Our Constitutionalized Adversary System*

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In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what. In the United States, however, the phrase "adversary system" is synonymous with the American system for the administration of justice—a system that was constitutionalized by the Framers and that has been elaborated by the Supreme Court for two centuries. Thus, the adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.

The rights that comprise the adversary system include personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury, the rights to call and to confront witnesses, and the right to require the government to prove guilt beyond a reasonable doubt and without the use of compelled self-incrimination. These rights, and others, are also included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law—a concept which itself has been substantially equated with the adversary system.[1]

An essential function of the adversary system, therefore, is to maintain a free society in which individual human rights are central.[2] In that sense the right to counsel is "the most precious" of

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1 GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 122 (1978).

2 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

rights, because it affects one's ability to assert any other right.[3] As Professor Geoffrey Hazard has written, the adversary system "stands with freedom of speech and the right of assembly as a pillar of our constitutional system."[4] It follows that the professional responsibilities of the lawyer within such a system must be determined, in major part, by the same civil libertarian values that are embodied in the Constitution.

CRITICISMS OF THE ADVERSARY SYSTEM

In recent years, attacks upon the adversary system have been unprecedented in their breadth and intensity, and at times have been "scathing [and] venomous."[5] For example, at a conference of twenty-five of the country's "professional elite"[6] (most of them lawyers and judges) the adversary system was "thoroughly savaged."[7] Efforts by the conferees to produce an acceptable alternative to the adversary system ended unsuccessfully on a "note of resignation."[8]

It is not coincidental that these attacks on the adversary system have taken place in the context of critical analyses of lawyers' ethics. Critics concerned with the negative aspects of zealous, client-centered advocacy have recognized that the reforms they believe necessary in lawyers' ethics can come about only through a radical restructuring of the adversary system itself.

For example, former Federal Judge Marvin Frankel has proposed significant restrictions on confidentiality that would subordinate clients' interests to those of nonclients.[9] Mr. Frankel acknowledges that his proposals are "radical"[10] and that they would effect an "appreciable revolution" in procedure, in lawyer-client relations, and in the lawyer's self-image.[11] Significantly, although he professes "a profound devotion to a soundly adversary mode of reaching informed decisions,"[12] Mr. Frankel concedes that his reforms will be impossible "until or unless the adversary ethic comes to be changed or subordinated."[13] Indeed, an entire chapter of his book is entitled *Modifying the Lawyer's Adversary Ideal*,[14] and another chapter closes with a hope for "wiser, more

3 Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1957), *quoted with approval in* United States v. Cronic, 466 U.S. 648, 654 (1984).

4 HAZARD, *supra* note 1, at 123.

5 Jethro K. Lieberman, Book Review, 27 N.Y.L. REV. 695 (1981).

6 J.N. Green, *Foreword* to HAZARD, *supra* note 1, at ix.

7 HAZARD, *supra* note 1, at 123.

8 *Id.* at 126.

9 MARVIN E. FRANKEL, PARTISAN JUSTICE (1980).

10 *Id.* at 83.

11 *Id.*

12 *Id.* at 9.

13 *Id.* at 18.

14 *Id.* ch. 6.

effective ideas for breaking the adversary mold . . . ."[15] Thus, the adversary system has become a battleground on which fundamental issues of lawyers' ethics are being fought out.[16]

THE ADVERSARY SYSTEM AND INDIVIDUAL DIGNITY

It is not surprising to find a sharp contrast in the role of a criminal defense lawyer in a totalitarian society. As expressed by law professors at the University of Havana, "the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanction which will best rehabilitate him."[17] Similarly, a Bulgarian attorney began his defense in a treason trial by noting that "[i]n a Socialist state there is no division of duty between the judge, prosecutor, and defense counsel . . . . The defense must assist the prosecution to find the objective truth in a case."[18] In that case, the defense attorney ridiculed his client's defense, and the client was convicted and executed.[19] (Sometime later the verdict was found to have been erroneous, and the defendant was "rehabilitated.")

A Chinese lawyer, Ma Rongjie, has described the role of counsel in similar terms.[20] Lawyers are "servants of the state."[21] The function of the defense lawyer in criminal cases is, at most, to plead mitigating circumstances on behalf of clients whose guilt is largely predetermined.[22] Mr. Ma represented Jiang Qing, widow of Mao Tse Tung, in the trial of the "Gang of Four." Jiang Qing had requested a lawyer who would assert her innocence, but such a request was impossible to honor, Mr. Ma said. On the contrary, in representing "the criminals" (as Mr. Ma referred to his clients) he and the other defense lawyers conducted no investigations of their own, objected to no prosecution questions, cross-examined no prosecution witnesses, and called no witnesses themselves. Nor did the defense attorneys even meet with their clients. "There

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15 *Id.* at 100.

16 *See also* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 38 WM. & MARY L. REV. 5 (1996); Monroe H. Freedman, *The Trouble with Post-Modern Zeal*, 38 WM. & MARY L. REV. 63 (1996).

17 JOHN KAPLAN, CRIMINAL JUSTICE 264-65 (1973); Jesse Berman, *The Cuban Popular Trials*, 69 COLUM. L. REV. 1317, 1341 (1969).

18 *Id.* KAPLAN at 264-65.

19 In the trial of anti-Hitler bomb plotters in July 1944, the court-appointed lawyer for one of the defendants "expressed horror at his client's actions and closed by demanding the death penalty for him." V.R. Berghahn, *The Judges Made Good Nazis*, N.Y. TIMES BOOK REV., Apr. 28, 1991, at 3 (reviewing I. MULLER, HITLER'S JUSTICE (Harvard 1991)).

20 *Chinese Lawyer Has High Hopes For His Country*, N.Y. TIMES, Jan. 6, 1982, at B5 [hereinafter *Chinese Lawyer*].

21 *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Preamble (The phrases used in the United States to convey a similar notion is "officers of the court" or "officers of the legal system."

22 *Chinese Lawyer*, *supra* note 20.

was no need to talk to them," Mr. Ma explained. "The police and the prosecutors worked on the case a very long time, and the evidence they found which wasn't true they threw away."[23]

Commenting on a similar legal system in the Soviet Union, Alexander Solzhenitsyn wrote sardonically:[24]

> On the threshold of the classless society, we were at last capable of realizing the conflictless trial—a reflection of the absence of inner conflict in our social structure—in which not only the judge and the prosecutor but also the defense lawyers and the defendants themselves would strive collectively to achieve their common purpose.

Under the American adversary system, a trial is not "conflictless," because the lawyer is not the agent or servant of the state. Rather, the lawyer is the client's "champion against a hostile world"[25]—the client's zealous advocate against the government itself. Unlike Mr. Ma, therefore, the American defense lawyer has an obligation to conduct a prompt investigation of the case.[26] All sources of relevant information must be explored, particularly the client.[27] Rather than accepting the government's decision to preserve or destroy evidence, the defense lawyer has a duty to seek out information in the possession of the police and prosecutor.[28] Defense counsel has those duties, moreover, even though the defendant has admitted guilt to the lawyer and has expressed a desire to plead guilty.[29] As explained by the ABA *Standards for Criminal Justice*, the client may be mistaken about legal culpability or may be able to avoid conviction by persuading the court that inculpatory evidence should be suppressed; also, such an investigation could prove useful in showing mitigating circumstances.[30]

Such rules, reflecting a respect for the rights even of the guilty individual, are a significant expression of the political philosophy that underlies the American system of justice. As Professor Zupancic has observed, "[i]n societies which believe that the individual is the ultimate repository of existential values, his status vis-a-vis the majority will remain uncontested even when he is

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23 *Id.* (A decade later, the Chinese system remained the same). *See also* Sheryl WuDunn, *In Murky Trials, China Buries Tiananmen Affair*, N.Y. TIMES, Jan. 20, 1991, at L10 (describing the trials of the leaders of the 1989 democracy movement).

24 ALEKSANDR I. SOLZHENITSYN, GULAG ARCHIPELAGO 374 (Thomas P. Whitney trans., Harper & Row, 1974), *quoted in* Ralph J. Temple, *In Defense of the Adversary System*, 2(2) ABA LITIGATION, 43, 44 (Winter 1976).

25 *See* STANDARDS RELATING TO THE DEFENSE FUNCTION 146 (ABA Approved Draft, 1971).

26 STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (ABA 1979).

27 *Id.* at 4-3.2, 4-4.1.

28 *Id.* at 4-4.1.

29 *Id.*

30 *Id.* Commentary to Standard 4-4.1.

accused of crime. He will not be an object of purposes and policies, but *an equal partner in a legal dispute . . . .*"[31]

THE ADVERSARY SYSTEM AND INDIVIDUAL RIGHTS

There is also an important systemic purpose served by assuring that even guilty people have rights. Jethro K. Lieberman has made the point by putting forth, and then explaining, a paradox:[32]

> The singular strength of the adversary system is measured by a central fact that is usually deplored: The overwhelming majority of those accused in American courts are guilty. Why is this a strength? Because its opposite, visible in many totalitarian nations within the Chinese and Russian orbits, is this: Without an adversary system, a considerable number of defendants are prosecuted, though palpably innocent. . . . In short, the strength of the adversary system is not so much that it permits the innocent to defend themselves meaningfully, but that in the main it prevents them from having to do so.

