While Professor Hazard devotes much of his commentary to the virtues of finality, he offers almost no discussion of the virtues of review—of the desirability of diffusing power, of permitting litigants additional persuasion opportunities, of imbuing some decisions with greater import by having them made repeatedly.

Further evidence of Professor Hazard's ambivalence is found in his tentative endorsement of the proposition that "finality should be given still greater emphasis so that the state courts can have more time to try to be fairer in the first place."[12] First, on a theoretical level, it is unclear how far Professor Hazard wants to take this argument; the logical conclusion, of course, would be the abolition of appeal and the transfer to the trial level of all resources now devoted to appeal. Second, on a practical level, Professor Hazard's thesis seems dependent upon an inaccurate assumption. Professor Hazard claims that the reason to limit federal review is to conserve resources of the state criminal courts. Resources would be conserved only if, upon federal habeas review, there were a large number of convictions reversed—thus obliging state judges either to retry or to dismiss charges. But the data available from federal post-conviction review do not support this assumption. Rather, reversal rates are very low, and the number of retrials insiguificant.[13] Thus, championing the desirability of appeal and post-conviction review need not be perceived as relegating state criminal trial courts

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10 *See* Strickland v. Washington, 104 S. Ct. 2052, 2064-70 (1984).

11 *See, e.g.*, United States v. Birges, 723 F.2d 666, 670 (9th Cir), *cert. denied*, 104 S. Ct. 1926 (1984) ("customary procedure for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack . . . because usually such a claim cannot be advanced without the development of facts outside the original record") (citations omitted).

12 Hazard, *supra* note 1, at 649.

13 BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEDERAL REVIEW OF STATE PRISONER PETITIONS/HABEAS CORPUS 5 (1984) (of 1,899 cases studies, 3.2% were granted in whole or part; "1.8% . . . resulted in any type of release of the petitioner") (footnote omitted).

or any other first tier to "suggestion-making."[14] Most first tier decisions remain as binding rulings. I admit to some degree of puzzlement at how Professor Hazard can worry that judges would have too little, rather than too much, power.

Of course, some state prosecutorial time is spent in defending post-conviction attacks, but again, it is unclear why Professor Hazard chooses to characterize that investment of time as "large."[15] Data suggest that fewer than three per hundred state or federal prisoners seek post-conviction review in federal court and that less than five percent of a federal district court docket is devoted to such cases.[16] Further, there is no basis for Professor Hazard's assumption that the resources spent adjudicating habeas litigation "deal with marginal procedural issues usually irrelevant to guilt" and that, because of this resource expenditure, other individuals wait in the "long queue."[17] Empirical studies of habeas litigation reveal a wide variety of claims, many of which are guilt-related.[18] Further, many of the major Supreme Court decisions on habeas corpus are cases in which such issues as the burden of proof in criminal cases and the quality of counsel are raised.[19] I doubt Professor Hazard would describe such cases as involving "marginal procedural issues" or "technical regularity."[20] Finally, Professor Hazard's comments surely do not reflect the statistic that, in death penalty cases decided on the merits by the federal courts of appeal from 1976 to 1983, the habeas petitioners prevailed seventy percent of the time.[21]

Finally, Professor Hazard objects to my discussion of "models" of adjudication. He prefers to discuss adjudication as embodying "elements of both fairness and finality."[22] By electing to "put the problem" in a "simpler" fashion,[23] by limiting his discussion to what he terms fairness and finality and what others have described as the struggle between "justice" and "efficiency," Professor Hazard

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14 Hazard, *supra* note 1, at 650.

15 *Id.* at 649.

16 Resnik, *supra* note 3, at 942-51 (estimates based upon data from Administrative Office of the United States Courts, from United States Department of Justice, and from National Criminal Justice Information Service).

17 Hazard, *supra* note 1, at 649.

18 *See, e.g.*, Allen, Schachtman & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675 (1982); Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

19 *See, e.g.*, Engle v. Isaac, 456 U.S. 107 (1982) (burden of proof); United States v. Frady, 456 U.S. 152 (1982) (burden of proof); Strickland v. Washington, 104 S. Ct. 2052 (1984) (assistance of counsel).

20 Hazard, *supra* note 1, at 649 & 650.

21 Barefoot v. Estelle, 103 S. Ct. 3383, 3405 (1983) (Marshall, J., dissenting) (relying upon research by NAACP Legal Defense and Education Fund).

22 Hazard, *supra* note 1, at 648.

23 *Id.*

does not capture all of the tradeoffs to be made. By looking only at fairness/finality, Professor Hazard implicitly suggests that procedure has only the instrumental goal of producing outcomes. The problem for Professor Hazard seems to be how to weigh the need for a number of outcomes against concerns that an outcome in an individual case is in error.

I believe that, while outcome production is an important purpose of procedure, procedure has other goals. Because I believe that the normative, political functions of procedure are as important as its outcome production function, I find it helpful to discuss several elements of procedure and not limit my consideration to justice and efficiency or fairness and finality. That is why I provided a discussion of several valued features of adjudication—litigant persuasion opportunities and autonomy, decisionmakers' power, their impartiality, visibility, and rationality, finality, revisionism, economy, consistency, differentiation and ritual. In my view, we must understand the interaction among these valued features to assess the advisibility of giving preclusive weight to decisions rendered by any one set of decisionmakers.

Professor Hazard complains that, in my discussion, I provide no "norm"[24] by which to assess the preferences to be made. I disagree: a central norm for me is concern about power concentration—a concern evidently not shared (to the same degree) by Professor Hazard and hardly shared at all by a majority of the current Supreme Court. I fear for a society in which single individuals can determine whether a person is to be imprisoned, can decide whether a person is to win or lose property, can make all decisions about what rights the state will enforce—all without curbs on his or her authority.

Professor Hazard also shares concern about social values, but for some reason he takes as symbolic of current social understanding the highly controversial case of Bernard Goetz.[25] For reasons not made totally clear, Professor Hazard sees the Goetz incident as linked to the availability of post-conviction review. I do not believe that Goetz shot four people because he was angry at a system in which some small fraction of criminal cases are reviewed on appeal and an even smaller fraction of convictions are reconsidered by federal courts while the defendants remain in prison. Goetz, his defenders, and all of us share fears of criminal attack. But fear for one's own safety does not translate (for me) into a mandate for empowering individuals to make final decisions. After all, it is the finality of Goetz's decision that is horrific. Goetz is an example of what

24 *Id.*
25 *Id.* at 652.

is frightening—inordinate power concentrations in any one person. We should not impose such finality in cases in which we have reasons to suspect both that the process is unfair and the outcome inappropriate. Such "finality" would institutionalize the ills we must struggle against.