

PURSuing NON-ADVERSARIAL JUSTICE WITHIN AN ADVERSARIAL STRUCTURE[†]

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I INTRODUCTION

It is not controversial that it is a fundamental responsibility of courts to administer justice. Some jurisdictions pursue this responsibility through an adversarial process in which the participants each present arguments and evidence for their preferred outcome and a judge or jury strives to serve as a neutral decision maker regarding which party has provided the most persuasive case under the relevant law.¹ Alternatively, some jurisdictions apply a non-adversarial process in which the judicial participant fulfils a more directive role in managing the inquiry. In such a system, confrontational participation by opposing parties fulfils a lesser role in the process. In a traditional inquisitorial system, for example, the judicial officer actively directs the collection and assessment of evidence and 'defines the scope and extent of the inquiry.'²

Categorising structures as 'adversarial' or 'non-adversarial' can suggest that each institution can be clearly classified as falling within one of two mutually exclusive categories. Some problem-solving courts appear to blur the boundary between these categories, however, in that they include roles and procedures that are ordinarily exclusively associated with each approach. In some mental health courts, for example, the prosecutor brings criminal charges and the defendant is required to choose either to pursue the traditional adversarial trial or to plead guilty to the charges and accept conditions of probation monitored by the mental health court. If the defendant chooses to plead guilty, the conditions of probation can be enforced with periods of incarceration if the defendant fails to comply. Some aspects of this process and of the roles fulfilled by the prosecutor, the defendant and the judge are consistent with an adversarial process. The conditions of probation and the judge's role in monitoring compliance with those conditions are less adversarial, however, in that those conditions reflect the premises that the defendant is less culpable than ordinary offenders due to mental impairment and that he/she is subject to treatment that can promote his/her interest in ameliorating his/her disorder as well as the societal interest in reducing the risk of recidivism. Thus, the judge monitors conditions of probation through a cooperative

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¹ Bryan A Garner (ed), *Black's Law Dictionary* (West, 9th ed, 2009) 62.

² *Ibid* 864.

process between the court, the defendant and the treatment providers, which is designed to advance the converging interests of the defendant and the public.³

Although mental health courts are often referred to as problem-solving courts that provide an alternative to an adversarial criminal trial, the features described above suggest that they might also be seen as pursuing a modified or hybrid process that applies adversarial and non-adversarial elements. In contrast, criminal trials in an adversarial system might appear to provide a paradigmatic example of a categorically adversarial process. This article questions that premise, however, identifying some relevant considerations and a pattern of analysis that suggests a role for non-adversarial justice within an essentially adversarial criminal justice process.

The analysis presented here draws upon some examples from the criminal law of the United States. However, these examples do not suggest that the law of the United States should be understood as authoritative regarding these matters, or that the analysis presented is limited to the law of the United States. Rather, these examples are intended to illustrate a pattern of analysis that might be useful to those examining some potential boundaries of the adversarial process in various systems that apply such a framework. The manner and degree to which it might be applicable to the criminal justice process in other countries that apply adversarial processes might vary across institutional structures and the accompanying principles of substantive justice. This analysis does not purport to provide a formula for identifying and addressing circumstances amenable to non-adversarial justice within the criminal justice process. Rather, it attempts to clarify some important considerations for reflection in attempting to identify legitimate functions for non-adversarial justice within a generally adversarial criminal justice process.

The analysis proceeds in the following manner. Part II clarifies some aspects of the relationship between substantive justice and procedural justice. Part III presents an argument for the proposition that a generally adversarial process is appropriate for criminal cases. Part IV examines the administration of psychotropic medication to restore competence to proceed, as an example of a potentially non-adversarial function within a generally adversarial process. Part V concludes the article.

3 Carol Fidler, 'Building Trust and Managing Risk: A Look at a Felony Mental Health Court' (2005) 11 *Psychology, Public Policy and Law* 587, 589–94; Allison Redlich, 'Voluntary, but Knowing and Intelligent? Comprehension in Mental Health Courts' (2005) 11 *Psychology, Public Policy and Law* 605, 605–9.

II JUSTICE: SUBSTANTIVE AND PROCEDURAL

A Substantive Justice

In discharging their responsibility to administer justice, courts strive to interpret and apply the principles of justice embodied in the applicable law. To the degree that this process succeeds, each participant receives the treatment that he or she is due according to those principles.⁴ Critical moral justice addresses the treatment that each individual is due according to the most morally defensible principles of justice. Conventional moral justice addresses the treatment that each individual is due according to the principles of justice that are generally accepted as just within a particular society or system of law.⁵ In a democratic society, the citizens identify the applicable principles of justice to which they bind themselves by embodying them in law through that democratic process. Courts in a democratic society apply the principles of justice embedded in these laws. Thus, justice under law in a democratic society approximates conventional moral justice according to the principles of justice formally adopted in that society.⁶

Variations in interpretation and application of the principles of justice occur for a variety of reasons in a variety of circumstances. Explicit variations occur across jurisdictions that adopt different principles of justice or different standards for the application of common principles. Alternatively, variations can occur within jurisdictions due to different interpretations and applications of the principles and standards embodied in law. These variations within jurisdictions might reflect the relatively general formulations of the applicable principles and standards as well as the differences that arise in attempting to apply those principles and standards to a broad range of circumstances. Variations within jurisdictions raise concerns regarding comparative justice.