Lieberman concludes that "[o]nly because defense lawyers are independent of the state and the ruling political parties and are permitted, even encouraged, to defend fiercely and partisanly do we ensure that the state will be loathe to indict those whom it knows to be innocent." This benefit, however, is largely invisible. "We rarely see who is not indicted, we never see those whom a prosecutor, or even a governor or president might like to prosecute but cannot."[33]

There is another systemic reason for the zealous representation that characterizes the adversary system. Our purpose as a society is not only to respect the humanity of the guilty defendant and to protect the innocent from the possibility of an unjust conviction. Precious as those objectives are, we also seek through the adversary system "to preserve the integrity of society itself . . . [by] keeping sound and wholesome the procedure by which society visits its condemnation on an erring member."[34]

In an insightful article, Professor John B. Mitchell has explained how defense counsel serves to make our criminal procedures consistent with our ideals.[35] By providing a vigorous defense, even for someone the lawyer knows is guilty, Mitchell

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31 Bostjan M. Zupancic, *Truth and Impartiality in Criminal Process*, 7 J. CONTEMP. L. 39, 133 (1982) (emphasis added).

32 Lieberman, *supra* note 5.

33 *Id.*

34 Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 35 (Harold Berman ed., 1960) (In more down-to-earth language, John Condon, a Buffalo criminal defense lawyer, once commented that he is "an expert in quality control.").

35 John B. Mitchell, *The Ethics of the Criminal Defense Attorney*, 32 STAN. L. REV. 293 (1980).

says, defense counsel "makes the screens work."[36] Mitchell's screens are the procedures and standards that we use to protect individual rights in the criminal process (and to protect those who should not become entangled in the criminal process). These standards include reasonable suspicion for a stop on the street, probable cause for an arrest, prosecutorial discretion to indict and go to trial, and guilt beyond a reasonable doubt at trial. Mitchell shows how zealous defense tactics have served to make the screens work as they should, for example, by improving the professionalism of police work.[37] In one community, defense counsel argued in narcotics cases that the prosecution had presented only the uncorroborated testimony of a single police officer. After four acquittals in such cases, the police began to corroborate drug buys with concealed transmitters and marked money. In other cases, acquittals resulted from the failure of investigators to dust for fingerprints; thereafter, a suspect tentatively identified as a robber was not tried because the fingerprints found on the cash drawer were not his. Also, the quality of eyewitness identifications has been improved by defense attacks on suggestive pretrial identification procedures.

Professor Lawrence H. Tribe has added that "procedure can serve a vital role as . . . a reminder to the community of the principles it holds important."[38] He explains:

> The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.

These rights to which Professor Tribe refers are essential components of the adversary system as it has evolved in American constitutional law.

The False Metaphor of Warfare

A familiar device of those who denigrate the adversary system is the metaphor and rhetoric of war, complete with "battlefield," "weapons," "ammunition," and lawyer-mercenaries who "marshal

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36 *Id.* at 298.

37 *Id.* at 306-7.

38 Laurence H. Tribe, *Trial by Mathematical Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1391-92 (1971).

the forces" for a "grimly combative" engagement.[39] "We set the parties fighting," says Mr. Frankel.[40]

The true picture is rather different from the physical violence that is conjured up by that rhetoric. People who have grievances against one another come to lawyers as an alternative to fighting it out physically. "We" don't set the parties fighting. Rather, society, through the legal system, channels people's grievances into socially controlled, nonviolent means of dispute resolution. We—the lawyers—play an indispensable part in that constructive societal process.

A dramatic illustration of violence transformed into peaceable dispute resolution occurred in the 1960s, when a major social concern was to "get them out of the streets and into the courtrooms." The reference was to members of a racial minority with severe and longstanding grievances against American society. Riots, with arson, looting, and serious assaults, took place in several cities, including our national capital. With remarkable efficiency, and giving most citizens a sense that justice was indeed being done, the adversary system was put to work to further the ideals of equal protection of the laws and other fundamental concepts of our constitutional democracy.[41]

We are sometimes told that other countries, like Japan, are superior to the United States because they have fewer lawyers and less litigation.[42] But in place of a "litigation explosion,"[43] Japan has suffered a violence explosion. In addition to familiar crimes like illegal drugs, organized crime in Japan provides an extortion service known to police there as "intervention in civil affairs."[44] As reported in the *New York Times*, a factor in the strength of the yakuza, or organized criminals, is that the number of lawyers is limited. "Thus, many people with grievances, like victims of traffic accidents, hire yakuza to obtain damage pay-

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39 MARVIN E. FRANKEL, PARTISAN JUSTICE 11 (1980).

40 *Id.* (quoting C.P. CURTIS, IT'S YOUR LAW 1 (1954)). Mr. Curtis was sometimes careless in language and superficial in arguments in defense of adversarial ethics, which makes him a favorite target of critics. *See, e.g.*, John T. Noonan, Jr., *Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227 (1981).

41 *See* Frank I. Michelman, *The Supreme Court and Litigation Access Fees*, 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527.

42 *See, e.g.*, V. P. Dan Quayle, Speech to the American Bar Association (Aug. 13, 1991) (this was a recurrent theme).

43 *See, e.g.*, Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (The "explosion" of tort litigation in the United States is a myth.); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Kenneth I. Chesebro, *A Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AMER. U. L. REV. 1637 (1993); Coyle & MacLachlan, *Business Cases Clog Courts*, NAT'L L.J. 1, Aug. 7, 1995 (business cases, not tort cases, are crowding the federal court docket).

44 Steven R. Weisman, *Is Big Business Getting Too Cozy with the Mob?* N.Y. TIMES, Aug. 29, 1991, at A4.

ments [in exchange for] a percentage of the payment." The yakuza offer their services openly, some from storefront offices. In effect, "the mob in Japan . . . fills a function played by lawyers in other societies."[45] In place of the metaphorical violence of American litigation, therefore, the paucity of lawyers in Japan has resulted in violence in fact.

THE ADVERSARY SYSTEM IN CIVIL LITIGATION

The adversary system has also been instrumental, principally in civil litigation, in mitigating the grievances of several minorities, women, consumers, tenants, citizens concerned with health and safety in our environment, and others. As one who celebrates these advances in individual rights and liberties (and those in criminal justice too), I view with concern and some suspicion the calls for basic changes in adversarial zeal. Of course, it is preferable to negotiate a satisfactory resolution of a dispute. Experience teaches, however, that those in power do not ordinarily choose to negotiate unless there is a credible threat of successful litigation.

In a report to his Board of Overseers in 1983, Harvard President Derek Bok decried "the familiar tilt in the law curriculum toward preparing students for legal combat," and called instead for law schools to train their students "for the gentler arts of reconciliation and accommodation."[46] These are themes long associated with retired Chief Justice Warren Burger.[47]

In response to such critics, Professor Owen Fiss has observed that they see adjudication in essentially private terms. Viewing the purpose of civil lawsuits to be the resolution of discrete private disputes, they find the amount of litigation we encounter to be evidence of "the needlessly combative and quarrelsome character of Americans."[48] Fiss, on the other hand, sees adjudication in more public terms. That is, civil litigation is "an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."[49] Thus, we turn to courts not because of some quirk in our personalities, but because we need to, and we train our students in the tougher arts not because we take a special pleasure in combat, but to equip them to secure all that the law promises.[50] Fiss concludes:[51]

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45 *Id.*

46 *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), *citing* Derek C. Bok, *A Flawed System*, HARV. MAG. 45 (May-June, 1983), *reprinted in*, N.Y. ST. B.J. 8 (Oct. 1983), N.Y. ST. B.J. 31 (Nov. 1983); *excerpted in*, 33 J. LEGAL EDUC. 579 (1983).

47 *Id. citing* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systemic Anticipation*, 70 F.R.D. 83, 93-96 (1976).

48 Fiss, *supra* note 46, at 1089-90.

49 *Id.*

50 *Id.*

> To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country . . . has a case like *Brown v. Board of Education*, in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame. What is unique is not the problem, that we live short of our ideals, but that we alone seem willing to do something about it. Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment.

Comparing "adjudication American-style" with that in England, Ralph Temple has noted[52] that there are no lawsuits in Britain challenging the legality of an oppressive law, no injunctions against illegal government actions, and no class actions to protect civil liberties. British law "has yet to discover the principle flowing from *Marbury v. Madison* . . . , that a healthy legal system requires that the courts have the power to declare unlawful those acts of the majority, through its legislature or its executive, which are abusive."[53] Mr. Temple notes that there is no greater animosity between Irish Protestants and Catholics than there was between Southern whites and blacks. Nevertheless, the bitterness has been deeper and the violence greater in Ireland because the British legal system is "incapable of producing social revolution and justice through its legal system—incapable of producing a *Brown v. Board of Education*, a *Baker v. Carr*, or a *United States v. Richard Nixon*."[54] That is, through our constitutional adversary system, "[t]ime and again the heat of our social struggles has been effectively transmuted into courtroom battles, and our society is the stronger for it."[55]

As indicated by their citation of *Brown v. Board of Education* and other cases of national import, Professor Fiss and Mr. Temple are directing their attention principally to civil litigation in which the outcome of the particular case is an expression of public policy that extends beyond the interests of the immediate parties. The point they make is of broader significance, however, and is not limited to the overtly "political" case or even to the leading case that establishes the new rule.

For example, a case might hold for the first time that a tenant has a right, apart from the express terms of her lease, to safe and habitable premises, or that a consumer can avoid an unconsciona-

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51 *Id.*

52 Ralph J. Temple, *In Defense of the Adversary System*, 2(2) A.B.A. LITIG. 43, 47 (Winter 1976).

53 *Id.*

54 *Id.*

55 *Id.*

ble sales-financing agreement, or that an employee under a contract terminable at will can sue for wrongful discharge, or that an insurance company can be held liable in punitive damages for arbitrarily withholding benefits due under a policy. Such a case, establishing new rights and deterrents against harmful conduct through civil litigation, is also "a tribute to our inventiveness," using "state power to bring a recalcitrant reality closer to our chosen ideals." If the leading case is to have meaning, however, it will come to fruition in the series of everyday cases that follow and apply it, cases that will truly make the ideal into reality.

In that sense, even ordinary personal injury litigation is an expression, procedurally and substantively, of important public policies. Through the adversary system we provide a social process through which a person with a grievance against another can petition the government for redress in a peaceable fashion. Echoing Professor Fiss and Mr. Temple, therefore, the Supreme Court has noted that "[o]ver the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights."[56] The Court added: "That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride."[57]

The Civil Trial and the Constitution

Rights like trial by jury and the assistance of counsel—the cluster of rights that comprise constitutional due process of law—are most important when the individual stands alone against the state as an accused criminal. The fundamental characteristics of the adversary system also have a constitutional source, however, in our administration of civil justice. Just as a judge in criminal litigation must be impartial,[58] a judge in a civil trial "best serves the administration of justice by remaining detached from the conflict between the parties."[59] A judge who departs from the essentially passive role that is characteristic of the adversary system deprives civil litigants of due process of law.[60] Also, proper representation in civil as well as criminal cases demands that attorneys take an active role in investigating, analyzing, and advocating their clients' cases. This is "the historical and the necessary way in which lawyers act within the framework of our system of juris-

56 Zauderer v. Office of Disciplinary Counsel, 105 U.S. 626, 642-43 (1985).

57 *Id.* at 643.

58 United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945) ("[The trial judge] must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.").

59 Gardiner v. A.H. Robins Company, Inc., 747 F.2d 1180, 1192 (8th Cir. 1984).

60 *Id.* at 1183, 1191.

prudence to promote justice and to protect their clients' interests."[61]

The Supreme Court has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as plaintiffs attempting to redress grievances or as defendants trying to maintain their rights.[62] Due process in civil cases is not identical, of course, to due process in serious criminal cases. For example, as in criminal cases not involving imprisonment, the individual's right to an opportunity to be heard does not necessarily mean that the state has an obligation to provide counsel to a civil litigant at state expense.[63] The Supreme Court has recognized, however, that in civil cases as well as criminal, due process would be denied if a court were arbitrarily to refuse to hear a party through retained counsel.[64] Also, the right to trial by jury in the traditional common law manner is guaranteed in civil actions at law by the Seventh Amendment[65] and by similar state constitutional provisions.

It is misleading to suggest, therefore, that the adversary system is part of our constitutional tradition in the administration of criminal, but not civil, justice. In fact, the adversary system in civil litigation has played a central role in fulfilling the constitutional goals "to . . . establish Justice, insure domestic Tranquillity, . . . promote the general Welfare, and secure the Blessings of Liberty . . . ."[66] This has been recognized by the Supreme Court in its holdings that civil litigation is part of the First Amendment right to petition, through the courts, for redress of grievances.[67] That right is not limited to political issues or litigation against the gov-

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61 Hickman v. Taylor, 329 U.S. 495, 511 (1947) (Jackson, J., concurring).

62 Logan v. Zimmerman Rush Co., 455 U.S. 422, 429 (1982). *See also* James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. REV. 383, 397-401 (1983).

63 Lassiter v. Department of Social Services, 452 U.S. 18 (1981); *compare*, however, Santosky v. Kramer, 455 U.S. 745 (1982); In Matter of the Appeal in Gila County Juvenile Action, 637 P.2d 740 (Ariz. 1981).

64 Powell v. Alabama, 287 U.S. 45, 69 (1932); Goldberg v. Kelley, 397 U.S. 254, 270 (1970).

A plurality opinion in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), upheld a 120-year-old statute (since repealed) that put a $10 limit on lawyers' fees in applications for benefits before the Veterans Administration. The plurality found the procedures consistent with due process because veterans' groups make trained advocates available to veterans free of charge, the veterans' applications are unopposed by any adversary, and the veterans' burden of proof is less than a preponderance of the evidence.

Despite those unique factors, Justice Stevens is correct in concluding that the plurality opinion "does not appreciate the value of individual liberty." 473 U.S. 305, 358 (Stevens, J., dissenting). *See also* Linda Himelstein, *This Is One Court with a Shortage of Lawyers—Judge Lets It Be Known: Veterans Need Legal Help, Fast*, LEGAL TIMES, May 4, 1992, at 1.

65 Sartor v. Arkansas Natural Gas Co., 320 U.S. 620, 627 (1944); Stevens v. Howard D. Johnson, 181 F.2d 390, 394 (4th Cir. 1950).

66 U.S. CONST. preamble.

67 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983); United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 223 (1967).

ernment, but embraces "any field of human interest" and any controversy, including even personal injury cases between private parties.[68]

The line of cases establishing the constitutional foundations of civil litigation begins, appropriately, with a civil rights case, *NAACP v. Button*.[69] The State of Virginia had sought to prohibit NAACP lawyers from soliciting clients to litigate school desegregation cases. The state's position was that it had a legitimate, traditional interest in proscribing solicitation by lawyers who have a financial interest (as the NAACP lawyers did)[70] in stirring up litigation.

Interestingly, even in dissenting in *Button*, Justice Harlan made the same point that Professor Fiss was later to make:

> We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights.[71]

The majority also saw the case in terms of broad public policy. In the context of NAACP objectives, litigation is "not a technique of resolving private differences"; rather it is a "means for achieving the lawful objectives of equality of treatment by . . . government," and "a form of political expression" that may well be "the sole practical avenue open to a minority to petition for redress of grievances."[72]

Button was followed a year later by *Brotherhood of Railroad Trainmen v. Virginia*.[73] That case involved a union practice of soliciting job-related personal injury litigation on behalf of lawyers selected by the union. The two dissenting Justices pointed out that, unlike *Button*, the *Brotherhood* case did not involve "a 'form of political expression' to secure, through court action, constitutionally protected civil rights."[74] On the contrary, they noted, "[p]ersonal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims."[75] The Court nevertheless held, following *Button*, that "in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution."[76] The Court recognized that the sub-

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68 United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 223, *quoting* Thomas v. Collins, 323 U.S. 516, 531 (1945).

69 NAACP v. Button, 371 U.S. 415 (1963).

70 *See id.* at 457 (Harlan, J., dissenting).

71 *Id.* at 453.

72 *Id.* at 429.

73 Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

74 *Id.* at 10 (Clark, J., dissenting) (quoting NAACP v. Button, 371 U.S. at 429).

75 *Id.* (Clark, J., dissenting).

76 *Id.* at 6.

stantive (personal injury) rights involved had been conferred by Congress in the Safety Appliance Act and the Federal Employers' Liability Act, "statutory rights which would be vain and futile" if workers, through a selected spokesperson, could not receive counsel regarding civil litigation.[77]

The next case in the *Button* line is *United Mineworkers of America v. Illinois State Bar Association*,[78] where the union had employed a lawyer on salary to represent members in litigating workers' compensation claims. The state enjoined the union activity as unauthorized practice of law, distinguishing *Button* as being concerned chiefly with "litigation that can be characterized as a form of political expression."[79]

The Supreme Court responded, however, that its decisions in *Button* and *Brotherhood of Railroad Trainmen* cannot be so narrowly limited. Although the litigation in question was not "bound up with political matters of acute social moment," the First Amendment extends beyond political activity. "Great secular causes, with small ones," are protected, and are "not confined to any field of human interest."[80] Subsequently, in response to a further effort to limit the scope of these cases, the Supreme Court reiterated in *United Transportation Union v. State Bar of Michigan* that the union's activity "undertaken to obtain meaningful access to the courts [in personal injury cases] is a fundamental right within the protection of the First Amendment."[81]

The underlying substantive rights in the union cases had been established by federal statute, but that fact is not controlling. On the contrary, the right to petition for redress of grievances in a tort case in a state court is protected even if the state litigation has a chilling effect on federal statutory rights. For example, in *Bill Johnson's Restaurants, Inc. v. NLRB*,[82] an employer had sued a waitress in state court for libel and other torts, demanding relief that included $500,000 in punitive damages. The alleged libel had been committed during efforts to organize a union. The employer had threatened to "get even" with the picketers "if it's the last thing I do," and he had warned the waitress's husband that he would hurt the couple financially.[83] After a four-day hearing, an NLRB administrative law judge found that the employer had filed the state civil action to retaliate against the employee's exercise of rights under the National Labor Relations Act, and also found that the allegedly libelous statements were

77 *Id.* at 5-6.
78 United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967).
79 *Id.* at 221.
80 *Id.* at 233 (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)).
81 United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971).
82 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).
83 *Id.* at 733.

truthful. Relying upon those findings, the NLRB enjoined the employer from prosecuting the state action, and the Ninth Circuit affirmed the Board's order.