Comparative justice requires that we treat like cases alike and relevantly different cases differently, in a manner consistent with their relevant differences according to the applicable principles and standards of justice.⁷ Consistent interpretation and application of principles of non-comparative justice would produce comparative justice. In practice, variations will occur due to differences in circumstances or in interpretations among decision makers. In pursuit of comparative justice, courts strive to minimise unjust discrepancies by developing common interpretations of the applicable principles and of the factors relevant to the application of those principles to various circumstances. Reliance on precedent is one method that courts apply in pursuit of comparative justice.⁸

4 Garner, above n 1, 942; Robert Audi (ed), *Cambridge Dictionary of Philosophy* (Cambridge University Press, 2nd ed, 1999) 456; Lesley Brown (ed), *Newer Shorter Oxford English Dictionary* (Clarendon Press, 4th ed, 1993) 1466.

5 Joel Feinberg, *Freedom and Fulfilment: Philosophical Essays* (Princeton University Press, 1992) 200–1.

6 Robert F Schopp, 'Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparative Justice' (2001) 53 *Florida Law Review* 475, 513–17.

7 Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (UMI, 1980) 265–87.

8 Garner, above n 1, 1295.

Retributive justice requires that courts apply criminal punishment in a manner consistent with the principles embodied in the applicable law.⁹ One important source of inconsistency in the interpretation and application of criminal law is the difficulty that arises in attempting to clearly and consistently define the relationships among the various purposes and justifications of criminal punishment. Criminal punishment is often intended to pursue preventive purposes and to conform to retributive justifications, at least in the sense that it treats proportionality to culpability or blameworthiness as a limit on the severity of justified punishment.

For example, a recent United States Supreme Court decision prohibiting a sentence of life imprisonment without the possibility of parole for juvenile offenders who commit crimes other than homicide, identifies retribution, deterrence, incapacitation and rehabilitation as legitimate goals of criminal punishment.¹⁰ Some passages in this opinion suggest that a life sentence is inappropriate for juvenile offenders because it cannot serve any of these legitimate purposes.¹¹ Other passages in the same opinion appear to treat retribution as the primary goal, however, in that they emphasise the significance of the lesser culpability or moral reprehensibility of the juvenile offender.¹² Thus, the opinion provides ambiguous guidance to trial courts in selecting the appropriate sentence in circumstances in which the convicted juvenile offender appears to deserve a less severe sentence due to conditions rendering them less culpable than other offenders, even though the offender reveals personal characteristics that suggest an elevated risk of recidivism that would support an extended sentence for preventive purposes.

A derivative source of inconsistency in the application of punishment is the difficulty the courts encounter in applying general standards embodied in law to specific offenders and circumstances. The United States Supreme Court, as shown in the case discussed above, recognises that some juvenile offenders might represent exceptions to the generalisation that juveniles are not sufficiently culpable to merit the extreme sentences. The opinion partially justifies the categorical exemption for juveniles, by referring to the risk that case-specific sentencers will not be able to accurately identify the specific, individual juveniles who are sufficiently culpable to justify a life sentence without the possibility of parole.¹³ Some sentencing statutes identify psychological impairment or situational circumstances as relevant mitigating factors which justify reduced severity of punishment. However, they provide no clear rules or criteria that would promote consistent application to different offenders in a variety of circumstances, by a variety of case-specific decision makers.¹⁴

9 Audi, above n 4, 456.

10 *Graham v Florida*, 130 S Ct 2011, 2028 (2010).

11 *Ibid* 2028–30.

12 *Ibid* 2026–28, 2030.

13 *Ibid* 2031–32.

14 American Law Institute, *Model Penal Code* — Proposed Official Draft 1962 § 210.6 (4).

Consider, for example, the following hypothetical offenders who commit similarly serious offences involving burglary.¹⁵ In each case, the offender was arrested by police who were responding to calls from residents who heard someone in their basements at night. When the police arrived at each house, they found a broken window and an offender collecting food and clothes stored in the basement by the owners. One of the offenders, Anderson, suffered chronic and serious, but not psychotic, depression that involved sadness, pessimism and hopelessness.¹⁶ Another, Cook, manifested mild mental retardation that rendered it very difficult for him to find and retain a job.¹⁷ Davis did not qualify for any clinical diagnosis, but had suffered extended and severe socioeconomic deprivation since childhood. Thus, he had minimal education and deficiencies in social and occupational skills. East was a factory worker who had recently lost his job when his factory closed down, during a period in which it had been very difficult to find another job due to economic conditions.

Each of these offenders committed an offence in conditions that arguably mitigate culpability and thus the severity of appropriate punishment to some degree. It is very difficult, however, to articulate a clear interpretation of the relevant principles of retributive justice that would provide clear standards for the consistent and principled application of criminal punishment to these offenders relative to each other and to other offenders who commit various offences in a wide variety of circumstances. Concerns regarding comparative justice become acute when addressing an offender, such as Cook, who manifests a relatively permanent condition as compared to offenders like Anderson, Davis and East, who engage in criminal conduct at least partially in response to conditions that are more amenable to treatment or to changes in economic circumstances.

B Procedural Justice: Adversarial and Non-Adversarial

Adversarial and non-adversarial justice do not provide competing theories or principles of substantive justice. Rather, they provide alternative procedural frameworks for interpreting and applying the applicable principles and standards of substantive justice.¹⁸ Each framework might provide more, or less, appropriate procedures for pursuing substantive justice, depending partially upon the circumstances and partially upon the applicable principles of substantive justice. Procedural justice can converge with, or diverge from substantive justice in at least two distinct senses.

15 Ibid § 221.1.

16 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: Text Revision: DSM-IV-TR* (American Psychiatric Publishing, 4th ed, 2000) 349–56.

17 Ibid 41–9.

18 Garner, above n 1, 62; Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 1–6.

1 Outcome Convergence or Divergence

A procedural framework can converge with or diverge from the applicable principles of substantive justice to the degree that it promotes outcomes that are consistent, or inconsistent, with those prescribed by the applicable principles of substantive justice. Consider, for example, a strictly consequentialist system that is designed with the sole purpose of minimising recidivism. Arguably, an early common law approach of applying capital punishment as the presumptive punishment for a broad range of felonies would minimise recidivism.¹⁹ Thus, the procedural approach that most accurately identified those guilty of felonies and applied capital punishment would best converge with the prescribed outcome in such a system.

In contrast, a utilitarian consequentialist system would attempt to maximise utility, understood as happiness, or the net balance of pleasure over pain for all who are affected.²⁰ Reducing recidivism would be only one element in the more complex goal of maximising utility. Different procedures might be more successful in promoting verdicts and sentences that maximise utility for all who are affected than those that would promote the single goal of minimising recidivism. A system that minimised individual liberty, imposed a dominant police state and applied severe torture to those suspected of committing crimes, for example, might substantially reduce recidivism but also reduce utility. Furthermore, different procedures might be more or less successful at maximising either of these consequentialist goals under various circumstances.

Alternately, a purely retributive system would attempt to apply punishment in proportion to the individual offender's desert, as measured by considerations such as the severity of the offence and the culpability of the offender.²¹ Various procedures might be more or less successful in applying verdicts and sentences that accurately reflect the applicable principles of retributive desert.

It might be difficult to identify criminal justice procedures that reliably produce outcomes most consistent with either consequentialist or retributive justifications of criminal punishment. Furthermore, that problem is compounded when institutions of criminal punishment attempt to integrate consequentialist and retributive principles. Consider, for example, the previously discussed case that prohibits the application of a life sentence to juvenile offenders who commit offences that do not include homicide. The opinion identifies incapacitation, deterrence, rehabilitation and retribution as legitimate purposes of criminal punishment. Some passages in the opinion appear to identify these purposes as alternative legitimate purposes of punishment, but other passages appear to identify retribution as a controlling principle regarding proportionality, in that offenders should receive the punishment they deserve, or as a limiting principle, in that offenders should receive punishment that is no more severe than they deserve.²²

19 Leon Radzinowicz, *A History of the English Criminal Law and its Administration from 1750 — The Movement for Reform, 1750–1833* (Macmillan Co, 1948) 1–8.

20 Audi, above n 4, 942.

21 Ibid 759.

22 Above nn 10–13 and accompanying text.

This opinion illustrates a more general concern regarding outcome convergence. That is, realistic interpretations of the purposes and justifications of criminal punishment recognise that these institutions are designed to pursue and protect a complex set of societal goals and values. Thus, developing procedures that maximise the potential of institutions to produce outcomes that converge with the principles of retributive justice embodied in a particular legal system becomes more difficult as the complete set of purposes and justifications becomes more complex and the relationships among the various purposes and principles remain uncertain.

2 Process Convergence or Divergence

Various procedures might be more or less likely to apply the law and punishment through a process that converges with, or diverges from the principles of retributive justice and the broader principles of political morality embodied in the relevant legal institutions. In the United States, for example, a defendant may waive his or her right to representation by an attorney and plead guilty if he or she is able to do so ‘competently and intelligently.’²³ It seems reasonable to expect that defendants who are represented by competent attorneys are more likely than those who are not represented to raise systemically appropriate defences, present relevant evidence and advance persuasive arguments. If the prosecuting attorney also presents the most relevant and persuasive evidence and arguments for the state, this combination of evidence and argument from both participants can reasonably be expected to provide the judge or jury with a relatively complete understanding of the case. Therefore, if the underlying substantive principles were concerned only with achieving outcome convergence in the form of systemically accurate verdicts and proportionate punishment, defendants probably should not have the authority to waive the right to an attorney and to represent themselves.

Insofar as the underlying substantive principles embodied in the law of a western liberal democracy require respect for the right of a competent individual to make self-regarding decisions, however, competent defendants arguably should be allowed to waive the right to an attorney and plead guilty or represent themselves. The dissenting opinion in a recent Supreme Court case interprets the basis for the right to waive representation and defend oneself as a right to individual dignity understood as a right to direct one’s own fate through the exercise of individual choice.²⁴ The justices who joined in this opinion would have allowed the defendant to waive the right to an attorney and to represent himself in a criminal trial.

The majority opinion in that case allows the trial court to appoint an attorney to represent a defendant who prefers to represent himself if that defendant suffers mental illness that renders him or her incompetent to conduct proceedings by himself.²⁵ The majority opinion directs attention toward the fairness of the trial and toward the appearance of fairness, in contrast to the dissent’s focus on the individual’s right to direct one’s own fate through individual choice.