The Supreme Court acknowledged that the broad, remedial provisions of the National Labor Relations Act were intended to guarantee employees the right to engage in concerted activity without fear of restraint or interference from the employer.[84] The Court also recognized the chilling effect on that right of a state lawsuit, particularly when filed against an hourly-wage waitress who lacks the backing of a union.[85] Nevertheless, the Court unanimously reinstated the state tort action.

In doing so, the Court relied in part on an earlier holding that the antitrust laws do not prohibit filing of a lawsuit, regardless of the plaintiff's anticompetitive motive in doing so, unless the suit is a "mere sham."[86] Thus, as long as litigation has a "reasonable basis," as distinguished from being "baseless litigation," the First Amendment right to petition for redress of grievances through civil litigation prevails over legislative policy.[87] Not only does the party to a labor dispute have a constitutional right to seek local judicial protection from tortious conduct, but the state has "a compelling interest in maintaining domestic peace"[88]—a fundamental social goal that is fostered by civil litigation.

Bill Johnson's Restaurants was reaffirmed in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[89] The Court explained that the First Amendment right to litigate cannot be overcome by the "sham" exception unless the lawsuit is "objectively baseless" or "objectively meritless."[90] To satisfy that test, the litigation must be "so baseless that no reasonable litigant could realistically expect to secure favorable relief."[91] All that is necessary is an objective "chance" that a claim "may" be held valid.[92] In that event, the First Amendment right is secure, even if the litigant has no subjective expectation of success and is acting maliciously.[93]

The union cases discussed earlier—*Brotherhood of Railroad Trainmen, United Mine Workers*, and *United Transportation*

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84 *Id.* at 740.

85 *Id.* at 741.

86 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972). (This rule is often referred to as the *Noerr* doctrine, from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).).

87 *Bill Johnson's Restaurants*, 461 U.S. at 744.

88 *Id.* at 741.

89 Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 59 (1993).

90 *Id.* at 60.

91 *Id.* at 62.

92 *Id.*

93 *Id.*

Union—involved associational activity. That is, union members had joined together to protect common interests, including the right to petition for redress of grievances through the courts. Those opinions therefore discuss both the right of association and the right to petition, each of which is separately protected by the First Amendment. The right to petition, however, is not granted solely to associations. Indeed, the Court in *Brotherhood of Railroad Trainmen* expressed its concern with "the rights of individuals" to petition for redress of grievances.[94] Moreover, it would be anomalous if an individual were to have a lesser right than a group to seek redress in the courts.[95]

The Jury as an Aspect of the Adversary System

Another constitutional element of our adversary system is the jury. In criminal cases the right to trial by jury is guaranteed by Article III, section 2, of the Constitution and by the Sixth Amendment; in civil cases at law, trial by jury is required by the Seventh Amendment. State constitutions have similar provisions.

The jury serves in criminal cases to prevent oppression by the government.[96] As observed by Justice Lewis F. Powell, Jr. (who was neither a radical nor a cynic):[97]

> Judges are employees of the state. They are usually dependent upon it for their livelihood. And the use of economic pressure to express displeasure with decisions unfavorable to those in power is not novel. Congress' exclusion of the Justices of the Supreme Court from the general pay increase for other federal judges [in 1965] is an unfortunate example . . . .

Justice Powell went on to note that reprisals against jurors for verdicts disagreeable to those in power are less likely because they

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94 Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 6 (1964). *See also* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

95 The fact that an association was involved cannot have been the controlling factor. Efforts to secure low-cost medical care may be subject to state interference, despite the fact that an association is involved. Garcia v. Texas State Board of Medical Examiners, 421 U.S. 995 (1975), *aff'g* 384 F. Supp. 434 (W.D. Tex. 1974). However, a dictum in a plurality opinion in *Walters v. National Association of Radiation Survivors* says of the union cases that "the First Amendment interest at stake was primarily the right to associate." 473 U.S. 305, 335 (1985). The entire dictum is one paragraph in a 19-page opinion. Moreover, the *Walters* plurality dictum does not discuss the right to petition for redress of grievances, nor does it cite the Court's opinion in *Bill Johnson's Restaurants*, unanimously upholding the right to petition. In addition, one of the strongest arguments for the defendant waitresses in *Bill Johnson's Restaurants* was that the state litigation had been brought by their employer for the purpose of chilling their constitutional and statutory rights to associate in a union; even so, it was the employer's right to petition, not the employees' right of association, that prevailed. It seems unlikely, therefore, that the plurality opinion in *Walters* signals an overruling of the cases upholding the First Amendment right to petition for redress of grievances.

96 Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

97 Justice Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 9-10 (1966).

would involve far greater political risks.[98] As the Supreme Court has held, therefore, the jury provides "an inestimable safeguard against the . . . compliant, biased, or eccentric judge."[99]

Trial by jury is particularly important in criminal litigation, but its value in civil trials is considerable. As noted by Alexander Hamilton in *The Federalist No. 83*, the most effective argument against adoption of the Constitution without a Bill of Rights was the absence of a requirement of trial by jury in civil cases.[100] The Supreme Court has therefore recognized that the civil jury is "so fundamental and sacred" that it should be "jealously guarded" by the courts.[101]

One of our most respected federal trial judges, William G. Young, has emphasized the effect of the jury in democratizing the law:[102]

> Without juries, the pursuit of justice becomes increasingly archaic, with elite professionals talking to others, equally elite, in jargon the elegance of which is in direct proportion to its unreality. Juries are the great leveling and democratizing element in the law. They give it its authority and generalized acceptance in ways the imposing buildings and sonorous openings cannot hope to match.

Thus, the American jury system is "our most vital day-to-day expression of direct democracy," in which "citizens are themselves the government."[103] In this governmental role, juries have the power to nullify legislation—to "limit . . . the power of legislatures who eventually must countenance the non-enforceability of [criminal] laws which citizens are unwilling to enforce."[104] Similarly, jurors can bring the moral sense of the community to bear in civil cases in finding for plaintiffs or defendants and in assessing damages.

Also, as Chief Justice Rehnquist has reiterated, the "very inexperience [of jurors] is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the

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98 *Id.* at 10. *See U.S. Judge Retracts Criticism of a Juror*, N.Y. TIMES, Feb. 10, 1987, at B1. The judge publicly apologized for criticizing the sole juror who had held out for acquittal after a two-week trial, thereby causing a mistrial. On its editorial page the *Times* denounced the criticism of the juror as an "outrage." N.Y. TIMES, Feb. 12, 1987, at A30.

99 *Duncan*, 391 U.S. at 156.

100 THE FEDERALIST No. 83 (Alexander Hamilton), *cited in In re* U.S. Financial Securities Litigation, 609 F.2d 411, 420 n.29 (9th Cir. 1979).

101 Jacob v. City of New York, 315 U.S. 752, 752-53 (1942), *quoted in In re* U.S. Financial Securities Litigation, 609 F.2d at 421. *See also* Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935); Beacon Theatres v. Westover, 359 U.S. 500 (1959).

102 WILLIAM G. YOUNG, TRYING THE HIGH PROFILE CASE, text at note 26 (1984).

103 *Id.* text at note 20.

104 Paul D. Carrington, *Trial by Jury*, DUKE L. MAG. 13 (vol. 5, no. 1, 1987). *See also*, Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); PATRICK DEVLIN, TRIAL BY JURY 160 (1956); NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (Harvard, 1995).

judicial eye."[105] Dean Paul Carrington adds the pungent comment that juries are "a remedy for judicial megalomania, the occupational hazard of judging."[106]

THE SEARCH FOR AN ALTERNATIVE SYSTEM

In both criminal and civil cases, therefore, the adversary system of justice comprises a constitutional system that includes the right to retained counsel, trial by jury, and other processes that are constitutionally due to one who seeks to redress a grievance through litigation. It is not surprising, therefore, that those who urge fundamental changes in the adversary system typically ignore the constitutional impediments to their proposals.

In one of the most important critiques of the adversary system, for example, Marvin Frankel acknowledges that the adversary system is "cherished as an ideal of constitutional proportions" in part because "it embodies the fundamental right to be heard."[107] He recognizes too that his proposals for change run counter to constitutional interests in "privacy, personal dignity, security, autonomy, and other cherished values."[108] His book, however, includes barely a paragraph describing in positive terms the right to counsel,[109] refers only in passing to the privilege against self-incrimination,[110] and makes scant if any reference to privacy, personal dignity, autonomy, and other fundamental rights that gain vitality from the adversary system. Although the thesis of his book is that the adversary system too often sacrifices truth to "other values that are inferior, or even illusory,"[111] Mr. Frankel does not identify which of our "cherished rights" are in fact inferior or illusory, nor does he suggest how those rights are to be subordinated without doing violence to the Constitution.

Those who would either replace or radically reform the adversary system must ultimately sustain the burden of showing how their proposals can be reconciled with constitutional rights. Even before that point is reached, however, they must demonstrate, in their own utilitarian terms, that the adversary system is inferior to the proposed alternatives. To the contrary, however, the available evidence suggests that the adversary system is the method of dispute resolution that is most effective in determining truth, that

105 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting) (quoting HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966)).

106 Carrington, *supra* note 104.

107 MARVIN E. FRANKEL, PARTISAN JUSTICE 12 (1980).

108 *Id.*

109 *Id.* at 5-6.

110 *Id.* at 76.