23 *Godinez v Moran*, 509 US 389, 396 (1993).

24 *Indiana v Edwards*, 128 S Ct 2379, 2393 (2008) (Scalia J).

25 *Ibid* 2388.

Thus, their different conclusions regarding the procedural question of whether the defendant should be allowed to proceed without an attorney reflect different understandings regarding the underlying values most relevant to this particular question. In short, identifying the most defensible applications of adversarial and non-adversarial procedural justice requires careful attention to the applicable principles of substantive justice and to the manner and degree to which various procedures converge with, or depart from, the outcomes and processes prescribed by those principles.

III CRIMINAL LAW AND PROCEDURAL JUSTICE

Procedural justice in the context of the criminal law is arguably highly compatible with adversarial process for at least three reasons. The first reflects the expression of condemnation inherent in criminal punishment. According to James Fitzjames Stephen, many people refrain from committing murder, ‘because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged.’²⁶ Criminal punishment inflicts hard treatment on culpable offenders in a manner that expresses condemnation, including reprobation and resentment toward those offenders.²⁷ By proscribing categories of conduct as crimes and prescribing punishment for those who culpably engage in such conduct, society condemns certain categories of conduct as wrongful by societal standards and it condemns the offenders who are guilty of those crimes as culpable wrongdoers. Applying punishment in proportion to the severity of a specific offence and the culpability or blameworthiness of the offender emphatically reaffirms the societal condemnation of the category of conduct prescribed by the offence definition. Furthermore, the application of proportionate punishment explicitly condemns the specific conduct that constitutes the offence and the specific offender as a culpable wrongdoer.²⁸ This emphasis on the infliction of aversive consequences and the accompanying expression of condemnation can reasonably be expected to encourage confrontational, rather than mutually cooperative, attitudes.

Compare, for example, criminal punishment to civil liability, as legal responses to conduct that causes bodily injury to another person. A society that was concerned only with compensating those who suffered injury might abandon the criminal law and rely solely upon tort law regarding assault or civil negligence to provide compensation for those who are injured by others. Such an approach would provide compensation for those who were intentionally or negligently injured by another without requiring proof of culpability or blameworthiness.²⁹ By including culpability elements and excuses, criminal prohibition and punishment directs attention toward the wrongful conduct and the culpable offender. By requiring culpability

26 Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979) 489, quoting J F Stephen, *History of the Criminal Law of England* (1883) 444.

27 Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970) 95–118.

28 Robert F Schopp, *Justification Defenses and Just Convictions* (Cambridge University Press, 1998) s 23.

29 Wayne R LaFave, *Criminal Law* (West, 5th ed, 2010) s 1.3(b).

and inflicting hard treatment, with its inherent expression of condemnation, on the culpable offender, society pursues societal interests in preventing crime by condemning that conduct as wrongful and that offender as a culpable wrongdoer. This expression of condemnation by society toward the offender can reasonably be expected to elicit confrontational responses from the defendant.

The second reason that suggests an adversarial structure is appropriate to the criminal law involves the application of hard treatment upon the offender. One could imagine an institution that would express condemnation of the crime and of the culpable offender only through an emphatic statement of disapproval. In practice, however, criminal punishment expresses that condemnation by inflicting hard treatment, such as incarceration and, in extreme cases, execution. Reform or rehabilitation might be components in an ideal outcome, but criminal punishment ordinarily pursues societal interests at the expense of convicted offenders by applying methods such as incarceration that are aversive to experience and result in disadvantages that extend beyond release. Thus, it is difficult to interpret the criminal justice process of trial and punishment as a cooperative process pursuing the converging interests of the offender and of the state.

Consider the contrast between the criminal justice process and a variety of ‘problem-solving courts,’ such as juvenile courts, drug courts and mental health courts.³⁰ These courts are designed to pursue therapeutic interventions that benefit the offender in a manner that promotes societal interests in reducing recidivism. These courts reflect the judgments that the offenders they address are less culpable than those addressed in conventional criminal courts and that this lesser culpability reveals the potential for rehabilitation that will reduce the risk of recidivism. This judgement of lesser culpability also justifies the decision to reduce or eliminate the hard treatment that expresses condemnation of culpable wrongdoers. Some of these courts provide for expungement of the records of offenders who fulfil conditions of their suspended sentences, thus retracting the condemnation expressed by the initial requirements of a guilty plea and a suspended sentence as methods to enforce conditions of probation.³¹ Insofar as these problem-solving courts apply suspended sentences, expunge records, or use similar approaches, they can reasonably be understood as pursuing the converging interests of society and of the defendants in reform and rehabilitation, through methods that are less condemnatory than traditional forms of criminal punishment. Criminal conviction and punishment, in contrast, might promote reform and rehabilitation in some offenders, but the application of serious criminal sentences places a strong emphasis on punishment and condemnation of the culpable wrongdoer.

The third reason that arguably supports an adversarial structure for the criminal trial is that the judge and prosecutor are both state actors. Each has distinctly different role-responsibilities, but neither role is directed primarily toward promoting the defendant’s interests. The prosecutor is responsible for pursuing

30 Fisler, above n 3, 589; King et al, above n 18, 138–69.

31 Fisler, above n 3, 589–94; King et al, above n 18, 149–53; Redlich, above n 3, 605–9.

justice according to law by presenting the case of the people in pursuit of criminal convictions and punishment of those who are guilty of criminal conduct.³² The judge is responsible for protecting the defendant from trial processes or punishments that are prohibited by the relevant law, but that responsibility is part of a more general responsibility to administer the criminal law, including the infliction of punishment on offenders who are found guilty.³³ Both pursue principled enforcement of criminal laws that authorise criminal punishment of those who are convicted. Thus, a clearly adversarial role for the defendant and defence attorney might reasonably be seen as necessary for the purpose of promoting a balanced inquiry that produces outcomes consistent with the relevant evidence and with the applicable principles of substantive justice. In short, the societal interest in preventing crime through the infliction of punishment and the expression of condemnation, inherently conflicts with the interest of the defendant in protecting his or her wellbeing by avoiding conviction and punishment. Thus, it is difficult to develop a realistic process for the rigorous application of the criminal law that will address serious criminal charges against responsible defendants and discipline the exercise of coercive force by the state in a manner that can avoid adversarial interaction between the prosecutor and the defendant.

The three arguments presented here do not purport to establish that criminal law must be applied through an adversarial process. Rather, they provide reasoning that explains why an adversarial system might be identified as particularly appropriate in the context of the criminal law. Even if these arguments are persuasive, however, it does not necessarily follow that criminal trials must apply an unbounded adversarial process. As discussed briefly in the introduction, various procedures and roles can be designed and pursued in ways that are more, or less, adversarial. Identifying aspects of the criminal justice process in which the legitimate interests of the participants converge can enhance the ability of the participants to develop less adversarial approaches that promote these converging interests. Identifying such areas requires that one direct attention toward two areas of inquiry. First, distinguish the defendant's legally protected interests from his or her comprehensive interests and preferences. Second, identify the range and boundaries of legitimate state interests. These inquiries can identify some circumstances in which the legitimate interests of the state and of the defendant converge. Explicitly identifying these circumstances and developing appropriate standards and procedures to address them can: (1) limit, to some degree, the adversarial quality of the criminal process and (2) identify some legitimate functions for non-adversarial justice in the context of the adversarial criminal trial. It is important to explicitly identify these functions as non-adversarial because the generally adversarial context of the criminal trial can reasonably be expected to promote a reflexively adversarial responsiveness among some participants.

32 National District Attorneys Association, *National Prosecution Standards* (3rd ed, 2009) s 1.1, 1.2.

33 *Nebraska Code of Judicial Conduct*, 5 Neb Rev Stat ss 5–203 (2010).

IV CONVERGING INTERESTS

A *Competence to Proceed*

Consider, for example, circumstances in the criminal trial, and in the criminal justice system more broadly, in which the administration of psychotropic medication raises questions regarding relevant interests and responsibilities. Consider the following hypothetical: Baker has been charged with serious felonies, found incompetent to stand trial due to a psychotic disorder and been committed for treatment intended to restore competence to proceed at trial. Preliminary assessment indicates that during periods of active psychosis, he hears the hallucinatory voice of God issuing commands and he frequently conforms to those commands. According to testimony at a preliminary hearing prior to the scheduled trial, he refused to converse with his attorney or to participate in the trial because the hallucinatory voice told him that the judge and his attorney were agents of Satan who were participating in a conspiracy to prevent him from fulfilling God's commands. That testimony also indicates that the conduct that led to his arrest and the current criminal charges was in response to a similar hallucinatory voice ordering him to burn down false churches as identified by the voice.³⁴

Treatment for his psychosis is reasonably expected to promote his treatment interests by ameliorating his disorder in a manner that would improve his ability to accurately recognise reality and engage in practical reasoning. If that treatment succeeds to the degree that it renders him competent to proceed with trial, he could present an insanity defence. The trier of fact might, or might not, accept that defence. Thus, treatment that restores competence to proceed would expose him to the risk of a conviction and a serious criminal sentence. However, withholding treatment would reasonably be expected to promote Baker's comprehensive interests. After remaining incompetent to proceed at trial on the criminal charges for a reasonable period of time, he would be subject to commitment to a mental health facility.³⁵ If treatment at that facility was successful in ameliorating his impairment to the degree that he no longer met the criteria for commitment, he would then be eligible for release.

According to accepted practice, incompetent defendants charged with serious crimes are committed to treatment facilities and subject to treatment designed to ameliorate their disorders and render them competent to proceed with trial. Clinically appropriate treatment that restores competence to proceed promotes the defendant's treatment interests, understood as therapeutic effects and side effects, as well as societal interests in resolving serious criminal charges.³⁶ Although avoiding trial might be in the comprehensive interests of some

34 Robert F Schopp, 'Treating Criminal Offenders in Correctional Contexts: Identifying Interests and Distributing Responsibilities' (2009) 27 *Behavioral Sciences and the Law* 833, 842-4 (presenting an earlier variation of Baker).

35 *Jackson v Indiana*, 406 US 715, 738-41 (1972).