111 *Id.* at 12.

gives the parties the greatest sense of having received justice, and that is most successful in fulfilling other social goals as well.

One system of justice that recently received serious although brief consideration is the way in which trials are conducted under autocratic regimes like the Soviet Union and China, where lawyers are "servants of the state." For example, at the conference of "members of the country's professional elite" referred to earlier,[112] the discussants considered whether the United States should adopt "the system of adjudication used in the countries that describe themselves as socialist," including the (then-Communist) Soviet Union.[113] Specifically, the advocate would not be chosen by and owe primary allegiance to a party to the litigation; rather, each lawyer would be a member of the court's staff, responsible to the court for investigating and presenting an "assigned" side of the case.[114] This proposed abandonment of the traditional ideal of the right to counsel was not limited to civil cases; indeed, it was being contemplated principally for criminal cases.[115] The discussants concluded, however, that despite the "perversions" of client-centered advocacy, "the detachment of advocate from client might beget worse."[116] It was on that "note of resignation" that the discussion of alternatives to the adversary system "died out."[117]

More sophisticated (and more persevering) critics have turned to the inquisitorial systems of continental European democracies for an alternative to the adversary system.[118] The central characteristic of the inquisitorial model is the active role of the judge, who is given the principal responsibility for searching out the relevant facts. In an adversary system the evidence is presented in dialectical form by opposing lawyers; in an inquisitorial system the evidence is developed in a predominantly unilateral fashion by the judge, and the lawyers' role is minimal.[119]

One contention of those who favor the inquisitorial model is that the adversary system limits the factfinder to two sources of data or to one of two rival factual conclusions.[120] Frequently, of course, there is no need for more than two submissions, for example, if the sole issue is whether one car or the other ran the red light, or whether the defendant was the man who had the gun. In

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112 HAZARD, *supra* note 1.

113 *Id.* at 125-26.

114 *Id.*

115 *Id.*

116 *Id.* at 126.

117 *Id.*

118 *See, e.g.*, JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977); LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977).

119 *See* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1087-90 (1975).

120 Peter Brett, *Legal Decisionmaking and Bias: A Critique of an Experiment*, 45 U. COLO. L. REV. 1, 23 (1973).

such a case, it is ordinarily appropriate for the factfinder to rely upon two sets of conflicting data, which may come, of course, from numerous sources.

Where there truly are more than two sides of a case, however, the adversary system provides a variety of devices for presenting them. Such procedures include joinder of plaintiffs and defendants, impleader, interpleader, intervention, class actions with more than one class representative and with subclasses, and amicus presentations. To take a relatively simple illustration, a single adversary proceeding may involve the following diverse submissions of fact: (a) D1 was negligent in driving; (b) D2 was negligent in repairing the brakes; (c) D3 manufactured a car with a faulty brake-system design; (d) D4 supplied the car manufacturer with brakes that had a latent defect; (e) P was actually the only party at fault; and (f) P was contributorily negligent.

Effectiveness in the Search for Truth

Those who favor the inquisitorial model also contend that it produces a larger body of relevant information for the decisionmaker than does an adversarial system. For example, Professor Peter Brett argues that the inquisitorial system is preferable because the judge is not limited to the material that the opposing parties choose to present. Rather, the judge "may if he wishes" actively search out and incorporate in his decision materials that neither party wishes to present.[121] All other considerations, Professor Brett asserts, "pale into insignificance beside this one."[122] Unfortunately, however, just as the inquisitorial system "allows the fact-finder free rein to follow all trails,"[123] it also allows the fact-finder to ignore all trails but the one that initially appears to be the most promising. It does so, moreover, without the corrective benefit of investigation and presentation of evidence by active adversaries.

This concern was expressed in a prominent thesis that was put forth by Professor Lon L. Fuller and adopted by a Joint Conference of the American Bar Association and the Association of American Law Schools.[124]

> What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and without awaiting further proofs, this label is promptly assigned to it. It is a

121 *Id.* at 9.

122 *Id.* at 22.

123 *Id.*

124 Lon L. Fuller, *The Adversary System*, *in* Talks on American Law 34 (Harold Berman ed., 1971); *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

> mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.
>
> An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.

As suggested by its adoption by the Joint Conference, Professor Fuller's thesis is undoubtedly shared by the overwhelming majority of American lawyers and judges, on the basis of both intuition and practical experience.

The validity of the Fuller thesis can be considered in both theoretical and practical contexts. If the inquisitorial judge is to pursue the truth of a particular matter, where does she start? The "most sophisticated modern view" in Europe recognizes an inescapable "circularity" in the inquisitorial judge's role: "You cannot decide which facts matter unless you have already selected, at least tentatively, applicable decisional standards. But most of the time you cannot properly understand these legal standards without relating them to the factual situation of the case."[125] In addition, "[i]t stands to reason that there can be no meaningful interrogation [of witnesses by the judge] unless the examiner has at least some conception of the case and at least some knowledge about the role of the witnesses in it."[126]

The solution in Europe to the inquisitorial judge's "circularity" problem is the investigative file, or dossier. The dossier is prepared by the police, who, in theory, act under the close supervision of a skilled and impartial judge or examining magistrate. "The practice, however, is in striking contrast to [this] myth."[127] The examining magistrate's investigative and supervisory role is minimal. The dossier—on which the trial judge relies to decide what facts and law are relevant to the case—is little more than a file compiled by the police.[128] "The plain fact is that examining magistrates are no more likely than comparable American officials to leave their offices, conduct prompt interrogations of witnesses or

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125 Damaska, *supra* note 119, at 1087.

126 *Id.* at 1089.

127 Abraham S. Goldstein and Martin Marcus, *The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 248 (1977); *See also* Thomas Weigand, *Continental Cures for American Ailments, in* 2 CRIME AND JUSTICE 381 (Norval Morris & Michael Tonry eds., 1980); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983).

128 Goldstein and Marcus, *supra* note 127, at 247-50, 259.

of accused persons, or engage in searches or surveillance. For such tasks, they rely almost entirely upon the police."[129] The trial judge, in turn, tends to rely heavily upon the police-developed dossier.[130]

The prosecutorial bias that inevitably results from this process is confirmed by the personal experience of Bostjan M. Zupancic. Professor Zupancic clerked for several investigating magistrates in the Circuit Court of Ljubljana, Yugoslavia. "One cannot start from the presumption of innocence" under an inquisitorial system, he writes:[131]

> In purely practical terms, if one opens a file in which there is only a police report and the prosecutor's subsequent request for investigation and develops one's thought processes from this departing point—one cannot but be partial. A clear hypothesis is established as to somebody's guilt, and the investigating magistrate's job is to verify it. But just as a scientist cannot start from the premise that his hypothesis is wrong, so the investigating magistrate cannot start from the premise that the defendant is innocent.

Professor Zupancic found that, as a result, prosecutorial bias on the part of the inquisitorial judge is not a matter of probability; it is a certainty.[132]

Meanwhile, the prosecutor plays a distinctly secondary role to the police and the judge, and defense counsel is "particularly inactive."[133] "Rarely does [the defense attorney] conduct his own investigation in preparing for trial. Even if his client should suggest someone who he thinks will offer testimony favorable to the defense, he often passes the name on to the prosecutor or judge without even troubling first to interview the witness himself."[134] Very likely, European defense lawyers do not conduct the kind of thorough interview of a potential witness that is professionally required in the United States, because they could be charged with a criminal offense or with professional impropriety for obstructing justice if they did so.[135]

Only in the rare case in which the defense lawyer assumes an active—that is, an adversarial—role, is there an exception to the typical situation in which the inquisitorial judge follows the course plotted out by the police.[136] In those few cases, "genuine

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129 *Id.* at 250.
130 *Id.* at 266.
131 BOSTJAN M. ZUPANCIC, CRIMINAL LAW: THE CONFLICT AND THE RULES 54 n.45.
132 *Id.* at 54-63 & n.45.
133 *Id.* at 265.
134 *Id.*
135 Damaska, *supra* note 119, at 1088-89.
136 Goldstein and Marcus, *supra* note 127, at 265-66.

probing trials" do take place.[137] The European experience itself seems to confirm, therefore, that adversarial presentation by partisan advocates is more effective in developing relevant material than is unilateral investigation by a judge.

Our constitutional adversary system is based in part on the premise that the adversary system is more effective in the search for truth. As the Supreme Court has reiterated in an opinion by Justice Powell:[138]

> The dual aim of our criminal justice system is "that guilt shall not escape or innocence suffer," . . . . To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made.

In the criminal process there are special rules, particularly the exclusionary rules, that recognize values that take precedence over truth. The adversary system should be even more effective in determining truth in the civil process, therefore, where such values are not ordinarily applicable. A study of civil litigation in Germany conducted by Professor Benjamin Kaplan (later a Justice in the Supreme Judicial Court of Massachusetts) found the judge-dominated search for facts in German civil practice to be "neither broad nor vigorous," and "lamentably imprecise."[139] Professor Kaplan concluded that the adversary system in this country does succeed in presenting a greater amount of relevant evidence before the court than does the inquisitorial system.[140]

There is support for that conclusion in experiments conducted by members of the departments of psychology and law at the University of North Carolina.[141] One study[142] tested the thesis, which I had put forward, that the most effective means of determining

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137 *Id.* at 265.