36 Schopp, above n 34, 837-8.

individuals, defendants have no legally protected interest in avoiding a fair trial or a legitimately imposed criminal sentence.³⁷ Thus, treatment that ameliorates Baker's impairment to a degree that renders him competent to proceed with trial, without inducing serious side effects, promotes his treatment interests, his legally protected interests in a fair trial and the state's legitimate interest in resolving serious criminal charges. Withholding clinically appropriate treatment would undermine the state's legitimate interest in resolving serious criminal charges and Baker's treatment interests. Although Baker might prefer to avoid trial, he has no legally protected interest in avoiding a fair trial. Thus, the legitimate interests of the defendant and the state converge.

Compare the hypothetical Baker to Moran, a real defendant, who was tried for three counts of first-degree murder.³⁸ Moran discharged his attorney and entered a guilty plea in order to prevent the presentation of mitigating evidence regarding capital sentencing.³⁹ The Court held that the standard for competence to plead guilty or to waive the right to counsel required no more than the capacity to understand the proceedings and assist counsel, necessitated by the standard for competence to proceed with trial.⁴⁰ Expert testimony described Moran as very depressed and as experiencing remorse and guilt.⁴¹ Clinical depression can include the experience of sadness, guilt, pessimism, hopelessness and worthlessness.⁴² By his own account, Moran 'really didn't care about anything.'⁴³ The dissent interpreted Moran's decision and conduct during trial as volunteering himself for execution and identified Moran's depression and the state administered medication as likely explanations for that behaviour.⁴⁴ As interpreted by the dissent, the administration of medication by the state raised questions regarding effects of that medication on Moran's ability or desire to participate effectively in the adversarial process or to make intelligent decisions regarding that process.

Moran had a legally protected interest in receiving a fair trial, but he had no legally protected interest in avoiding a fair trial. Some defendants, such as Baker, might prefer to remain incompetent to proceed in order to avoid a fair trial, a guilty verdict and criminal punishment, but those defendants have no legally protected interests in avoiding these outcomes. According to the opinions, Moran's decision to discharge counsel was intended to avoid the presentation of mitigating evidence and thus, to promote a death sentence. Although this might have been his preference, he had no protected interest in 'state assisted suicide' through an uncontested capital sentence that had not been clearly justified as proportionate to his culpability for the offences.

37 *Riggins v Nevada*, 504 US 127, 135 (1992); *Singleton v Norris*, 319 F 3d 1018, 1026 (8th Cir, 2003).

38 *Godinez v Moran*, 509 US 389, 391–2 (1993).

39 *Ibid* 392.

40 *Ibid* 402.

41 *Ibid* 409–10 (Blackmun J).

42 American Psychiatric Association, above n 16, 349–81.

43 *Godinez v Moran*, 509 US 389, 410–11 (1993) (Blackmun J).

44 *Ibid* 416–17 (Blackmun J).

The state has legitimate interests in resolving serious criminal charges, in achieving just verdicts and sentences and in maintaining the integrity of the process.⁴⁵ The state has no legitimate interest in promoting an uncontested trial that produces a guilty verdict and maximum sentence by administering medication that may undermine the defendant's motivation or ability to rigorously test the state's case. Insofar as medication administered by the state may have undermined the defendant's motivation or ability, the absence of a contested trial undermines the legitimate interests of the state and of the public in maintaining the integrity of the criminal justice process. Arguably, the legitimate interests of Moran and of the State converge on a monitored process of treatment that maintains Moran's competence to proceed without undermining his ability or motivation to vigorously contest the state's case.

B Legitimate Interests and Health Care Ethics

Although we frequently frame the adversarial process as one that involves a conflict of interests between two participants, some aspects of the process can involve other participants whose roles can raise other potential conflicts. Consider, for example, the roles of health care providers in providing treatment intended to restore competence to proceed at various stages in the criminal justice process. In *Panetti v Quarterman*, the American Psychological Association, the American Psychiatric Association and the National Alliance on Mental Illness filed an amicus brief that advocated commutation of capital sentences for offenders who are found incompetent to face execution.⁴⁶ The brief suggests that failure to commute the capital sentence would force the offender to make very difficult treatment decisions, but it provides no clear reasoning to explain why this would be unacceptable.⁴⁷ The ethics code of the American Psychological Association identifies a primary goal of the code as 'the welfare and protection of the individuals and groups with whom psychologists work.'⁴⁸ The first principle listed in that code is 'Beneficence and Nonmaleficence', which requires that psychologists promote welfare and do no harm.⁴⁹ Similarly, the American Psychiatric Association subscribes to 'ethical statements developed primarily for the benefit of the patient.'⁵⁰ Arguably, the recommendation of commutation reflects the implicit premise that psychologists and psychiatrists cannot ethically

45 Schopp, above n 34, 838.

46 *Panetti v Quarterman*, 551 US 930 (2007); American Psychological Association, American Psychiatric Association and National Alliance on Mental Illness, *Amicus Brief in Support of Petitioner (Scott Louis Panetti) in the Case of Panetti v Quarterman* (2007) 16. In this case, the Supreme Court addressed the competence to face execution of a convicted offender who reportedly was aware that he had committed the murders for which he had been sentenced, that he had been sentenced to death for those murders and that the state's reported motive for executing him was as punishment for those murders, but who reportedly believed that the state's real motive was to prevent him from preaching.

47 *Ibid* 17.

48 American Psychological Association, 'Ethical Principles of Psychologists and Code of Conduct' (2002) 57 *American Psychologist* 1060, 1062.

49 *Ibid*.