138 United States v. Nobles, 422 U.S. 225, 230 (1975) (quoting Berger v. United States, 295 U.S. 78, 88 (1935), and citing United States v. Nixon, 418 U.S. 683, 709 (1974)); Williams v. Florida, 399 U.S. 78, 82 (1970); Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

139 Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 420-21 (1960).

140 *Id.*

141 The first of those studies purports to validate the Fuller thesis. John Thibault et al., *Adversary Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972). The researchers conclude: "The adversary mode apparently counteracts judge or juror bias in favor of a given outcome and thus indeed seems to combat, in Fuller's words, a 'tendency to judge too swiftly in terms of the familiar that which is not yet fully known.'" *Id.* at 401. However, the methodology of that study has been subjected to devastating criticism. *See* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); Peter Brett, *Legal Decisionmaking and Bias: A Critique of an Experiment*, 45 U. COLO. L. REV. 1 (1973). Although those criticisms destroy the usefulness of the study, they do not, of course, invalidate the Fuller thesis. Also, the subsequent studies, which are discussed below, have avoided the methodological errors of the first study.

142 E. Allan Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).

truth is to place upon a skilled advocate for each side the responsibility of investigating and presenting the facts from a partisan perspective.[143] Although that proposition is related to the Fuller thesis, its focus is different. Professor Fuller was concerned with the fact-finder and with her mental processes in developing a working hypothesis and then unconsciously becoming committed to it prematurely. The second thesis focuses on the adversaries and on their incentive to search out and to present persuasively all material that is useful to each side, thereby providing the fact-finder with all parts of the whole.

The study produced conclusions that tend to confirm both the Fuller thesis, regarding the judge's psychological risk of premature commitment to a theory, and the second thesis, regarding the adversaries' incentive to investigate diligently. First, as soon as they become confident of their assessment of the case, inquisitorial fact investigators tend to stop their search, even though all the available evidence is not yet in.[144] Second, with one exception of major importance, even adversary investigators have a similar but lesser tendency to judge prematurely.[145]

Third (the crucial exception), when adversary fact investigators find the initial evidence to be unfavorable to their clients, they are significantly more diligent than are inquisitorial investigators in seeking out additional evidence.[146] The researchers concluded, therefore, that the adversary system "does instigate significantly more thorough investigation by advocates initially confronted with plainly unfavorable evidence."[147] That is, in those situations of "great social and humanitarian concern" the adversary system maximizes the likelihood that all relevant facts will be ferreted out and placed before the ultimate fact finder.[148]

Another finding, which surprised the researchers, is that the opponent of an adversarial lawyer transmits more facts that are unfavorable to her own client. Apparently, awareness that one has an adversarial counterpart is a significant inducement to candor.[149]

I do not mean to suggest that these studies prove that the adversary system is preferable as a means to determine truth. Such experimental efforts to replicate real life and to quantify it statistically are surely limited in their usefulness. On the other

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143 The proposition was taken from Monroe H. Freedman, *Professional Responsibilities of the Civil Practitioner*, *in* EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 151, 152 (Donald T. Weckstein ed., 1970)

144 Lind et al., *supra* note 142, at 1141.

145 *Id.* at 1141-43.

146 *Id.*

147 *Id.* at 1143.

148 *Id.*

149 *Id.* at 1136.

hand, the research that has been done provides no justification for preferring the inquisitorial search for truth or for undertaking radical changes in our adversary system.

The Flawed Analogy to Nonlitigation Settings

Opponents of an adversarial model sometimes argue that "others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system."[150] That proposition, even if accurate, hardly demonstrates that an adversary system is not preferable when society seeks to resolve disputes that have arisen between contesting parties. There are inevitable differences between, say, a scientist seeking a cure for cancer, and two parties who blame each other for an automobile accident. The laboratory is not a courtroom, where each contesting party is asserting her truth as exclusive of the other's and each is demanding her due.

Moreover, in the case of the research scientist, truth is ultimately knowable in an absolute sense—either a cure works or it doesn't. In most litigation, however, we can rarely be certain that a verdict is synonymous with "truth." This is so, unhappily, even when the verdict is based on scientific evidence and guilt has been determined "beyond a reasonable doubt."[151]

The modes of inquiry, therefore, tend to reflect the kind of "truth" that is being sought and the manner in which the issue has been presented for resolution.

Also, the accuracy of the proposition that other disciplines do not follow some form of adversary process is highly doubtful, at least in the breadth in which it is stated.[152] Moreover, to the extent that other disciplines do not use adversarial or dialectical techniques in attempting to resolve disputed issues, they suffer for it.

Assume, for example, a historian trying to determine whether Richard III ordered the murder of the princes in the Tower, or whether it was militarily justifiable for the United States to devastate Nagasaki with an atomic bomb. Obviously, the historian's inquiry would not be conducted in a courtroom, nor would con-

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150 Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1036 (1975). *See also* Brett, *supra* note 141, at 23.

151 *See, e.g.*, Monroe H. Freedman, *Pale Horse, Pale Justice*, Legal Times, Mar. 23, 1992.

152 A professor of biological sciences and dean of Columbia College has explained "the process of scientific investigation" in part as follows:

> We scientists love to do experiments that show our colleagues to be wrong and, if they are any good, they love to show us to be wrong in turn. *By this adversarial process*, science reveals the way nature actually works.

Robert E. Pollack, *In Science, Error Isn't Fraud*, N.Y. Times, May 2, 1989, at A25 (emphasis added).

testing advocates be available to appear and present their cases. However, the conscientious historian's search for truth ideally would start from a position of neutrality and would necessarily include a careful evaluation of evidence marshaled in conflicting memoirs of those who were involved or by other historians and commentators strongly committed to differing views.

Unfortunately, though, even scholarly historians (like judges and magistrates) are not always neutral in their search for truth and are not always truthful in their use of research data. For example, the prominent military historian, S.L.A. Marshall, wrote a book purporting to show that 75 percent of infantrymen will not fire their weapons when engaging the enemy.[153] The book has been described as "fundamental" and has had a "profound influence" in military education.[154] Nevertheless, three historians have concluded, more than four decades later, that "[t]he systematic collection of data that made Marshall's ratio of fire so authoritative appears to have been an invention."[155] Another scandal raising questions of methodology in historical research has related to the role of German industrialists in supporting Hitler. The controversy has involved charges and counter-charges of ideological bias, professional jealousy, and even fraudulent use of sources.[156] As a consequence of this fiercely adversarial debate, historians are "learning [a lesson] very fast . . . . [T]hey are checking their quotations and footnotes thrice over."[157] Apparently, therefore, historical research and analysis has gained in reliability as a result of adversarial challenge.

In medicine there is ordinarily less partisanship than in historical research, because there is less room for the play of political ideology. There is also less personal interest and bias than in the typical contested lawsuit. Nevertheless, anyone about to make an important medical decision for oneself or one's family would be well advised to get a second opinion. And if the first opinion has come from a doctor who is generally inclined to perform radical surgery, the second opinion might well be solicited from a doctor who is generally skeptical about the desirability of surgery. According to one study, about 20 percent of surgical operations have been unnecessary.[158] A bit more adversariness in the decision-

153 S.L.A. MARSHALL, MEN AGAINST FIRE (1947).

154 Richard Halloran, *Pivotal S.L.A. Marshall Book on Warfare Assailed as False*, N.Y. TIMES, Feb. 19, 1989, at A1.

155 *Id.*

156 *A Quarrel Over Weimar Book*, N.Y. TIMES, Dec. 23, 1984, at A1; *Academic Fraud Inquiry Dropped*, N.Y. TIMES, Jan. 3, 1985, at C22.

157 V.R. Berghahn, *Hitler's Buddies*, N.Y. TIMES BOOK REV., Aug. 2, 1987, at 12 (reviewing DAVID ABRAHAM, THE COLLAPSE OF THE WEIMAR REPUBLIC, 2d ed. (1987)).

158 Nancy Hicks, *A Second Opinion Reduces Surgery*, N.Y. TIMES, June 19, 1973, at 21.

making process might well have saved a gall bladder here or a uterus there.[159]

Moreover, it is well established in our law that the extent of due process—meaning adversary procedures—properly varies depending upon what is at stake in the litigation.[160] In medical research, prior to World War II, the material rewards of biological research were small, and scientific chicanery was limited.[161] Since then, however, publication of discoveries has become essential to professional advancement and to obtaining large grants of money for research.[162] The resultant scandals in the search for scientific truth—including those at the Sloan-Kettering Institute, the University of Cincinnati, Emory University, the University of Utah, M.I.T., and Harvard University—have become sufficiently numerous[163] to warrant editorial comment in the *New York Times*.[164] One result is that scientists have come to recognize the need for an adversarial check in the form of replication of research by a skeptical colleague.[165]

In addition, the National Institutes of Health established an Office of Scientific Integrity to adjudicate charges of scientific fraud.[166] The office was originally designed by scientists "who wanted to keep lawyers and legal procedure out of their affairs."[167] But the methods of scientists proved to be a "recipe for disaster"

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159 *See, e.g.*, Gina Kolata, *Rate of Hysterectomies Puzzles Experts*, N.Y. TIMES, Sept. 20, 1988, at C1.

160 C. BLACK, CAPITAL PUNISHMENT 32-35 (1974).

161 Ernest Borek, *Cheating in Science*, N.Y. TIMES, Jan. 22, 1975, at L39. Nevertheless, recent scholarship has raised serious questions about the integrity of such figures as Louis Pasteur. A Princeton professor maintains, among other things, that Pasteur, to head off competitors, purposely withheld reporting a method he used to prepare the chicken cholera vaccine. Lawrence K. Altman, M.D., *Revisionist History Sees Pasteur As Liar Who Stole Rival's Ideas*, N.Y. TIMES, May 16, 1995, at C1, (discussing G.L. GEISON, THE PRIVATE SCIENCE OF LOUIS PASTEUR). *See also* Dinitia Smith, *Scholar Who Says Jung Lied Is at War with Descendants*, N.Y. TIMES, June 3, 1995, at L1.

162 *Id.*

163 Philip J. Hilts, *Misconduct in Science Is Not Rare, a Survey Finds*, N.Y. TIMES, Nov. 12, 1993, at A22; *Scientist Fined for Killing Cells Created in Lab by a Colleague*, N.Y. TIMES, Aug. 31, 1994, at A16; Lawrence K. Altman, M.D., *The Doctor's World; Her Study Shattered the Myth that Fraud in Science is a Rarity*, N.Y. TIMES, Nov. 23, 1993, at C3; Ernest Borek, *Cheating in Science*, N.Y. TIMES, Jan. 22, 1975, at L39; *Harvard Scientists Retract Publications on Medical Findings*, N.Y. TIMES, Nov. 22, 1986, at L9; *Study Accusing Researchers of Inaccuracies Is Published*, N.Y. TIMES, Jan. 15, 1987, at A18; *Fraud and Garbage in Science*, N.Y. TIMES, Jan. 29, 1987, at A26; *Cholesterol Researcher Is Censured for Misrepresenting Data in Article*, N.Y. TIMES, July 18, 1987, at L8; Malcolm W. Browne, *Physicists Debunk Claim of a New Kind of Fusion*, N.Y. TIMES, May 3, 1989, at A1; *Inquiry to Reopen in Science Dispute*, N.Y. TIMES, Apr. 30, 1989, at L29. *See also* Murray Levine, *Scientific Method and the Adversary Model: Some Preliminary Thoughts*, 29 AM. PSYCHOLOGIST 661, 669-76 (1984).

164 *Credit and Credibility in Science*, N.Y. TIMES, July 26, 1987, § 4, at 26.

165 *Id.*

166 *See* Gina Kolata, *Inquiry Lacking Due Process*, N.Y. TIMES, June 15, 1996, at C3.

167 *Id.*

when applied to adjudication.[168] The OSI irreparably damaged reputations and careers.[169] As the scientist who first headed up the office acknowledged, he had had no notion of the importance of "fair play and all that."[170] The former director of NIH said that she was "horrified" by the results. "I came full circle to thinking that an adversarial system was necessary," she said, to avoid "a hideous travesty of justice."[171]

In anthropology, "checks and balances" to "control subjectivity" are now recognized as essential.[172] The controversy over a recent book critical of Margaret Mead's work on Samoa illustrates the problem. Professor Derek Freeman has contradicted Professor Mead's highly influential conclusions regarding child raising, sexual promiscuity, competitiveness, violent behavior, psychological disturbances, and jealousy. He attributes her alleged errors to factors familiar to any adversary cross-examiner: lack of opportunity to observe accurately (she was unfamiliar with the language and lived with expatriate Americans rather than in a Samoan household) and bias (she was intent upon proving that culture controls the character of individuals and societies).[173] Professor Freeman, on the other hand, is known to have strong ideological biases of his own.[174]

As for the merits of the disputed issues, "anthropologists suspect that, as often turns out to be the case, neither [Professor Mead nor Professor Freeman] is totally right or totally wrong."[175] That is, Professor Freeman's critical approach has corrected and supplemented Professor Mead's work, which still provides correction and supplementation to his.

Even the field of fossil history—where political or social ideology would appear to have scant influence—has produced evidence that the inquisitorial system is a flawed one for seeking truth. Some of the most influential geological findings in the past quarter century have recently produced charges of "willfully tr[ying] to dupe the scientific community" and "the biggest paleontological fraud of all time." These charges have been met with countercharges of "lies," "malicious bias," "professional jealousy," and "trying to cash in."[176]

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168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 N.Y. TIMES, Feb. 6, 1973, at E8.

173 Edwin McDowell, *New Samoa Book Challenges Margaret Mead's Conclusions*, N.Y. TIMES, Jan. 31, 1983, at A1 and C21.

174 *Id.* at C1.

175 *Id.* at A1.

176 William E. Stevens, *Scientist Accused of Faking Findings*, N.Y. TIMES, Apr. 23, 1989, § 1, at 24.

In short, probably any search for truth can benefit from "checks and balances" to "control subjectivity." That is particularly true when, as in legal disputes, there are conflicting versions of fact, disagreements over policy, and uncertainty resulting from personal interest and bias.

A Paradigm of the Inquisitorial Search for Truth

One final illustration. There is considerable concern with the broad, unsupervised prosecutorial discretion that pervades American criminal justice and that produces a large proportion of negotiated guilty pleas. Suppose, then, that we wanted to find out whether judicial supervision of prosecutions, which is characteristic of the inquisitorial systems in France, Italy, and Germany, successfully avoids the problems associated with prosecutorial discretion and plea bargaining.

If we followed an inquisitorial mode of investigation, we might seek out one of the country's leading authorities on criminal law and procedure, whose background includes experience in law practice, service as a consultant to a presidential crime commission, and scholarship in the field. In short, we might turn to Abraham S. Goldstein, Sterling Professor of Law at Yale University, and provide him with grants to employ the assistance of several qualified investigators. If we did, Professor Goldstein could be expected to produce a lengthy, scholarly, and carefully reasoned article in the *Yale Law Journal* entitled, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*.[177]

We might also expect this paradigm of inquisitorial investigation and fact-finding to settle the issue, but we would be disappointed. In the best adversarial tradition, two other scholars, also with impressive credentials, would write a response to Professor Goldstein and his co-author. The response would charge that the authors had "misinterpreted the most important characteristics of the procedures they intended to describe" and that "their descriptions are substantially misleading," because they were "preoccupied with their own false model" and "captives of the myths they seek to explode."[178]

The irony, of course, is that the scholars who adopted an adversarial posture to challenge Professor Goldstein's inquisitorial findings are two of the leading proponents of the inquisitorial system as a means for determining truth. If we cannot trust that system successfully to seek out the truth in the ideal circum-

177 Goldstein and Marcus, *supra* note 127, at 240.

178 John H. Langbein and Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549, 1550, 1552, 1567 (1978).

stances of Professor Goldstein's study, however, how much confidence can we have in the inquisitorial system in the courtroom?

The discussion thus far has focused principally on the relative effectiveness of the adversarial and inquisitorial systems in determining truth. The conclusion advanced is that the adversary system is superior, because it mitigates the decisionmaker's tendency to judge prematurely and uses the incentive of the contesting parties to search out relevant facts, policies, and authorities. At the very least, however, I think it is fair to say that the proponents of an inquisitorial system have not made their case, on grounds of truth-seeking, for abandoning the adversary system in favor of the inquisitorial system.[179]

INDIVIDUALIZED DECISIONMAKING VERSUS BUREAUCRACY

There is more to the adversarial–inquisitorial dispute, however, than efficacy in the search for truth. There is also an underlying difference in basic attitudes towards official power and individual rights. The conservative political philosopher, Ernst van den Haag, once described the genius of American democracy, in which official power is subject to checks and balances, as "institutionalized mutual mistrust." It has been observed similarly that "a cornerstone of our adversary system . . . is distrust of bureaucratic and rigidly controlled decisionmaking."[180] That is, the adversary system reflects not only respect for the individual, but also a lesser respect for bureaucratic authority.

A tennis anecdote helps to illustrate the point. In the 1937 Wimbledon Tournament, Don Budge won a decisive break point in

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179 Moreover, the proposals for adopting the inquisitorial system in this country seem so academic as to be out of touch with reality. An indefatigable proponent of the German system, Professor John H. Langbein, candidly admits that if he had to choose between the German procedure that he praises, and the American procedure that he denigrates, he might have qualms about choosing the German system. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 853 (1985). The reason is that he probably would be litigating in Cook County, Illinois, where "judges are selected by a process in which the criterion of professional competence is at best an incidental value." *Id.* Professor Langbein then implies that he would take his chances with a random choice among federal judges, but he is not clear that he would. I, surely, would not.

To institute the inquisitorial system in this country, with a judiciary properly trained on the German model for its special functions, would require that we would first have to restructure our educational system. Career judges would have several years of legal education, pass a first state examination, and apprentice for two and one-half years. *Id.* at 848-49. (With which judges in Cook County would they apprentice?) After a second examination, a judicial career would begin in the lowest courts; promotion would be based upon an "efficiency rating" determined by such criteria as caseload discharge rates, reversal rates, and evaluation by other judges. *Id.* at 850 (By which judges in Cook County would they be evaluated?) Entirely apart from the formidable constitutional difficulties, therefore, the institution of the inquisitorial system in the United States does not seem imminent for purely practical reasons.