50 American Psychiatric Association, *The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry* (revised ed, 2009) 2.

provide treatment expected to restore competence if that restoration could harm the offender by rendering him eligible for execution.⁵¹

I have argued elsewhere that the ethical obligation of treatment providers to promote the wellbeing of their clients should be interpreted as conferring an obligation to protect the clients' treatment interests, understood as therapeutic effects and direct side effects of treatment. The alternative interpretation of that obligation, understood as requiring treatment providers to promote their clients' comprehensive interests, would require that providers frequently engage in professional negligence by practicing beyond the boundaries of their expertise and in some circumstances it would create conflicts between the ethics of those professions and societal standards embodied in law.⁵² Consider, for example, the previously discussed defendants Baker and Moran. Treatment to restore or maintain competence to proceed in the criminal trial would arguably promote their treatment interests by alleviating impairment without inducing severe side effects. Withholding that treatment might promote their comprehensive interests, however, by protecting them from the risk of convictions and serious criminal sentences.⁵³

For the purpose of this article, I will assume that treatment to restore competence to proceed with trial is consistent with the ethical obligations of treatment providers and with the societal values embodied in law. In what manner might a non-adversarial process for monitoring and directing the administration of such treatment advance the legitimate interests of the various participants in the adversarial criminal trial, considering at least: the defendant's interest in receiving a fair trial, the state's interest in resolving serious criminal charges, the public interest in maintaining the integrity of the process and the treatment providers' interest in practicing in a manner that reflects the ethical principles of their professions?

It is not apparent that the relevant considerations and likely effects would be the same for all criminal justice systems. The relevant effects might differ according to the underlying principles of criminal justice and according to the broader principles of political morality underlying the comprehensive set of legal institutions. For the purpose of this initial analysis, I have assumed that the relevant criminal justice system accepts retributive principles insofar as it attempts to apply criminal punishment only to those who are guilty of committing criminal offences, applying punishment in proportion to the severity of the offence and the personal culpability or blameworthiness of the offender. Consider the potential of a non-adversarial process of treatment administration and monitoring in the framework of outcome or process convergence as discussed in Part II(B).

51 Robert F Schopp, 'Involuntary Treatment and Competence to Proceed in the Criminal Process: Capital and Noncapital Cases' (2006) 24 *Behavioral Sciences and the Law* 495, 523–4.

52 Schopp, above n 34, 844–52.

53 See Part IV above.

C Outcome Convergence

Insofar as the criminal justice system strives to apply criminal punishment in proportion to the severity of the offence and the offender's culpability, the offender's mental state at the time of the offence is directly relevant to a just outcome, but the mental state at the time of the trial is not directly relevant. The mental state at the time of the trial might be indirectly relevant, however, insofar as it influences the validity of the trial process in measuring guilt and culpability at the time of the offence. Treatment that restores the defendant's competence to proceed in the trial should promote outcome convergence insofar as it facilitates the trial process in providing an accurate assessment of the defendant's culpability, or lack thereof, at the time of the offence. Insofar as the treatment restores the defendant's capacity to participate in the trial process and assist an attorney, it should facilitate these functions, at least to a degree similar to that of an ordinary criminal trial with a competent defendant.

If the treatment fails to restore the defendant's capacity to competently participate but ameliorates the most flagrant symptoms, it might result in a misleading appearance of competence by an incompetent defendant. In those circumstances, treatment could exacerbate the risk of outcome divergence by promoting the illusion that the defendant is competently facilitating a defence that advances the most relevant arguments and evidence. For example, the trier of fact might believe that all relevant evidence has been presented, even though some exculpatory or mitigating evidence has been overlooked because the defendant has not been able to communicate effectively with his/her attorney. Alternatively, treatment may restore the defendant's competence in a manner that renders his/her appearance and conduct during the trial misleading in contrast to his/her severe level of impairment at the time of the offence. This raises questions regarding the most effective way to prevent jurors from drawing inaccurate conclusions regarding guilt or severity of culpability from the defendant's appearance and conduct during the trial.

Similarly, consider the possible significance of circumstances such as those identified by Justice Blackmun regarding the administration of medication to Moran.⁵⁴ Assume, for the sake of analysis, that the medications administered to Moran were intended to maintain his competence to proceed and that they had the effect of promoting a condition in which he was competent but 'really didn't care about anything.'⁵⁵ Although competence ordinarily addresses capacity, rather than motivation, medication administered by state actors that undermines motivation to contest the state's allegations and evidence raises serious concerns regarding the accuracy of the outcome and the integrity of the process. A negotiated plea bargain might ordinarily provide a reasonable basis to infer that the state has persuasive evidence of guilt. That inference is called into question, however, when the state administers medication that might undermine the defendant's motivation.

54 *Godinez v Moran*, 509 US 389, 416–17 (1993) (Blackmun J).

55 *Ibid.*

D Process Convergence

The concern regarding the risk that state administered medication undermined Moran's motivation to contest the state's evidence, blurs the boundary between outcome convergence and process convergence. State administered medication that dilutes the adversarial process raises concerns regarding the possible effects on the justice of the outcomes, but it also raises distinct concerns regarding the integrity of the process. Even if the evidence of guilt was so clear that Moran's lack of motivation had no effect on the outcome of the trial, his failure to vigorously contest the state's case undermines the ability of the public to be confident in the legitimacy of the outcome or the reliability of the process as applied to other cases. Insofar as his failure to contest the state's case was a result of the medication, it raises serious concerns regarding the potential for manipulation by state actors in this case or in others.

Recall the previously discussed disagreement between opinions regarding the right of the defendant to waive the right to an attorney and conduct his/her own defence.⁵⁶ If the competent individual's right to direct his/her own life through the exercise of choice is the primary basis for the right to waive, then a waiver by a competent defendant appears to conform to this principled basis. Alternatively, if maintaining discipline on the exercise of force by the state and the integrity of the process are important values, independent of their effects on promoting an accurate outcome in this case, then a waiver that relieves the state of the obligation to persuasively prove its case undermines those values.

Arguably, addressing the decision regarding treatment to restore competence to proceed through a non-adversarial process could protect: the defendant's treatment interests and his/her legally protected interests in receiving a fair trial; the state's legitimate interests in generating accurate verdicts and proportionate sentences; and the public interest in maintaining the integrity of the process. In a generally adversarial process, however, it may not be realistic to expect the various participants to fully recognise and promote these converging legitimate interests. The defendant is at risk of receiving serious punishment if he/she is found guilty. Although he/she has a legitimate interest in a fair trial, rather than in a preferred outcome, it is reasonable to suppose that most defendants will be primarily concerned with protecting their comprehensive interests. If the defendant is guilty, it seems unlikely that his/her primary concern will be directed toward promoting the integrity of the process or principled justice. If the defendant is not guilty, he/she may well have lost confidence in the system by the time the court addresses competence to proceed. Similarly, the defence attorney in an adversarial system is likely to be oriented toward protecting his/her clients against the state. Thus, defence attorneys are likely to be suspicious of a proposed non-adversarial process. One reasonable concern regarding a generally adversarial system is therefore that participation in such a system seems likely to promote reflexively adversarial attitudes.

56 See above nn 24–5 and accompanying text.

Given the prosecuting attorney's responsibility to pursue justice according to law, it arguably falls within his/her role to promote such a process, but it seems likely that the generally adversarial process will render that difficult.⁵⁷ Arguably, the primary responsibility regarding the possible adverse effects of medication on the integrity of the process rests on the judge, in cooperation with independent health care providers. Competent and responsible health care providers administering treatment to restore or maintain competence to proceed, may tend to focus their attention on the capacities of comprehension, reasoning and communication that are ordinarily understood to be central to competence. Thus, they may tend to overlook or underestimate the practical effects of decreased motivation, such as those reported in the Moran case. Alternatively, health care providers may generally tend to assess treatment effects and side effects without fully understanding the trial process and the manner in which relatively subtle side effects might undermine participation in the generally adversarial process.

Thus, it is plausible to suppose that the trial judge should establish a non-adversarial approach, assessing the effects of treatment to restore competence to proceed based on the integrity of the adversarial trial process. Such a procedure might involve assessment of the defendant's impairment, the therapeutic effects of treatment and the side effects of that treatment, by an independent clinician who is not working with either the prosecution or the defence. However, many competent and careful clinicians will lack the familiarity with the trial process that is required to fully assess the significance of various types of impairment or side effects on the defendant's ability to discharge his/her role. Thus, the clinical assessment of impairment, therapeutic effects and side effects, might require cooperation with a legal actor who can work with the clinician to estimate the likely effects of the clinical condition on the defendant's participation in the trial process. In some circumstances, the judge may be able to fulfil this function, but in others, an independent legal actor may be more appropriate. The combined clinical and legal assessment would be directed toward protecting the converging legitimate interests of the defendant and the state, in a fair trial that would generate accurate verdicts and proportionate sentences.

V CONCLUSION

Although we tend to frame the discussion as one regarding adversarial or non-adversarial institutional structures, adversarial criminal justice systems include shared responsibilities and limits on adversarial participation. In the United States, for example, it falls within the legitimate roles of the trial judge, the defence attorney and the prosecuting attorney to call attention to concerns regarding the defendant's competence to proceed.⁵⁸ Even within a generally adversarial process, courts can place legitimate limits on unbounded adversarial practices in a manner that promotes their ability to apply just procedures and promote just outcomes.

⁵⁷ See National District Attorneys Association, above n 32.

⁵⁸ Michael L Perlin, *Law and Mental Disability* (The Michie Company, 1994) 507.

Pursuit of that goal requires, as initial steps, that courts: (1) distinguish the defendant's legally protected interests from his/her comprehensive interests; (2) identify the range and boundaries of legitimate state interests; (3) define the legitimate roles and boundaries of various participants, such as health care providers; (4) articulate the underlying principles of substantive justice that provide the foundation for legitimate interests, procedures and roles; and (5) apply procedures that facilitate the pursuit of legitimate interests in a manner that reflects the underlying principles and constrains inappropriate adversarial participation by various actors.

Although the examples presented in this article address United States Supreme Court opinions and the specific function of psychotropic medications, the basic structure of the analysis is intended to be applicable in other jurisdictions that apply a generally adversarial process. Careful examination of the principles of substantive justice embodied in specific systems of law and of the legitimate responsibilities and interests of various actors in the applicable institutional structures, has the potential to identify systemically appropriate limits on the adversarial process and to define roles for specific participants that facilitate systemically appropriate non-adversarial functions.