180 Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 19 (1978).

his semifinals match because an official called his opponent's ball out when, as Budge knew, it was in. Budge therefore gave back the point by making an obvious error in returning the next serve. After Budge had won the match, he was approached by Baron Gottfried von Cramm, the German star, whom he was to play in the finals. To Budge's surprise, von Cramm criticized Budge for having engaged in unsportsmanlike conduct. It is preferable, von Cramm explained, for a player to suffer an injustice than for an official to be embarrassed by exposure of the erroneous call that caused the injustice.[181] As that anecdote suggests, there are political, social, and humanist values that are expressed in the American preference for a system in which there is relatively greater regard for the individual litigant and less for the bureaucratic decisionmaker.

One of the ways in which our constitutionalized adversary system controls the bureaucratic tendencies of a professional judiciary is through trial by jury.[182] As discussed earlier, the jury system serves several crucial functions—preventing governmental oppression, countering compliant, biased, or eccentric judges, leveling and democratizing the law, bringing a fresh perspective to familiar fact patterns, and governing by direct democracy. Achievement of those goals requires an independent jury that could not exist under the judicial control that is characteristic of an inquisitorial judge.[183] The judge would investigate the facts; the judge would select the witnesses; the judge would conduct virtually all of the examination of witnesses; and, then, the judge would instruct the jury. In short, the trial would most closely resemble the presentation of evidence by a prosecutor to a grand jury. Although the grand jury was conceived as a safeguard against government abuse, it has become so dominated by the prosecutor that there are frequent suggestions that it be abolished as useless. In an inquisitorial system, we could expect a similar fate for the petit jury.

Professor Damaska provides another perspective on the greater tolerance in continental Europe for bureaucratic justice. He has found in Anglo-American law a striving for "the just result" in the light of the particular circumstances of the individual case.[184] He contrasts this traditionally strong attachment to "individualized justice" with the relatively greater concern of continental decisionmakers for "uniformity and predictability: they are

181 Bodo, *Whatever Happened to Sportsmanship?* EASTERN REV. 29 (Oct. 1983).

182 WILLIAM G. YOUNG, TRYING THE HIGH VISIBILITY CASE (1984), text at notes 18-26; Saltzburg, *supra* note 180, at 19.

183 In fact, the "episodic" nature of investigation and presenting evidence in Germany makes a jury a practical impossibility. Kaplan, *supra* note 139, at 418-19.

184 Damaska, *supra* note 119, at 1103-4.

much more ready than the common-law adjudicator to neglect the details of the case in order to organize the world of fluid social reality into a system."[185] For anyone trained in the American constitutional system, there is something chilling about a bureaucratic determination to organize the world of fluid social reality into a uniform and predictable system, without regard to the particular cases of individuals.

The Sense of Having Been Treated Fairly

The concept of individualized justice connotes two related but distinct ideas. First, there is individualized justice in the sense of respect for the individual in the light of his or her particular circumstances. Second, there is the idea of individual autonomy—that each of us should have the greatest possible involvement in, if not control over, those decisions that affect our lives in significant ways. With regard to the latter, the empirical studies that have been done suggest, again, a preference for the adversary system over the inquisitorial.

In one such study,[186] the experimenters sought to use the insight of John Rawls[187] that individuals who are ignorant of their own status of relative advantage or disadvantage will choose ideal principles of justice. Subjects in one experimental group were told the details of a dispute, which strongly favored one party, but they were not told which side they would ultimately have to assume. Thus, the subjects were kept behind a Rawlsian "veil of ignorance" regarding their tactical interest in the procedure that might be used to resolve the dispute. Subjects in another experimental group were told about the same dispute but were informed at the outset which side they would be on. The subjects of the study were thus in three groups—those who were ignorant of what their status would be, those who knew that they would have the advantageous position, and those who knew that they would be in the disadvantageous position.

Members of each group were next presented with various models of hearing procedures, ranging from inquisitorial to adversarial, with mixed procedures in between; that is, the procedural models were designed to provide dispute resolution choices ranging from maximum decisionmaker control to maximum party control. The subjects were then asked to express their preferences among the procedural models.

"One of the clearest findings in our data," the researchers concluded, "is that the adversary procedure is judged by all of our

185 *Id.* at 1104.
186 John Thibault et al., *Procedural Justice as Fairness*, 26 Stan. L. Rev. 1271 (1974).
187 John Rawls, A Theory of Justice (1971).

subjects—both those in front of and behind the veil of ignorance—to be the most preferable and the fairest mode of dispute resolution."[188] More significantly, those subjects who were seeking the fairest procedural model in ignorance of what their own status would be were the most strongly in favor of the adversary system.[189]

Similar results were obtained in further studies conducted in the United States and Germany.[190] One conclusion of the experiment in Germany is that the results in the United States were not significantly affected by cultural bias.[191] Most important, when the ultimate decisional power is in a third party, "participants in both Hamburg and Chapel Hill prefer to use an adversary procedure," in which their control over the presentation of the case is highest.[192]

Researchers also have conducted studies to determine whether a litigant's acceptance of the fairness of the actual decision is affected by the litigation system used. Their conclusion is that "the perception of the fairness of an adversary procedure carries over to create a more favorable reaction to the verdict for persons who directly participate in the decisionmaking process."[193] This is true "regardless of the outcome."[194] Therefore, "the attorney should see himself as the agency through which the client exercises salutary control over the process. In this client-centered role, the attorney best functions as an officer of the court in the sense of serving the wider public interest."[195]

The Problem of Socioeconomic Unfairness

There is, nevertheless, a troubling question, about the fairness of a client-centered adversary system in which the wealth of the contending parties—and, therefore, the quality of the representation—may be seriously out of balance. "How much justice can you afford?" the lawyer in a *New Yorker* cartoon pointedly asked a client.

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188 Thibault et al., *supra* note 186, at 1287-88.

189 *Id.* at 1288-89.

190 Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 Yale L.J. 258 (1976).

191 Assuming that there is a culturally determined bias in the United States in favor of an adversary system, that would be a reason to retain that system. Also, Professor Hazard has suggested another perspective on the cultural aspects of procedural models. In our political culture, he notes, "the interrogative system of trial could well turn out to resemble congressional hearings." Hazard, *supra* note 1, at 128.

192 LaTour et al, *supra* note 190, at 282.

193 Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 Va. L. Rev. 1401, 1416 (1979).

194 *Id.* at 1417.

195 *Id.*

One response is that unequal justice is one of the costs of the American economic system. How much food, housing, clothing, education, or other basic needs can one afford? Sadly, equal justice may be far down on the list for a major portion of our citizens. The criticism is not of an adversary system but of a capitalist one.

Yet an expressed purpose of the Constitution is to "establish Justice,"[196] the judiciary is one of the three branches of our constitutional structure, and due process of law and equal protection under the law are explicitly guaranteed to all persons.[197] If another system of justice were likely to reduce significantly the unfairness caused by an imbalance in litigation resources, without introducing comparable unfairness, one would have to embrace it.

There is no persuasive evidence, however, that the inquisitorial system does that job. At least in personal injury cases, the contingent fee is a great equalizer of legal resources between rich and poor, as demonstrated after the industrial disaster in Bhopal.[198] Legal clinics and prepaid legal plans also mitigate the problem. Moreover, if we are sufficiently concerned about unequal advocacy to revolutionize our system of justice, a more sensible course would be a genuine effort to equalize advocacy through a vastly expanded system of government-supported legal aid.[199]

In any event, it is doubtful that we would be better off with a system of inquisitorial judges instead of zealous advocates. As long as we maintain a capitalist society (or something approximating one) the judges will come predominantly from the upper socioeconomic classes. The judges will also be interested in advancing their careers. One need not be a Marxist to expect class, political, and other bias to play a significant part in inquisitorial judging.[200] Even in the face of superior resources, therefore, representation by one's own advocate before a jury of one's peers seems a safer choice.

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196 U.S. CONST. preamble.

197 U.S. CONST. amends. V, XIV.

198 After thousands of people were killed and injured by the release of toxic gas in Bhopal, India, lawyers from the United States took on a multinational corporation on behalf of the impoverished victims. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 255 (1990).

199 FRANKEL, *supra* note 107, at ch. 9.

200 Inquisitorial judging by professional magistrates does not seem to have solved those problems in Belgium. According to the *New York Times*, the vast majority of Belgians consider their judicial system to be corrupt. Tina Rosenberg, *Barbarity in Belgium*, Oct. 21, 1996, at A16. There is a "tradition of cronyism" in which "[political party] loyalty weighs more heavily than competence." Marlise Simons, *Sex, Lies and the Courts: A Fury Rises in Belgium*, N.Y. TIMES, Oct. 19, 1996, at L3. An editorial in the Belgian newspaper *De Morgen* said: "Incompetent magistrates are not punished, the promotion of cronies is not questioned, unsolved crimes are accepted as destiny, [and] investigations are shelved in dubious ways . . . ." *Id.*

CONCLUSION

The adversary system, like any human effort to cope with important and complex issues, is sometimes flawed in execution. It is both understandable and appropriate, therefore, that it be subjected to criticism and reform. The case for radically restructuring it, however, has not been made. On the contrary, based upon reason, intuition, experience, and some experimental studies, there is good reason to believe that the adversary system is superior in determining truth when facts are in dispute between contesting parties.

Even if it were not the best method for determining the truth, however, the adversary system is an expression of some of our most precious rights. In a negative sense, it serves as a limitation on bureaucratic control. In a positive sense, it serves as a safeguard of personal autonomy and respect for each person's particular circumstances. The adversary system thereby gives both form and substance to the humanitarian ideal of the dignity of the individual. The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice.