Title

Popular Culture and the American Adversarial Ideology

ISBN

9780199272235

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Publication Date

2005

University of California, Los Angeles
School of Law
Public Law & Legal Theory Paper Series

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In *Law and Popular Culture* (edited by Michael Freeman, Oxford University Press, forthcoming 2004)

Research Paper No. 03-23

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POPULAR CULTURE AND THE AMERICAN ADVERSARIAL IDEOLOGY

By Michael Asimow[1]

Let's begin with a thought experiment. Imagine two courtroom movies. *Both involve jury trials.* The movie can involve a civil or a criminal case, whichever you prefer. The trial is fairly lengthy and involves sharply conflicting testimony from numerous witnesses including expert witnesses. However, the legal procedures in the two movies are quite different.

In the first movie, the lawyers control the proceedings. The lawyers pick the jury, each side using all of its peremptory challenges. Each one makes an opening statement. The lawyers decide which witnesses to call and in which order. Each side calls its own paid expert witnesses whose opinions differ sharply. Each lawyer cross examines the other's witnesses at length. Each lawyer delivers a lengthy closing argument. The judge has little to do during the trial except to keep order, rule on evidentiary objections, and instruct the jury. The jury retires. The first movie is a gripping, suspenseful drama. We have seen hundreds of similar films and television shows.

In the second movie, the judge has much greater control of the proceedings and the lawyers play subordinate roles. Prior to the trial, the judge has been heavily involved in the discovery process. The judge has conferred extensively with the attorneys about the issues in the case, the structure of the trial, and the potential witnesses. There are no peremptory jury challenges (only challenges for cause). The lawyers do not make opening statements. The judge decides which witnesses to call to provide oral testimony and in which order they will be called. There are no separate plaintiff (or prosecution) and defense cases. The judge, not the lawyers, retains the expert witnesses. The judge questions the witnesses (or might allow them to testify in narrative form). The lawyers are allowed to question witnesses after the judge is finished.

Toward the end of the second movie, the lawyers deliver closing arguments. The judge instructs the jury. The instructions include the judge's summation of the evidence and may indicate a preference for the story told by one side or the other, although the jury is told that the decision is up to them. The jury retires. The second movie is rather boring since the lawyers have relatively little to do. Many audience members have fallen asleep before the movie ends. None of them have ever seen any movies or TV shows like this before.

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After seeing the two movies, the members of the audience are asked which of the two systems they've just seen in action is more likely to uncover the truth about what really happened and to produce a just and correct outcome with a minimum of unnecessary cost and delay. First year law students at UCLA School of Law (surveyed on the second day of classes) favored the first system (lawyer control) by a vote of 61 to 16 (or about 79% to 21%).[2] I have conducted numerous informal conversations with lawyers and non-lawyers with about the same result: a high percentage of U. S. respondents believe that lawyer control is much better and that judicial control is a terrible idea.[3]

The lawyer-control system in the first movie is generally referred to as "the adversary system"[4] and I will be referring to the particular set of procedures described in the first movie as "the adversary model." I will also refer to an "adversarial ideology." I take an "ideology" to be a world-view that determines how society is and should be organized and how power is and should be exercised.[5] I assert that adversarialism is the dominant, usually unquestioned, ideology of the U. S. justice system. As a consequence, the U. S. employs a more extreme version of the adversarial system *than in any other country*.[6]

The adversary ideology presupposes that the best way to attain justice is to have two attorneys fight it out, then leave the decision to a neutral fact-finder. Thus a leading proponent of adversarialism writes: "The central precept of the adversary system is that

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[2] I make no claim that first year American law students represent a valid sample of the population at large. They are obviously better educated than the general population. Since they've committed themselves to a profession deeply imbued with the adversary system, it is not surprising that they believe in that system even before learning anything about it in law school. They also may be more competitive and argumentative than the general population. I also asked the question at the beginning of my presentation at the Law and Popular Conference at UCL. I didn't count the hands, but I would estimate the response as about 20 voting for judicial control and about 3 voting for lawyer control! Clearly, a group of academics is an even less valid sample than law students. Still, the participants at the UCL program were predominantly from the U. K., the U. S., and from Commonwealth countries. Only a few came from continental Europe. The preference of the academics for the inquisitorial system over the adversarial system which is used in almost all of their countries is a striking result.

[3] Thibaut & Walker studies seemed to show marked preference for adversary over inquisitorial models. Both participants and observers in their simulations preferred the adversary approach. But O'Barr & & Conley found that small claims courts litigants expected inquisitorial procedures to be used (in which the judge and the system would help them make their claims) and were disappointed and frustrated by the adversarial procedures actually used. 22 Law & Soc Rev 159-60. Also the MARC theory about our system being best in the world.

[4] See Fuller Forms & Limits--92 HLR 353, 363-4: The presentation of proofs & reasoned arguments by each of the litigants is the essence of litigation. This must be the work of counsel, not of the judge. 382-85.

[5] See Lawrence Grossberg et.al. Media Making: Mass Media in a Popular Culture 177-201 (Thousand Oaks CA Sage Publications 1998); Susan S. Silbey, Ideology, Power, & Justice in Garth/Sarat 272. I seek to avoid the pejorative or political connotations which the word "ideology" usually bears in discussions about popular culture.

[6] William T. Pizzi, Trials Without Truth chapter 6 (New York: New York Univ. Press 1999) (comparing criminal procedure in the U.S., U.K., Norway, and Germany). The U.K. and commonwealth countries make much less use of juries than the U. S. and accord trial judges considerably greater judicial power in jury trials than occurs in the U. S.

out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decisionmaker can base the resolution of a litigated dispute acceptable to both the parties and society."[7] Lord Denning wrote: "If [a judge] goes beyond [the normal role by calling witnesses or asking questions], he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well."[8]

The judge-control system in the second movie is generally referred to as the "inquisitorial system" and it resembles the way in which criminal and civil trials are conducted outside the U. S. and the U. K. and commonwealth countries.[9] I will be referring to the particular set of procedures described in the second movie as the "inquisitorial model." Note that my inquisitorial model has no counterpart in the actual procedures of any country, European or otherwise,[10] because my model leaves the *ultimate decision to a jury* rather than to a judge or a judge plus lay assessors.[11]

The unquestioned dominance of the adversarial ideology in the U. S. seems paradoxical because the general public despises and distrusts lawyers. In a recent ABA poll conducted by M/A/R/C Research, only 14% of the public were extremely or very confident in lawyers and 42% were only slightly or not all confident in lawyers. People had far more confidence in judges: 32% were extremely or very confident in judges and only 22% were slightly or not at all confident in judges.[12] Why, therefore, would people

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[7] Landsman 2. When two parties approach "the facts from entirely different perspectives and objectives…[they] will uncover more of the truth than would investigators, however industrious and objective, seeking to compose a unified picture of what had occurred." From ABA 1970 [this c/b ABA Stds Relating to Prosecution Function & Defense Function Approved Draft 1971] : [Lassiter 452 us 18,28, quoted in rubinstein n. 25).

[8] Jones v. National Coal Board (1957) 2 Q.B. 55 (Eng. Ct. of Appeal).

[9] The inquisitorial system used in European countries is nothing like the "Spanish inquisition" and probably should be renamed the "inquiry system" or some other title that does not suggest torture.

[10] In fact the civil and criminal procedures employed in both common law and civil law countries vary enormously so there is no single adversarial method or inquisitorial method. See Zuckerman eg at 47 & passim.

[11] I hold the presence of a jury constant in both models because the 6th and 7th amendments to the U. S. constitution guarantee the right to a jury in most civil and virtually all criminal cases. Since I want to talk about American procedural systems and ideologies, I accept this constitutional constraint. Juries are used sparingly in some countries outside the U. S. In the U.K., juries are employed in serious criminal cases in the Crown Court. Criminal juries are also used (although rather infrequently) in European countries such as Norway, Denmark, Belgium, Russia or Spain. The fact that juries are sometimes employed in these countries shows that the jury system is compatible with inquisitorial procedures. In addition to the presence of juries, there are numerous differences between my version of the inquisitorial model and the real inquisitorial system. For example, my model does not suggest that we delegate pretrial investigation to the judge or that we bar settlements, guilty pleas, or plea bargains. The model does not suggest that lawyers abandon zealous representation or any of the canons of ethics. The privilege against self-incrimination and the reasonable doubt rule would remain intact.

[12] American Bar Association, Perceptions of the U. S. Justice System (February, 1999) (referred to herein as the M/A/R/C study) 50. Only the media (at 8% confidence) ranked below lawyers. These results are consistent with a great deal of polling data. A Gallup poll of November 27, 2000, asked for the public's view of the honesty and ethics of 32 professions. Only 17% of the public gave lawyers a high or very high rating. The only professions ranked lower were newspaper reporters, insurance salesmen, advertising practitioners, and car salesmen. See generally Asimow, Nova.

want to turn over something as important as control of the trial process to lawyers in whom they lack trust and confidence rather than to judges in whom they repose much greater trust and confidence?   This article seeks the answer to this puzzle.

There are a number of reasons why people might adhere to the adversarial ideology despite their distrust of lawyers and despite the practical problems with the adversarial trials that are discussed in Part I . Some of these reasons are explored in Part II. However, Part III suggests that there is another important, though usually overlooked, reason for the dominance of the adversarial ideology. Popular culture has taught us to trust adversarialism and to regard the lawyer as the champion for our personal interests, indeed for our liberty.   Almost from the cradle, we have been absorbing narratives that glorify the work of lawyers in securing justice. Even more important, these narratives teach us that the adversarial system discovers the truth about what really happened. We have internalized countless versions of the first movie, a story that exalts the work of lawyers within the adversarial process, but we have seen few if any versions of the second movie.[13] By endlessly valorizing the adversary system, but without dwelling on its shortcomings, the media may have reinforced the adversary ideology.[14]

The purpose of this article is not to argue in favor of either the adversarial or inquisitorial systems. Nor is to set forth a case for any particular reform of the adversary system or to describe or advocate any of a multitude of possible alternatives or to argue that the benefits of a major change would outweigh the costs of making the transition.[15] The adversarial ideology is so deeply rooted in the U. S., so compatible with its competitive culture, and so well protected politically, that any fundamental change is unthinkable.[16] Instead, my objective is to speculate on why the adversarial ideology is so dominant in the U. S. despite the unpopularity of lawyers and the practical problems of the adversarial system.

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[13] The film *Excellent Cadavers* (1999), an HBO movie produced for television, is the rare exception: a gripping film involving a heroic investigating judge that includes an inquisitorial trial. However, the trial was extremely unusual--hundreds of Mafia thugs were put on trial simultaneously in a Sicilian courtroom. In general, the absence of films about inquisitorial trials is quite understandable. Most would be rather undramatic. See Langbein 52 Chi at 831 speaks directly to the non-dramatic nature of German civil trials & how these differ from the tense drama of US trials as shown in films & TV.

[14] Here I build on an insight tossed off by Carrie Menkel Meadow in a footnote. CMMK p 19, n 64.

[15] See John Leubsdorf, The Myth of Civil Procedure Reform, in Zuckerman, Civil Justice in Crisis, ch. 2 (questioning utility of various civil procedure reforms and noting difficulty of finding out whether they solved the problem or made it worse).

[16] Scholarly questioning of the adversary system dates back to Roscoe Pound's famous 1906 address to the ABA that condemned the sporting theory of justice. Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 A.B.A. Rep. 395 (1906), reprinted in abridged form, 57 A.B.A.J. 348 (1971). See Paul Verkuil, The Search for a Legal Ethic: The Adversary System, Liberalism and Beyond, 60 Soundings 54, 58-61 (1977). Numerous American academics have urged adoption of such changes, to no discernible effect. See Maximo Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure (2003--unpublished). N127; Gordon Van Kessel, Adversary Excesses in the American Criminal Trial, 67 Notre Dame L Rev 403 (1992).

I. COMPARING THE ADVERSARIAL AND INQUISITORIAL SYSTEMS

Most people, I believe, think the purpose of the dispute resolution system should be to achieve substantive justice at reasonable cost. Substantive justice means discovering the "truth" and reaching the "correct" result. Reaching the correct result in civil or criminal cases has (or at least often has) at least four components: i) ascertaining the applicable law; ii) ascertaining physical facts concerning what actually happened (who did what or said what to whom); iii) ascertaining states of mind; iv) correctly applying often vague and value-laden legal standards (such as reasonableness, malice aforethought, foreseeability or materiality) to the facts. In our system, task i) is for the judge and tasks ii), iii), and iv) are normally reserved for the jury.

If the judge and jury correctly perform each of these chores, the system will deliver the "correct" result and achieve substantive justice. Substantive justice also means resolving disputes consistently so that people in like circumstances are treated alike.[17] Finally, substantive justice entails an efficiency component, meaning that the process doesn't consume too many public or private resources and it operates with reasonable promptness.

Lawyers object to the idea that the dispute resolution system should be held accountable for discovering the truth or delivering substantive justice.[18] Because we can never know with certainty the truth about disputed past events or states of the human mind, they argue that truth-finding is a dream. Perhaps they take the postmodern tack in questioning whether "truth" exists at all. Most lawyers believe we should seek "procedural" rather than "substantive" justice and be satisfied with "trial truth" instead of "factual truth."[19] If we furnish the contestants with a fair process, consisting in part of combat between attorneys, whatever emerges from that process is "trial truth."[20] Lawyers also tend to brush aside considerations of efficiency or consistency as immaterial; what counts is a fair process, even if it is costly and slow and produces inconsistent outcomes.

But I wonder how many ordinary people agree with the lawyers. Are they really satisfied to settle for procedural justice, for "trial truth"? Don't they believe that systems that are *more likely* to discover factual truth and achieve consistent application of legal principles are better than ones that are *less likely* to achieve these things? Don't they think that a system that is cheaper and quicker is better than one that is costlier and

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[17] See Cass R. Sunstein et. Al., Predictably Incoherent Judgments, 54 Stanf L Rev 1153 (2002) (justice requires that outcomes in different cases must be consistent).

[18] A memorable statement of this view occurs in the film *A Civil Action*. Defense lawyer Jerome Facher (Robert Duvall) says to plaintiff's lawyer Jan Schlictmann (John Travolta) as they sit in the hallway awaiting the verdict and discussing settlement: "If you're really looking for the truth, Jan, look for it where it is. At the bottom of a bottomless pit." Apparently, Facher really spoke words to that effect. See Charles Harr, A Civil Action 340 (NY Vintage Books 1995).

[19] See W. Bradley Wendel, The Bilateral Ethics of Narrative: Toward a General Theory of Deception in Lawyering (2003) (available from Social Science Research Network, http://law.wlu.edu/lawcenter/papers.

[20] [Landsman 37: Truth is not the end the courts seek. Truth is nothing more than a means of achieving the end, justice. The disclosure of material fax is not the only means of achieving justice, and to treat it as the end is to open the way to unsavory abuses.

slower? I think most people expect their justice system to deliver truth, accuracy, consistency and efficiency. Nevertheless, most people (at least Americans) unquestioningly endorse the adversary approach to civil and criminal litigation.

A good way to evaluate procedural systems is to balance three fundamental criteria: accuracy, acceptability to the parties, and efficiency.[21] This is a consequentialist or utilitarian approach to determining what the best procedure might be.[22] I consider some non-consequentialist arguments in Part II.

Ideally, a good system should reach accurate and consistent results, should be viewed as fair by the disputants, and should function efficiently (meaning with as little delay and with as little cost to litigants and to the public as possible). However, there are always tradeoffs between the criteria. For example, providing numerous levels of appeal to make the results more accurate or consistent could serve the goals of accuracy and acceptability but be unacceptably slow and costly. On the other hand, a process might be efficient and accurate but totally unacceptable to the disputants who are subject to it. A reform designed to speed up the process might make it less accurate. In the following discussion, I attempt a rough balancing of these three criteria. This balancing analysis seems to cast doubt on the utility of the adversary system.[23] If that is so, the question of why people adhere to the adversarial ideology becomes even more puzzling..

A. Accuracy

A good dispute resolution system should deliver "accurate" results.[24] As discussed above, accuracy means correctly ascertaining past facts and states of mind and

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[21] See Michael Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L Rev. 1067, 1081 (1992); Paul Verkuil, The Emerging Concept of Administrative Procedure, 78 Columbia L Rev 258, 279-93 (1978). Zuckerman suggests a somewhat different calculus involving accuracy, cost, and delay. Adrian A. S. Zuckerman, Civil Justice in Crisis, ch. 1 (1999).

[22] Jeremy Bentham wrote: "A measure of government . . . may be said to be conformable to or dictated by the principle of utility, when . . . the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it." An introduction to the Principles of Morals and Legislation 13 (J. H. Burns and H. L. A. Hart, eds) London: Methuen 1983).

[23] This article exaggerates the differences between the adversary system and the inquisitorial systems in actual practice. Thus, in the adversary system, the vast majority of cases are settled rather than tried, often with the aid of mediators. Of the relatively few cases that are tried, a large number are tried to a judge rather than a jury. In civil jury trials, judges have numerous techniques to take the case from the jury such as summary judgment or directed verdict. Through motions in limine, judges control what evidence the jury will hear. Particularly in bench trials, judges are more active than the model would suggest. They frequently participate in questioning witnesses, for example. In addition, many important segments of the American justice system are more inquisitorial than the trial courts. For example, in both arbitration and administrative agency adjudication the decisionmakers are quite active in shaping the issues, protecting unrepresented or under-represented parties, questioning witnesses, and in trying to ferret out the truth.

[24] Accuracy in adjudication is important because it helps assure that legal rules will function as intended with the least amount of adverse social and economic consequences. See generally Louis Kaplow, The Value of Accuracy in Adjudication: An Economic Analysis 23 J. Leg Studies 307 (1994). Kaplow assumes that measures to improve accuracy will be costly, thus requiring an accuracy-efficiency tradeoff. Id. at 308, 347. This article contends that moving from lawyer control to judge control could improve both accuracy and efficiency.

correctly and consistently applying legal rules to those facts. In this article, I compare adversarial and inquisitorial models, *both* of which culminate in jury verdicts.[25] I ask whether an inquisitorial trial might result in more accurate and fewer capricious jury verdicts than are generated by adversary trials.

This inquiry immediately runs into difficulty because there is such profound disagreement about the performance of juries in civil and criminal cases. Some scholars think juries do an excellent job in both simple and complex cases and therefore would discount the need for any significant changes in the system.[26] Others are less sanguine and believe that jury errors are common in both simple and complex cases.[27] An unpredictable or capricious verdict--even an extreme outlier--is always possible, something that trial lawyers never forget.[28] The leading researchers on the American jury indicate that trial judges disagree with jury verdicts in about 20% of both civil and criminal cases.[29]

Of course, the legal system often consciously departs from the goal of finding accurate results because other values trump accuracy. The law of privilege is a good example; the attorney-client privilege or the privilege against self-incrimination obviously sacrifice accuracy to other objectives. However, all other things being equal, an accurate result is better than an inaccurate result.

[25] See note xx for reason for holding the jury constraint constant

[26] See, e.g., Neil Vidmar, The Performance of the American Civil Jury: An Empirical Perspective, 40 Arizona L Rev 849 (1998) reporting many studies; Shari Seidman Diamond & Jonathan D. Casper, Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury, 26 Law & Soc Rev 512 (1992) (juries are active information processors in complex civil case and well able to deal with expert testimony).

[27] Franklin Strier, Reconstructing Justice ch. 4; Reid Hastie & W Kip Viscusi, What Juries Can't Do Well: The Jury's Performance as a Risk Manager 40 AZ 901 (1998) (judges better able to deal with risk judgments than juries); George L. Priest, Justifying the Civil Jury in Verdict: Assessing the Civil Jury System (Robert E. Litan ed.) 103, 129-30 (Wash DC Brookings 1993) ("the civil jury is an engine of uncertainty") . Kagan 114-15 said jj reduce jury damage awards 20-25% of time. Christopher Drahozal, A Behavioral Analysis of Private Judging -- Duke LJ -- 2-3 (draft of Feb 13, 2003) (summarizing various studies indicating that juries make cognitive errors more frequently than judges) .

[28] The fact that mean jury verdicts are much higher than median verdicts suggests that outlier verdicts (which raise the arithmetic average) are not uncommon. See Robert MacCoun, Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by civil juries in Litan ed 137, 147-50; Peter Schuck, Mapping the Debate on Jury Reform id 306, 312 (reporting research on large variability in jurors' assessments of damages).

[29] Harry Kalven and Hans Zeisel found that judges usually agreed with juries, but there was a significant band of disagreement. In both criminal and civil cases, judges disagreed with the jury verdict about 20% of the time. See Harry Kalven, Jr., The Dignity of the Civil Jury, 50 Virginia L. Rev. 1055, 1064-65 (1964). In the 20% band of disagreement between judge and jury, in criminal cases judges would have convicted the defendant much more often than the jury. In civil cases, where the judge and jury disagreed about liability, the differences were about equally split between plaintiff and defendant. Where both agreed on a plaintiff verdict, the judge would have awarded about 20% lower damages. I regard these differences as quite significant. Diamond reports similar results in more recent studies. Shari Seidman Diamond, Convergence and Complementarity between Professional Judges and Lay Adjudicators 325 in Van Poppen. Diamond also reports studies in which judges express strong support of the jury system. Id. at 322-25. See also Donald Wittman, Lay Juries, Professional Arbitrators, and the Arbitrator Selection Hypothesis, 5 American Law & Economics Rev. 61 (2003) (reporting high correlations between decisions of court-annexed arbitrators and juries in same auto accident cases).

Obviously we have no way to know who was "right" when the judge and the jury disagreed. However, in my view, it is more likely that the judge was correct, given the judge's vast experiential advantage. I have reservations about the Kalven and Zeisel results. I believe that the actual rate of

Of course, regardless of one's assessment of the quality of jury verdicts and regardless of what system of trial is employed, some jury verdicts will necessarily be capricious. There might be procedural reforms that would preserve the political and legitimating advantages of jury trials while reducing the risk of jury errors or outlier verdicts.

1. Disparities in lawyer skills and resources

The adversary system presupposes a fair fight between lawyers who serve as the champions of their clients. If such a system is to deliver accurate results, there must be at least a rough equality between the two sides in their advocacy skills, their experience, and in the resources they bring to the struggle.[30]

If one side is substantially superior to the other, either in lawyer skills or experience or in resources, the likely result is a mismatch.[31] Such imbalances are, in fact, quite common.[32] Frequently, one lawyer is substantially superior in skill and experience to the other. Even more frequently, one lawyer (or more likely a team of lawyers) is backed by much greater resources than the other side and can afford to spend vastly more money in investigation, trial preparation, and trial resources. Thus the better financed team can purchase such costly inputs as jury consultants, the best qualified experts, audio visual aids, computer simulations and the like.[33] Indeed, it is increasingly true in our modern litigation system that one side cannot afford a lawyer at all and is acting pro se.[34] Pro se litigants are likely to be annihilated by the opposing lawyer.[35] Under modern conditions, little is done to equalize resources; legal service programs are

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disagreement must be higher than 20% because the judge was asked about agreement with a jury verdict *after* knowing what that verdict was. There is a natural tendency in a case involving a close factual or legal issues to shrug and assume the jury made a reasonable call. This is an example of the post hoc fallacy that is often noted by cognitive psychology researchers: people make very different assessments and predictions depending on whether their decision is made in hindsight or foresight.

[30] (Rubinstein 1873-4; CMM 22

[31] Indeed, there is truth in the observation that a jury consists of twelve people whose job it is to decide which side had the best lawyer. [Frankel 34

[32] Strier 75-82 (reporting a survey of 3800 jurors; one third saw a difference in courtroom skills and felt it probably affected the verdict). / [Frank 94-97, Kagan 93-96 is excellent & argues that our much more costly system exacerbates advantages of rich crim Ds as compared to Europe]

[33] Strier 178-80. See Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc Rev 95 (1974) (emphasizing the advantage that repeat players have over one-shot litigants).

[34] Thus, a 1990 study in the Maricopa County, Arizona, domestic relations court found that in 88% of divorce cases, at least one of the parties was unrepresented; both parties were unrepresented in 52% of the cases. American Bar Association, Litigants Without Lawyers (2002). See also American Bar Association, Commission on the 21st Century Judiciary, Justice in Jeopardy 53-54 (2003). Nolo Press, Berkeley California, publishes a very successful line of books advising people how to solve their legal problems, including civil and criminal litigation, without lawyers.

[35] It is unclear whether a judge is permitted to do anything to assist the pro se party who does not understand procedural or evidentiary rules without compromising his impartiality. See Litigants without lawyers, supra at 11, 15.

being progressively defunded and public defender systems groan under impossible caseloads and a severe shortage of resources.[36]

Some civil cases involve pitched battles between large law firms with virtually unlimited litigation budgets. A few major tort cases pit experienced and well-financed plaintiffs' firms against equally able defense teams. In some criminal cases (especially involving white-collar crime), determined and adequately resourced prosecutors battle well-financed defendants. But these are not typical situations (and when they do occur they tend to generate costly pretrial discovery phases and long and complex trials).

Where inequalities of skill or resources emerge, a basic tenet of the adversary system is that the judge should remain neutral and not intervene to rectify the imbalance.[37] If an inept attorney has overlooked a vital argument or issue or failed to object to inadmissible evidence, or made some other tactical blunder, the judge is expected to keep silent.[38] The assumption is that the less skillful, or less resourced, litigant should lose.[39] As in a baseball game, the umpire should continue to call balls and strikes the same even if the score is 22-0.

An inquisitorial model could be much more attentive to issues of distributive justice than the adversarial model. In the inquisitorial model, differences between the lawyers become less important. The judge's control over the proceedings functions as an equalizer. The judge frames the issues, selects and questions the witnesses,[40] and sums up the evidence for the jury. The lawyers have less space in which to employ tricks and stratagems and the jury should be less likely to be affected by disparities between lawyer skills and resources.

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[36] (Kagan 94, PDs seldom visit crime,, make pretrial motions etc; and also prosecutors lack resources so h/t plea out many cs). Molot n 83 citing Resnik on disparities.

[37] Some judges will try to help unrepresented parties or overwhelmed attorneys in small ways such as by suggesting evidence objections or helping them put questions to witnesses in correct form.

[38] In administrative adjudication, an administrative law judge is expected to rectify such inequalities to make sure that the public purposes behind the regulatory statute in question are served. Not so in the judicial system.

[39] "In an ideal adversary system, the less skillful antagonist is expected to lose the dispute, which under the laissez-faire notion is the proper outcome." Marian Neef & Stuart Nagel, The Adversary Nature of the American Legal System from a Historical Perspective, 20 N. Y. L. Forum 123, 162 (1974). Good stuff on inequality of lwyrs & rich litigants Frankel at 121-25] [Rubinstein 1876--= protex clause d/n guarantee equality of litigation resources, quoting the various filing fee cs] [1877, things we do to get equality such as waiver of filing fees, pro bono lwyrs, PDs, fee shifting, contingent fees, PDs, LSC, advertising--lmtd & underwhelming]

[40] In inquisitorial trials, the rules of evidence are much relaxed in comparison to those in adversarial trials with the result that more relevant evidence can be considered by the trier of fact. However, because the inquisitorial model discussed in this article preserves the jury, it might be necessary to retain some rules of evidence. This would complicate the question of whether witnesses should be questioned by the judge. Because of space limitations, I have excluded the question of whether the rules of evidence should differ as between the two models.

2. The trial process

A trial lawyer's responsibility is not to assist and facilitate the jury's search for the truth but to obstruct and obfuscate that search if such favors the interests of the client.[41] For several reasons, I believe this system excessively rewards the advocacy skills of the attorneys, encourages one or both attorneys to sow confusion, and makes jury errors more likely than under competing systems.[42]

a. Juror selection

In the U. S. brand of adversarialism, the lawyers control the identity of the jurors. [43] During voir dire, they question each potential juror (often using the process to subtly introduce their version of events). Then each side strategically employs its peremptory challenges (peremptories allow the lawyer to excuse particular jurors without stating a reason). The lawyers' ability to choose their jurors through voir dire and peremptory challenges can have a marked effect on the ultimate outcome, especially if one side has the resources to hire a jury consultant and the other does not.

Peremptory challenges are based on a vast array of stereotypes. While the *Batson* rule prevents lawyers from using their challenges for reasons of race or gender discrimination, *Batson* is difficult to enforce (and very time-consuming if the judge tries to enforce it). Discrimination based on social class, education, age, or profession is common and permissible. In an inquisitorial system, peremptories are eliminated. The judge questions the jury panel and entertains challenges only for cause.[44]

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[41] Frankel 75 maybe van kessel . For a discussion of the many ways in which the adversarial trial can thwart the search for truth, see Stephen Gillers, Regulation of Lawyers 457-513 (6th ed. 2002) (NY Aspen). Wendel challenges the assumption that it is ethically or morally permissible to obfuscate the truth in the trial process by the use of deceptive narratives.

[42] Strier ch 3.See cites on this in CMM 21-22. Frankel 75. Frankel: it is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth* 123 U Pa at 1038 (emph in original) Luban :The two adversary attorneys, moreover, are each under an obligation to present the facts in the manner most consistent with their client's position--to prevent the introduction of unfavorable evidence, to undermine the credibility of opposing witnesses, to set unfavorable facts in a context in which their importance is minimized, to attempt to provoke inferences in their client's favor. The assumption is that two such accounts will cancel out, leaving the truth of the matter. But there is no early reason to think this is so; they may simply pile up the confusion." David Luban, The Adversary System Excuse in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics (David Luban ed) Totowa NJ: Rowman & Allanheld 83, 94 (1983) [NB Luban [probably s/b cited to his book lwyrs & Justice AN Ethical Study 1988 rather than the 83 version]

[43] In Britain, juries are used only in serious criminal cases. Peremptory challenges have been abolished. Criminal Justice Act 1988, ch. 33 §118(1).

[44] Perhaps one might give each side not more than one or two peremptories to deal with the unusual situation of a truly biased juror such as a Ku Klux Klan member who couldn't be challenged for cause.

b. Choice of witnesses

It is not uncommon that a witness with important information about the dispute is not called by either party because each has reason to fear what the witness may say.[45] When the judge controls the choice of witnesses rather than counsel, this should not occur. The judge familiarizes himself with the case before trial and will identify and call all witnesses who have something to contribute to the search for the truth. Similarly, neither side may ask a pertinent question of the witness because neither lawyer is sure of the answer and is afraid to ask. If the judge asks the questions, this should not happen.[46] [move this?]

c. Witness preparation

In the U. S. system (much less so in the U. K.), counsel "interview" and "prepare" their witnesses for trial. The testimony offered by the witnesses is subtly molded by these preparation sessions.[47] Often, the witness understands what the lawyer wants without being told and delivers testimony that meets those expectations. The jury has no way to know how much the witness' testimony has been altered through this "preparation" process. Although ethical rules constrain the lawyer's ability to change witness testimony, these rules are seldom if ever enforced and are frequently flouted.[48]

If trials were conducted in an inquisitorial mold, attorneys would continue to prepare and coach their witnesses. However, if judges rather than attorneys were to question witnesses at the trial, the lawyers might find it more difficult to mold the testimony through prior coaching. The lawyers could not anticipate exactly what the judge will ask the witness. Moreover, if judges rather than attorneys called witnesses, witnesses might be less biased since they would view themselves as neutral rather than as spokesmen for the side that called them. When the judge questions a witness, the questioning combines both direct and cross examination. If the judge is skeptical about a witness' testimony, the judge will probe it. The result should be that witness testimony in an inquisitorial trial would be less staged and more spontaneous than it is now.

d. Perjury

Lawyers and judges take it for granted that a great many witnesses are lying under oath or at least uttering deceptive half-truths.[49] Lawyers may suspect that their witness is lying but unless the lawyer knows this for sure, the lawyer can ethically introduce the testimony. Other witnesses may not realize they are testifying falsely or deceptively but their bias in favor of one party or another induces them to do so. Perhaps they have

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[45] Was there something in strier about this?
[46] See Park in van koppen 143-44
[47] There is strong evidence in the psychology literature that a witness that has been coached by an adversary attorney more likely to be biased than a witness coached by a nonadversary attorney. Lind & Tyler 113-17.
[48] frankel 15. use references from ethics files. Mirjan Damaska, Presidentation of Eviedence and Factfinding Precision 123 U Pa L Rev 1083, 1094
[49] (Frank 85, 93) other sources?

forgotten what they really saw, or weren't so sure what they saw at the time, but nevertheless they testify confidently about those events. Perhaps they are leaving out something critical but the omission is never detected.

How does the adversary system deal with untruthful witnesses? Cross-examination of witnesses is supposed to unmask perjured or biased testimony but it seldom does so. More often than not, cross examination allows the witness the opportunity to further solidify the false or misleading testimony in the minds of the jury.[50] In any event, when counsel is in a position to impeach a witness' testimony, it can ordinarily be accomplished in ways other than cross examination (such as by actually introducing the impeaching evidence).

A comforting illusion of the adversary system is that jurors can make intelligent judgments about truth-telling by scrutinizing the demeanor of witnesses. The empirical evidence, however, suggests that this is a myth. Many witnesses are skillful liars. On the other hand, truthful witnesses are often nervous and their demeanor suggests to the jury that they are lying. Psychological studies show that people are not very good at distinguishing truthful statements from lies and that judgments as to demeanor are as likely to be wrong as right.[51]

Obviously, there is no simple antidote to the plague of perjured, deceptive or biased testimony. However, judges are experienced fact finders.[52] They appraise the credibility of witnesses every day of their professional life. They are less likely to be deceived by a skillful liar (or by a nervous but truthful witness) than are inexperienced

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[50] [Rick Abel sez to distrust Langbein, need a better source for this:] Langbein at 833 (CGA quotes Langbein) : Wigmore's stmt that cross examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" is just an article of faith. 2 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law 1697 (1904). Wigmore remarked that "It may be that in more than one sense [cross-examination] takes the place in our system which torture occupied in the mediaeval system." He also remarked that the "abuses and puerilities often found associated with cross-examination" were outweighed by its value. Notwithstanding Wigmore, it may be that cross examination, on balance, obscures and distorts the truth at least as often as it facilitates its discovery. For example, the various "commandments" for cross examiners are designed to prevent backfires (such as never asking questions to which you don't know the answer or never letting the witness explain an answer). These are all designed to prevent the witness from giving unwelcome testimony that might be truthful. See Roger Park, Adversarial Influences on the Interrogation of Trial Witnesses in Adversarial versus Inquisitorial Justice (Peter J. Van Koppen and Steven D. Penrod eds.) NY Kluwer Academic Press 2003 (arguing that interrogation by a neutral judge may be more effective in uncovering truth than examination and cross examination by adversary counsel).

[51] See Aldert Vrij, Detecting Lies and Deceit ch 3. (NY: Kluwer Academic/Plenum Publishers2000) (many studies show that both amateur and professional lie detectors detect only about 56% on average of lies where 50% would be random guessing); Otis Guy Wellborn, Demeanor, 76 Cornell LR 1075 (1991) (subjects do a better job of determining truth by reading written transcript than by hearing witness). See Roger C. Park, Empirical Evaluation of the Hearsay Rule in Essays for Colin Tapper (Peter Mirfield and Roger Smith, Butterworth 2003)

[52] Frankel 53-57 about how frustrating it is for jj to remain neutral when they see truth being twisted all over the place]

jurors. Thus the judge's ability to comment on the evidence at the end of the trial should be helpful to the jury in deciding which witnesses were truthful.[53]

5. Discrediting truthful witnesses on cross examination

Even if a witness is telling the absolute truth and counsel knows it, it is ethical (and indeed expected) for the lawyer to try to discredit the witness on cross examination. There are many lawyers' tricks for discrediting truthful witnesses, such as finding some slight inconsistency in the witness' testimony before and at the trial and magnifying its importance. Often the effect of cross examination is to so confuse the jury about whether the witness is telling the truth or not that the jury decides the case without taking the witness' testimony into account.[54]

A judge controlled trial can reduce the risks of errors arising out of cross-examination. The judge first allows the witness to testify, perhaps through narrative. Counsel can question a witness after the judge is finished, but it seems likely that this approach would diminish counsel's ability to sow confusion through hostile cross-examination. And the judge's summation of the evidence can help rehabilitate witnesses whom the judge believes were truthful but whose credibility was cast into doubt.

6. Structure of trials

In a long and complex adversary trial,[55] the fact that the two sides tell their stories separately is likely to confuse the jury. First the plaintiff (or prosecutor) puts on its evidence. Then the defendant puts on its evidence. Sometimes, the parties call adverse witnesses as part of their case in chief. Then the parties have an opportunity to present rebuttal witnesses. The lawyers control which witnesses are called and in which order. Some evidence may be redundant or extraneous to the real issues in the case.

The jurors must remember the testimony of each witness and whether the jury thought the witness testified truthfully. Witnesses describing the same events may have testified days or weeks apart. The jurors then have to put the jigsaw puzzle together on their own in deciding which story was the correct one. Even conscientious jurors who have taken notes and paid close attention to every witness are likely to find this process difficult to accomplish.

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[53] The Supreme Court ruled that a judge can comment on the evidence and express an opinion as to the facts so long as the judge immediately makes it clear that the jury has the ultimate power to determine the facts. Quercia v. United States, 289 U.S. 466 (1933) Materials on judge comment on evidence in Dzienk n 7, 12, 25, 29; molot 53, 73-74, 81

[54] frankel 16 frankel 27, lwyrs tricks such a s ins co making jury think D is poor] phony histrionics 30

[55] One might argue that inquisitorial methods should be used in lengthy and technically complex cases (such as product liability, racketeering, toxic tort, aircraft accidents, environmental, hi tech or other complex litigation) whereas adversarial methods can be retained in simpler cases. There is a substantial amount of scholarship on this issue but it is beyond the scope of this paper. See Schwartzer in Litan but see Galanter.

A judge-controlled trial would be different. The judge would frame the issues (obviously after consulting counsel) and decide who the witnesses will be and in what order they will testify. All witnesses to the same event would testify sequentially, whether they favored one side or the other. The trial would not be organized into separate plaintiff's (or prosecution's) case, then defense's case.[56] The judge would ask most of the questions and would sum up the evidence at the end. The problems of juror confusion or forgetfulness should be substantially alleviated.

7. Expert witnesses

Expert witnesses are frequently employed in modern litigation. Thus we expect to see experts testifying about such things as mental illness or DNA analysis in a criminal case, or about technical, scientific, economic or other matters in a civil case. For example, in a medical malpractice case, it is obligatory that each side present expert testimony about the standard of care exercised by physicians in the community. Of course, counsel select experts who will unequivocally back up their version of the facts; experts who are likely to testify in measured and careful terms will probably not be selected by either party.[57]

Because experts are paid by one side or the other, they usually feel bound to deliver the best possible testimony for the side that paid them; they regard themselves as members of the team.[58] Indeed, it is well known among lawyers that some experts are whores who will say anything if they are paid for it.[59] If one side has a financial advantage over the other, as is commonly true, the experts for the richer side are likely to be much more experienced and more persuasive than the experts for the poorer side.

Under the adversary approach, each lawyer is expected to cross examine the opponent's expert in order to discredit that expert. If there is some small difference between the expert's testimony at the deposition and trial, counsel will pounce on the difference in the hopes that the jurors will wholly disregard the expert. Since experts testify about technical matters about which the jurors are not expert, the effect of a battle of the experts, and cross examination of each of them, may be that the exasperated jury throws out the expert testimony altogether.

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[56] Langbein 52 Chi 830-32

[57] Langbein 52 Chi at 835-41 (the more measured and impartial an expert is, the less likely he is to be used by either side." At 835. at 838: most important factor is that j used expert b4 & he did good job.. The parties would be expected to split the cost of a judge-selected expert see wiley at 1428-29. In fact judges already have the power to appoint their own experts under Federal Rule of Evidence 706(a) but this power is seldom employed. See John Wiley, Taming Patent: Six Steps for Surviving Scary Patent Cases, 50 UCLA 1413, 1425-37. some fine quotes from Wiley about how bad biased experts can be; how muchg they h/t/b on the advocate's team-- 1427-28 At 1430-32 --explains that jj d/n use them because it interferes with neutrality.

[58] There is strong evidence in the psychology literature that a witness will bias testimony in the direction of the preferences of the side that summoned the witness. See Lind & Tyler 113-17.

[59] Judges maintain some control over expert witnesses because they can disqualify experts whose testimony is based on scientific theories that are not generally accepted. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

In an inquisitorial trial, the function of experts would be different. The judge rather than counsel would select the experts, although the judge would of course consult the parties in making the choice. As a result, a judge-selected expert would tend to be neutral (or at least would not be biased because he has been chosen and paid by one side or the other).[60] The jurors would be likely to rely on the opinion of a judge-selected expert and cross-examination of such an expert based on picky details would be less likely to discredit the expert.[61]

B. Acceptability to the parties.

The prevailing wisdom in the social-scientific literature is that litigants strongly prefer a system in which they (and their counsel) control the trial.[62] The large body of research in support of this view is derived from the seminal experiments conducted in the early 1970s by Thibaut and Walker.[63] Thibaut-Walker staged a simulated "trial" involving undergraduates who were found "guilty" or "innocent" of business plagiarism by a "judge." Half of the subjects experienced an "adversarial" trial, meaning that each of the subjects chose "lawyers" who argued on the subjects' behalf to the "judge." The other half experienced an "inquisitorial" trial, meaning that the subjects did not have their own lawyers; instead, a single appointed "lawyer" made arguments for both sides to a "judge."

By substantial margins, the students expressed greater satisfaction with the fairness of the adversarial procedure than with the inquisitorial procedure. This result held *regardless* of whether the subjects believed they were "innocent" or "guilty" of the charges against them and *regardless* of whether they were actually found "innocent" or "guilty" by the "judge."[64] Thibaut-Walker's findings are important and are the basis for many subsequent works involving the social psychology of the dispute resolution system. They showed that the perceptions of litigants that they have been treated fairly is extremely important *even if they are disappointed with the substantive outcome*.[65]

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[60] [Kagan 107, 244--judge hires the experts in Europe and isn't coached by either side]

[61] One variation here would be to allow the parties to put on their own experts after the judge-selected expert has testified. The party-selected experts would be sharply constrained by what the judge's expert had already testified. The jury is likely to be suspicious of a party-selected and paid expert who testifies in a way that sharply diverges from the testimony of the judge-selected expert

[62] See generally E. Allan Lind & Tom Tyler, The Social Psychology of Procedural Justice NY Plenum Press 1988); Tom R. Tyler, Justice and Power in Civil Dispute Processing, in Justice and Power in Sociolegal Studies (edited by Bryant G. Garth and Austin Sarat) 309 Chicago: Northwestern Univ Press 1998 309

[63] John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975). ch. 8.

[64] Unsurprisingly, those found innocent were much happier with either process than those found guilty but in all the various combinations, the subjects found the adversary approach to be fairer than the inquisitorial approach.

[65] Thibaut and Walker surveyed "observers" who had watched the proceedings but were not themselves "litigating." The observers agreed that the adversarial approach was better. Thibaut & Walker also wondered whether their results mirrored the fact that American students are accustomed to adversary procedures so would of course prefer them. They found that English, French and German students had about the same preferences as the American students. This experiment involved a written questionnaire describing different trial and decisional models, not a simulated trial. John Thibaut et. al., Procedural Justice as Fairness, 26 Stanford L. Rev. 1271 (1974).

I do not question the fundamental insight of Thibaut-Walker and many subsequent studies that procedural justice matters greatly independent of the outcome.[66] People are deeply concerned that decisionmakers seem neutral, unbiased, and honest as well as fair, polite, and respectful.[67] They care greatly about the opportunity for self-expression. And litigants are sensitive to whether they (or their advocates) control the proceedings because that affects whether they will have sufficient opportunity to tell their side of the story. However, it may be that the disputants are concerned less about the details of how control is exercised than their perception that the decisionmaker is trying to be fair, respectful of their rights, and polite.[68]

I do not believe that the Thibaut-Walker findings can be easily applied to the choice between my adversarial and inquisitorial models.[69] In my inquisitorial model, each litigant chooses its own advocate, whereas this was not true in any of the Thibaut-Walker inquisitorial simulations. Under my inquisitorial model, the advocates have numerous opportunities to represent their clients. For example, they make arguments to the judge before trial concerning the framing of issues, identity of witnesses, the order in which they will testify, and the questions the judge will ask them. The lawyers may question witnesses after the judge does so and seek thereby to discredit what the witness has said. They give closing arguments to the jury setting forth their interpretation of witness testimony and fitting it into the story that favors their client. There is ample opportunity for the litigants to tell their story to the judge and jury and have it fully considered.

It is wholly understandable that experimental subjects in the Thibaut-Walker study would distrust a system in which they are deprived of their own champion. Naturally, they are suspicious of a system in which they must depend on the judge alone or on a single assigned "investigator" to state their side of the dispute fairly. It is not so clear whether the subjects would equally resent an inquisitorial model like the one I propose: the litigants select a champion who represents their interests at every stage. Their stories and voices are clearly and repeatedly heard even though a judge, rather than the lawyers, controls the course of the trial.

Indeed, a follow-up study reported by Thibaut and Walker suggests that parties who can choose their own advocates find little difference between an active and a passive

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[66] Rubenstein Chicago ticket study?

[67] Tom R. Tyler, Why People Obey the Law ch. 11 (Yale U Press 1990);

[68] See Lind & Tyler 107-110; Tyler in Garth/Sarat at 326-27. Tyler, supra, conducted an ethnographic study of Chicago residents who had actual experiences with the police and courts (as opposed to Thibaut who studied college students who had no such experience). Tyler was able to derive a ranking of the importance in the minds of respondents of the various elements of procedural justice. He found that the decisionmaker's effort to be fair ranked first and ethicality (meaning politeness and respect for the rights of the parties) ranked second. Representation (which includes the extent to which the disputants have an opportunity to present arguments, be listened to, and have their views considered) ranked third. Id. Chapter 11.

[69] Obviously, Thibaut & Walker did not consider the allocation of responsibilities within the context of jury trials; they considered only the allocation of control between counsel and judge where the judge is the trier of fact.

judge.[70] Here the subjects were undergraduates in both the U. S. and Paris. The case was a simulated trial involving an assault arising out of a fight in a bar and a possible self-defense excuse. The "plaintiff" and "defendant" each chose advocates to present their side of the dispute but in half the cases the "judge" asked the questions and in the other half the advocates presented the evidence without interference from the judge. The subjects in both the U. S. and France were *equally satisfied with both versions.*

Assume, however, that Thibaut and Walker's findings that people prefer adversarial approaches could be generalized to my quite-different models. Even so, it is not clear that the results derived from studying undergraduate students in a pristine environment would describe the opinions of real litigants in our real and heavily flawed civil and criminal justice systems. The undergraduates gave no consideration to efficiency concerns; they were not bogged down in an expensive and slow process that is often bitterly resented by real world litigants. The stakes were very low; they didn't have to pay their lawyers and the whole process wrapped up in an hour. Nor were they subjected to the problem of capricious or confused juries,[71] inconsistent results,[72] perjurious or biased witnesses, uncivil and often rude lawyer behavior, lawyer strategies that obscure the truth, or serious inequalities of skill, experience or resources as between the advocates. Confronted with some of these rather unpleasant realities of the litigation process, each of which might be ameliorated in a judge-controlled jury trial, perhaps the undergraduates would reconsider their preferences.

C. Efficiency

Most people expect their justice system to deliver outcomes in a reasonable time and at reasonable cost to themselves and to the taxpayers. Thus in an efficient system, a unit of justice is delivered at lower cost and greater speed than in an inefficient system. Defenders of the adversary system are likely to admit that it is not a very efficient process but they say that efficiency doesn't matter.[73] You shouldn't ration justice, they say.

But efficiency does matter. Litigation has become the major profit center for large law firms; the major business litigation and tort defense cases in which they specialize are immensely profitable. But these profits come from the pockets of the litigants and are ultimately passed on to consumers. The costs of dispute settlement are a deadweight loss to the parties and to the economy as a whole. Higher litigation costs price potential users out of the justice system (either as plaintiffs or defendants).[74]

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[70] Id. Ch. 10.

[71] Tiebaut & Walker conceded that an inquisitorial approach "is most likely to produce truth" than an adversarial system. They were concerned only with litigant acceptability of the two systems. John Thibaut & Laurens Walker, A Theory of Procedure*,* 66 Calif. L. Rev. 541, -- (1978).

[72] In another body of social psychology research, consistency was found to be the major criterion on which people assessed procedural justice. Tyler, Why People Obey the Law 120.

[73] See Strier 87-90 (comparing lengthy US trials to brief German trials). Samuel Gross, who believes that there are substantial values in favor of adjudicative *inefficiency*, is convinced that the German justice system produces criminal and civil outcomes with much less cost and much more rapidly than our system. 739-740.

[74] Marcus 92-95

Delays in trying cases that are ready for trial are unconscionably long in many jurisdictions.[75] Many civil cases involve long and costly discovery[76] and produce lengthy and complex trials. They are very costly for the litigants[77] and for the taxpayers who pay the costs of judges and courthouses.[78] Anything that might speed up and simplify trials, and might decrease both the public and private costs of the justice system,[79] would be worth considering.

The costs and delays engendered in the adversary system undoubtedly induce many litigants to settle cases that they would prefer to try.[80] Only a small percentage of civil or criminal cases are actually tried (about 3% of federal civil cases, between 4% and 12% of California civil cases).[81] Many are dismissed by the courts on pretrial motions (such as demurrer or summary judgment) and many parties default or fail to press their case (about 30% on average).[82] Perhaps 60% of civil cases are settled through negotiation.[83] As many as 98% of criminal cases are plea bargained. When settlements are consensual and reflect a shared appraisal of the value of the claim, such settlements

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[75] See Marcus in Zuckerman 88-92.

[76] The process of pretrial discovery in civil litigation consumes substantial time and resources. Some discovery is necessary to prevent trial surprises and some of it facilitates settlement by exposing the weaknesses in each side's case. Unfortunately, a good deal of pretrial discovery is intended to run up the costs of the opposition to force settlement. Some unnecessary discovery is designed to generate additional fees and some to prevent any possibility of malpractice claims. A switch from an adversarial to an inquisitorial model might transfer responsibility for pre-trial fact development and case management from counsel to judges by making discovery a matter of judicial discretion rather than a matter of right. See Zuckerman 16-18 which discusses recent changes in the English civil procedure rules to give judges much greater control over pretrial activity. The objective is to save expense, place the parties on an equal footing, and ensure that the allocation of resources to a given case is proportionate to the amount involved, each party's financial position, and the complexity of the issues. Because of space limitations, I do not discuss reform of the pretrial investigatory phase in this paper.

[77] Kagan ch 6 on civil justice--huge fees, far higher than in comparison countries (104).

[78] Estimates of the cost of judicial time range between $600 and $1750 per hour, only a small part of which is offset by litigation filing fees. Marcus 95.

[79] Injury victims receive only about 50% of the premiums paid by for accident insurance. Legal fees of claimants consume about 30% of the total compensation paid to plaintiffs and defendants legal fees range from 16% in auto cases to 28% in non-auto cases. See Marc A. Franklin & Robert L. Rabin Tort Law and Alternatives 786-87 7th ed. 2001).[New York: Foundation Press). (Landsman ch 4) (Kagan has good stuff on efficiency) . Pace ch 4--extreme slowness. Kagan 82 quoting Alshuler: The American jury trial…has become one of the most cumbersome and expensive fact-finding mechanisms that humankind has devised." Lots of good figures in Kagan--trials take weeks, fees run into millions, all cuz of expansion of AL. 83: quoting Langbein: unworkable as ordinary or routine dispositive procedure. Van kellel 468-79 blaming adversarial system & judicial passivity for huge delays Kalven and Zeisel thought that jury trials took about 40% longer than bench trials. 50 Va at 1059.

[80] Lawyers bemoan the plummeting rate of cases that are actually tried, arguing that more cases should be tried to create precedents and jury verdicts that can be used as markers and to allow more people to have their day in court See Hope Viner Samborn, The Vanishing Trial, ABA Journal Oct. 2002, p. 24.

[81] See Richard L. Marcus, Malaise of the Litigation Superpower in Zuckerman ch 3, p. 82, 85, 114. These figures represent the percentage of civil cases tried of those that are filed. Of course, perhaps 10 cases are settled without any litigation filings at all for every case that is actually filed. Trubek et al 31 UCLA at 86-87.

[82] Id. at 82

[83] Ibid.

are good for the justice system and plainly efficient. Settlements can well be win-win affairs in which the parties come up with compromises that could not be achieved through a trial.[84] However, some settlements are dubious (though the exact number of these is unclear). Some plaintiffs must settle cheaply because unable to pay the costs of an epic struggle in court or endure a delay of many years until trial[85] and appeal are concluded.[86] In other cases, defendants enter into nuisance settlements because it is cheaper to settle than to contest a claim that they believe is meritless. Settlement denies the party who is in the right a judicial judgment affirming the value of his claim and may provide less than complete justice, especially in complex cases, cases involving groups, continuing disputes, and cases involving important public interest concerns.[87]

In criminal cases, some plea bargains are clearly desirable because they represent a shared appraisal of the risk of conviction and the attributes of the defendant. Most plea bargains, however, are coerced by the cost of trial (particularly where defendant is paying for his lawyer) or by the caseload. Both prosecutors and public defenders must deal somehow with an enormous caseload that precludes either trials or carefully tailored plea bargains. Such massive utilization of plea bargains can only be justified on efficiency grounds.[88] They are contrary to the ideals of substantive justice.[89] Depending on relative bargaining positions and the state of the caseload, defendants may receive a sentence much more or much less severe than is merited. Often the result is inconsistent with that in similar cases. The prevalence of plea bargaining probably leads to prosecutorial overcharging (so the prosecutor will have bargaining leverage) and it may encourage legislators to make criminal penalties harsher than would otherwise be the case. Perhaps worst of all, plea bargains deny the defendant and the crime victims their day in court. A system that made trials quicker and cheaper should result in fewer civil settlements or criminal plea bargains.[90]

[84] Because of space limitations, I cannot explore alternate dispute resolution here. Clearly, negotiation, mediation, and arbitration are much less adversarial than trials.

[85] Priest reported that in 1990 the delays in Chicago civil cases from filing suit to trial averaged 6 years. Priest 135 n.52. Since Illinois courts give no prejudgment interest, at least in tort cases, the effect is that $100 in a plaintiff's verdict is really worth only about $67. Id 130. Obviously, the Chicago situation is extreme and delays are far shorter in other jurisdictions.

[86] Owen M. Fiss, Against Settlement, 93 Yale 1073, 1076-78 (1984) (P's may need damages immediately; may be unable to finance the litigation including the various discovery costs and attorneys' fees). Many claims cannot be brought at all because there is not enough at stake to hire a lawyer to vindicate them.

[87] Fiss 1085-87; Frank B Cross, In Praise of Irrational Plaintiffs 86 Cornell LR 1 (2000) (settlement deprives P of day in court and opportunity for vindication).

[88] See, e.g., Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50 (1968); Langbein, Land Without Plea Bargaining: How the Germans Do It 78 Mich 204 (1979); Van Kessel, Adversary Excesses; Pizzi ch 4.

[89] In inquisitorial systems, plea bargains and guilty pleas were unknown. See Langbein, Land Without … But as a result of caseload pressures, many inquisitorial regimes have been reluctantly compelled to accept something like American plea bargains. See Langer

[90] See e.g. Steven J. Schulhofer, Is Plea Bargaining Inevitable? 97 Harv L Rev 1037 (1984) (discussing Philadelphia practice of conducting relatively short but contested non-jury bench trials; system allowed far higher percentage of criminal cases to be tried rather than plea bargained); Also contrast British magistrate courts where 98% of the cases are efficiently tried in a dignified way that really considers defendant's individual circumstances. Kagan 89-93

Finally, the taxpayers who must pay the costs of the dispute settlement system such as the salaries of judges and upkeep of the courthouse get less and less for each dollar they invest in that system. Reducing the cost and delay of trials would be a very good thing.[91]

How might the inquisitorial model save time and money? First, it would greatly speed up jury selection by abolishing most voir dire and peremptory challenges. That would put jury consultants out of business. Putting the judge in charge of the trial could also save time. At present, judges can do little to prevent the calling of redundant witnesses or to cut off unproductive lines of questioning. Under an inquisitorial approach, there would be fewer witnesses called and the examination of each witness would take less time. Probably opening statements would be dispensed with.

On the other hand, it may be that the inquisitorial model would actually save little time or money because it preserves the right to a jury trial. Jury trials always take longer than bench trials. The judge's new responsibility to sum up the evidence would consume additional time. And it is possible that the same number of witnesses will testify for about the same amount of time as under the adversarial model. On the other hand, given an inquisitorial model, some litigants would probably opt for a bench trial rather than a jury trial, since they would be fearful of the judge's ability to influence the jury. Thus the number of jury trials might be reduced. Therefore, the question of whether there would be significant savings cannot be answered on an a priori basis.

II. Reasons for belief in the adversarial ideology

This section explores, in a brief and tentative way, some of the reasons (both instrumental and non-instrumental in nature) why people might justify their belief in the adversary ideology, even if they distrust lawyers and even if they are aware of some of the inherent practical problems of the adversary system. Many of these reasons are closely related to one another and people are likely to believe in several of them (or even all of them).

A. Tradition and lack of knowledge of alternatives

Of course, an important reason why people believe in the adversarial ideology is that it has always been done that way and they know of no alternative. In my experience, people, even many lawyers, are surprised and intrigued to learn that the U. S. brand of adversarialism is more extreme than that which is practiced anywhere else in the world, including the U. K.

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[91] Even Cross, devotee of adversary system, concedes importance of efficiency. 206. Gross, however, disagrees. He argues that the high cost of litigation forces settlement (sometimes in ways that are different from results that would have been obtained in court) and leads to underenforcement of bad laws. "Under this view, efficiency is a troublesome measure: uiseful in part, irrelevant in part, and potentially stifling and destructive." Id at 757. Needless to say, I disagree. Of course, efficiency isn't the only criteria for designing a procedural system but it is certainly important and, all other things being equal, efficiency is better than inefficiency.

Thus in the 1999 ABA M/A/R/C/ survey, only 30% of respondents were either extremely or very confident in the U. S. justice system. Yet, remarkably, 80% agreed or strongly agreed to the statement "in spite of its problems, the American justice system is still the best in the world!" [92] Needless to say, few, if any, of these respondents, had a clue as to what the justice systems in rest of the world look like.

However, people may believe there are important reasons to adhere to traditional ways of resolving disputes even when they are aware of the alternatives.[93] Certainly many of the framers of the Constitution and the Bill of Rights were familiar with different models of dispute resolution. Various provisions of the founding documents seem more consistent with an adversarial than an inquisitorial approach to litigation.[94] These include the due process and self-incrimination clauses of the 5th amendment, the rights to jury trial in the 6th and 7th amendments, the right to confrontation and counsel in criminal cases in the 6th amendment, the right to bail in the 8th amendment, and the right to non-suspension of habeas corpus in Article I section 9.

In addition, traditionalists point to the law of unintended consequences and argue that the devil you know is usually better than the one you don't. An ideal inquisitorial system may look better than a flawed adversarial one, but the ideal system will have its own flaws if it is ever put into practice and turned over to fallible human beings. Moreover, the substantial transitional costs of changing from one system to a radically different one may be a sufficient reason to leave well enough alone. [Abel cites Luban for this?? its in note 40 or so]

B. Personal autonomy

The adversary system allows a litigant to make the major strategic decisions about his own case. It also allows the lawyers to make the tactical decisions about how to conduct the case. Thus litigants decide how much in resources should be invested in the case and whether to settle the case and on what terms. The lawyers decide which jurors to challenge, what the issues are, what witnesses to call, what questions to ask, and what arguments to make to the jury.[95] Judges make none of those decisions. Thus the adversary system exalts the value of personal autonomy.

The idea that we should make our own decisions about how to conduct our own lives is deeply cherished in Anglo-American society. Our economic system is rooted in

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[92] Pp 50, 59. Of the same respondents, 78% agreed or strongly agreed that the "jury system is the most fair way to determine the guilt or innocence or a person accused of a crime;" 69% agreed or strongly agreed that "juries are the most important part of our judicial system."
[93] Molot
[94] See Molot who argues that the adversarial system is far more consistent with these constitutional provisions. Nevertheless, I believe my inquisitorial model is consistent with these constitutional provisions.
[95] Granted, litigants may have little control over the tactical decisions made by their lawyers, but lawyers are at least somewhat constrained by their clients' desires. In any event, the tactical decisions are made by someone that the client is paying, who serves as the client's champion, and who the client can discharge.

personal choice, laissez faire values. The market allows a person great freedom in making decisions to buy or sell or in choosing to take risks that may lead to success or failure. Conservative economists believe that government regulation can be justified only in cases of market failure, such as a problem of failure to take account of externalities. Although litigation is not an exchange transaction in the market, many people would probably apply the same principles and oppose government regulation absent a strong showing that the system of individual choices is somehow damaging to the general public as opposed to the parties themselves.[96]

Philosophers extending back to John Stuart Mill insist that government should never interfere in decisions involving only an individual's personal life or welfare. In *On Liberty*, Mill wrote:

> ...the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . The interference of society to overrule his judgment and purposes in what only regards himself must be grounded on general presumptions; which may be altogether wrong, and even if right are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.[97]

C. Dislike of government officials in general

A generalized distrust of government officials and government power is a recurrent strain in American history. The original colonists--and probably most of the millions of immigrants who followed them--sought to escape from oppressive, authoritarian governments at home. The American Revolution threw off the despised British rule. The Revolution was followed by enormous popular resistance to the centralization of federal power.[98] Ever since, Americans seem to suspect government

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[96] In the 2003 UCLA law student survey, 6 of the 61 students who favored the adversarial approach said the inquisitorial approach interfered with personal autonomy.

[97] John Stuart Mill, Utilitarianism, On Liberty, Considerations on Representative Government (Geraint Williams, ed.)London: J. M. Dent (1993) pp 78, 144. Similarly, John Locke stressed that in leaving a state of nature and joining civil society, man gave up no more liberty than was absolutely necessary to secure the benefits of government. It should follow that, along with all other liberties, man retained the power to decide precisely how his own dispute should be presented in court. See John Locke, Two Treatises of Government (Peter Laslett ed. Cambridge: Cambridge University Press 1967). Another libertarian philosopher, F. A. Hayek, makes the same point. "It is because freedom means the renunciation of direct control of individual efforts that a free society can make use of so much more knowledge than the mind of the wisest ruler could comprehend." *The Constitution of Liberty* pp. 30 (1960) (Chicago: University of Chicago Press) Similarly, see Robert Nozick, Anarchy, State and Utopia NY Basic Books 1974; Paul Verkuil, Soundings 56-57; Neef & Nagel 161-62. Van Koppen & Penrod attribute the difference between American and Dutch criminal procedure to American individualistic traditions (which they call the John Wayne version of justice). 352-54.

[98] See Garry Wills, A Necessary Evil: A History of American Distrust of Government (NY Simon & Schuster 17, 318 (1999) .

officials and agencies of meddlesomeness, incompetence, or corruption.[99] These convictions are shared by people on both the left and right of the political spectrum. These feelings are the same whether we're talking about the police, the IRS, the FBI, the Bureau of Alcohol, Tobacco and Firearms, or the local Department of Motor Vehicles. The degree to which people distrust of government has fluctuated throughout American history but has been at a low ebb for the last generation.[100] currently Undoubtedly, people who distrust government officials will firmly oppose any proposal to give a government bureaucrat called a judge greater control over their dispute-settlement functions.[101]

D. Distrust of judges in particular

Based on many conversations I've conducted, I am convinced that many people, particularly lawyers, distrust judges intensely and would oppose any measure that would transfer control from lawyers to judges.[102] Every lawyer, it seems, has an anecdote about an atrociously biased or hopelessly incompetent judge.[103] These arguments have considerable merit. As the legal realists have taught us, judges, like every other human being, have their own political and social opinions. Judges might not be able to set these opinions aside and act neutrally when called upon to conduct an inquisitorial trial and sum up the evidence. Some judges are lazy and would do a poor job if the structure of the trial and examination of witnesses were left in their hands. Reasonable people could reject all inquisitorial approaches simply because they fear anything that would give unchecked powers to judges.

There are fundamental differences between the people who act as judges in the U. S. and in European systems. In continental Europe, judges are trained professionals. Only the best law school graduates are admitted into judicial training institutes. Judging is a career track, judges are trained and reeducated throughout their careers, and the judges are promoted to more responsible roles depending on their performance.[104] In the U.K., judging is not a separate career track but the appointment of judges by the Lord Chancellor is non-political and generally the most capable barristers are selected to become judges.[105]

[99] "In sum, the distinctive aspect of the American Creed is its antigovernment character. Opposition to power, and the suspicion of government as the most dangerous embodiment of power, are the central themes of American political thought." Samuel P. Huntington, American Politics: The Promise of Disharmony 33 (Cambridge MA: Belknap Press. 1981). See id. at 34, 88, 95.
[100] See generally John R. Alford, "We're All in This Together: The Decline of Trust in Government, 1958-1996" in John R. Hibbing & Elizabeth Theiss-Morse, eds (2001) What Is It About Government That Americans Dislike (Caimburge UK Cambridge Univ Press 2001);
[101]Kagan 15 & numerous other places. [does this add anything]

[102] [Frankel 50--jury survives here becuz of our distrust for jj & all govt officials, power corrupts etc]
[103] The 2003 UCLA law student survey asked students the reasons for their choice of the adversarial or inquisitorial approach. Of the 61 respondents who favored the adversary system, 13 mentioned their fear of biased judges. Another 14 believed that the inquisitorial system reposes too much power on judges.
[104] Langbein 52 Chi at 848-855. Eva Steiner, French Legal Method Oxford Univ Press 2002 ch 6.
[105] This system of appointments is currently changing. The position of Lord Chancellor has been abolished and appointments to the bench will be made by an independent judicial appointments commission. See

The manner in which American judges are selected bears no resemblance to these European models and does not contain built in protections to assure neutrality or competence. The quality of judges is mixed, depending on the jurisdiction. A few states have merit selection systems. Most states, and the federal system, rely on political appointments. Appointments at the federal level have become increasingly politicized. Although governors generally try to appoint qualified judges--if only to avoid being blamed for later fiascoes--politics has everything to do with these appointments. In most states, a prospective judge must be an active member of the governor's political party. Indeed, a newly appointed judge may be a politico who has been defeated for election and needs a new job. Campaign contributions don't hurt. In many places, particularly big cities, the judges may be the dregs of the profession. [106]

In states that rely on judicial elections (and the majority do), there is little reason to believe that elected judges will meet any standard of quality or will act independently. Elected judges are reluctant to render unpopular decisions that might arouse the groups likely to organize non-retention campaigns. Increasingly, judicial elections feature the same sort of attack television advertising and corrupt fundraising practices as do elections generally.[107] And regardless of the selection method, judges are drastically underpaid relative to successful practicing lawyers and often receive inadequate staff support. As a result, many able lawyers can't afford to become or remain judges and some lawyers who can't make a living practicing law want to become judges.

All these concerns about biased or incompetent judges have merit. But the present system of adversarial lawyer combat has problems aplenty too.[108] At least most trial judges are experienced in finding facts, appraising witness credibility, and conducting trials, unlike jurors who don't have a clue.[109] Judges have better access to knowledge about results in other trials and so can facilitate fair and consistent applications of vague legal standards by the jury. Research indicates that they are less likely to make common cognitive errors than juries and thus can structure trials in a way that minimizes the risk of such errors.[110] And at least judges are trained and socialized to act in a fair and neutral manner, regardless of their political biases.

Neil Rose, "Lawyers Backing Revolution Despite Consultation Worry," Law Society Gazette, p. 3 (June 19, 2003).

[106] Langbein 853 has good quotes

[107] A 2002 study of over 2400 state court judges showed that 46% of both trial judges and appellate judges believe that campaign contributions influence judicial decisions to at least some degree. Greenberg Quinlan Rosner Research, Justice at Stake: State Judges Frequency Questionnaire, http://faircourts.org/files/JASJudgesSurveyResults.pdf .

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[109] Obviously, judges are inexperienced when first appointed. In most systems, however, they are assigned to less difficult cases (such as misdemeanors) until they get some experience. Since judges tend to remain on the bench for lengthy periods, the odds are that any given judge will have considerable experience.

[110] Chris Guthrie et. Al., Inside the Judicial Mind, 86 Cornell LR 777, 826-27 (2001). For example, in setting damages, it appears that jurors often fall prey to the error of "anchoring," meaning that the choice of the correct number is heavily influenced by the numbers initially presented. Thus, it appears that the more plaintiffs ask for, the more a jury is likely to award. See Gretchen Chapman & Brian Bornstein, The more

E. Lawyers might do a better job

Some people simply doubt the ability of most judges to do what they would be called on to do in an inquisitorial system. Judges might lack the energy, motivation, skills, or time to gain an understanding of the issue, and make intelligent choices of which witnesses to call, how to organize the trial, how to question the witnesses, and how to appraise their testimony. Instead, they might well believe that adversarial lawyers, who are paid by their clients and intensely motivated to win, will do a better job of fact investigation and presentation of their client's position than a judge ever could do.[111]

E. Relation to sport and war

Some people think that a substantial reason for the widespread belief in the adversarial ideology is that people enjoy contests. Certainly, the media coverage of many notorious trials (most importantly the O. J. Simpson case) was similar to coverage of a sports event, concentrating on gimmicks and who was ahead on a given day. Scholars trace the origins of the adversarial system back to primitive systems of trial by battle and trial by ordeal.[112] It may be that people like adversarial contests for some of the same reasons they like sporting events and other contests and perhaps for the same reasons that many of them have a taste for war. Moreover, as pointed out at the beginning of this article, the adversarial system (with its potential for lawyerly strategy and gamesmanship) is vastly more entertaining for spectators and probably for the participants than the inquisitorial system (in which lawyers have relatively little to do).[113]

F. Fuller's hypothesis

Harvard Professor Lon Fuller famously criticized the inquisitorial system on neutrality grounds. Fuller argued that a judge who is involved in framing the issues and choosing witnesses prior to the trial would decide prematurely which side was correct and downgrade evidence to the contrary. In contrast, Fuller argued, the more passive judge in an adversarial trial is likely to remain neutral until all the evidence is in.[114] Fuller cited no authority for this proposition.[115] If Fuller is right, this would be a serious criticism of the inquisitorial model, since that model calls on the judge to choose and

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You Ask For, The More You Get, 10 Applied Cognitive Psychology 519 (1996); Cass Sunstein, Behavioral Law and Economics: A Progress Report, 1 American Law & Economics Re
view 115, 141-44.

[111] Of the 61 UCLA law students who favored the adversarial system, 18 thought that lawyers would do a better job than judges of conducting a fair trial.

[112] History traced thru trial by combat and battle thru Greece Rome & early GB in -Neef & Nagel 133-47. In US 153-61.

[113] Frankel 31

[114] Lon L. Fuller, "The Adversary System" in Talks on American Law (Harold Berman ed.) NY: Vintage Books 2d ed1971) p 43-44. Lon L. Fuller, the forms and limits of adjudication, 92 HLR 353, 382-84 (1978), published & edited posthumously, again no cites.

[115] Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 ABAJ 1159 (1958).

question witnesses and to sum up the evidence for the jury. The trial could not be fair unless the judge remains neutral until all of the evidence was in.

Fuller's insight was subsequently validated by Thibaut and Walker.[116] Thibaut & Walker constructed an experiment in which undergraduate students were asked to serve as "judges" in an assault case involving a self-defense issue. Half of the subjects were "biased" and half were not "biased." The experimenters biased the "judges" by exposing them to a series of similar self-defense cases in which the similar conduct had been found unlawful. Half of the trials simulated an "adversary" mode because the facts were presented by two "lawyers" labeled "prosecution" and "defense." The other half simulated an "inquisitorial" mode, meaning that a neutral "lawyer" presented the facts to the judge.

Thibaut and Walker concluded that the biasing information had a larger impact on the "judge" when the case was presented in an inquisitorial mode than an adversarial mode.[117] When the judge was not "biased," the conviction rates were the same whether an adversarial or inquisitorial trial occurred. Where the judge was biased, however, the judge was more likely to convict the defendant in an inquisitorial rather than adversarial trial.

Nevertheless, Fuller's hypothesis remains open to question. The "judges" in the Thibaut-Walker experiment were relatively unmotivated undergraduates. Couldn't professional judges who hear cases every day and are socialized to remain neutral do better? At least, couldn't they do a better job of remaining neutral than kids who may or may not be serious about what they are doing, have never done anything like this before, and are doing it in a simulated, laboratory setting?[118]

In any event, Thibaut-Walker's experiments provided for no advocates for the contending sides. In my inquisitorial model, however, advocates are involved at every stage. This should significantly check the possibility that the judge will jump to conclusions after being involved with the preparation of the case. In any event, Fuller's hypothesis seems somewhat quaint. The citadel has long since been breached. Judges now routinely engage in a host of pretrial case management activities, decide on

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[116] John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis ch. 6 (Hillsdale NJ: Lawrence Erlbaum Associates 1975)

[117] Thibaut and Walker also discovered that the *order* in which the case was presented made an even bigger difference, regardless of which trial mode was used and whether or not biasing information was presented. The last evidence presented was the most influential under both the inquisitorial and adversarial modes. Thus defendants did much better when the order was unlawful-lawful than when the order was lawful-unlawful.

[118] See Samuel Gross, The American Advantage: The Value of Inefficient Litigation 85 Michigan 734, 740 n 22. Gross wrote "it is pointless to use college students and first-year law students to simulate the roles of judges and lawyers in adversary and investigatory systems for litigation; even if these subjects develop the appropriate motivation for their roles, they cannot possibly have the essential training". Indeed Gross thought an investigatory judge should be better able than a passive one to confirm or disconfirm his initial hypotheses. Damaska criticized the Thibaut-Walker experiment because no "evidence" was presented, only a set of conflicting facts, and because the decisionmaker was passive under both the adversary and inquisitorial simulations. 123 U Pa 1095-1103.

preliminary injunctions or summary judgment motions, and become deeply involved in promoting settlement.[119] All of this exposes them to vast quantities of information about the case and could cause them to lose their neutrality.[120]

G. Lawyers' and judges' preference

One reason why we retain pure adversarialism is that lawyers like it. On this point, there is near-consensus among prosecutors and criminal defenders as well as plaintiffs' and defendants' lawyers.[121] Like all human beings, lawyers prefer a system that they control (whether through trials or through settlements and plea bargains) rather than one that subordinates them to power figures like judges whom they cannot control.[122]

Even the judges with whom I've discussed the matter appear uninterested in reforms that would increase their power. Many would prefer to avoid political heat that could jeopardize their chances of re-election or promotion to higher courts. Moreover, inquisitorial systems involve more work and more responsibility which many judges would prefer to avoid. A judge who is obligated to sum up the evidence for the jury, for example, has to pay much closer attention to the trial testimony than one who is mostly passive.

III. The adversary system in popular culture

(See SCY critique: need to tell a much more nuanced story]

A. Popular culture as a teacher

Popular culture is a powerful and prolific producer of ideological messages.[123] According to numerous studies, we draw much of our information (or misinformation) and beliefs from movies and television. The cognitive device through which this occurs is called "the cultivation effect." In answering questions or forming opinions, people

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[119] Marcus (in Zuckerman) 102-08; Resnik.

[120] See Resnik 425-31 (raising concerns about impartiality).

[121] At least, so I assume based on many informal conversations but no methodologically acceptable studies. See the survey of first year law students discussed at note xx.

[122] Of course, financial considerations also come into play. Certainly, judicially unsupervised discovery and lengthy trials are good for lawyers' income if they are paid by the hour). Indeed, for big firms, litigation is the engine that drives their profits. Procedural reform in all countries is resisted by lawyers with vested interests in the status quo. Zuckerman 44-45

[123] Same cite to Grossberg as above. "For many, perhaps most, the mass media today are in fact the primary if not the exclusive source of the public's knowledge about law, lawyers, and the legal system as a whole.. . Put simply, [popular culture, especially visual mass media] is a source of both meaning and the meaning-making tools people use to think and speak with.. [It is the source of the] "common narratives that organize our experience, [that we] use to make sense of things in our everyday lives.. . .This vast electronic archive provides us with the knowledge and interpretation skills we need to make sense of ordinary reality. From these familiar sources we learn the familiar plot lines, story genres, and character types out of which meanings are made. In a sense, we 'see' reality the way we have been trained to watch film and TV. The camera is in our heads. We've internalized the media's logic." Richard K. Sherwin, When Law Goes Pop 18-20 (Chicago Univ of Chicago Press 2000).

access information in mental "bins" consisting of information they've stored there.[124] People internalize movie and TV stories, often forgetting to discount for the fact that these stories were fictitious.[125]

Another branch of culture theory (sometimes called the "active audience" or "uses and gratification" approach) stress the way that differently situated audiences construct their own meanings out of materials presented to them in pop culture products. These meanings may vary or even contradict those that the producers of the product intended.[126] Space limitations do not permit a detailed discussion of either of these competing approaches, but they are complementary rather than inconsistent. Some consumers are relatively passive sponges of the information and messages conveyed to them through the media of pop culture. Other consumers are more active and fashion their own meanings out of the cultural raw materials available to them. Both theoretical approaches help explain how endlessly repeated tributes to adversarial behavior in television and movies could produce and propagate the dominant adversarial ideology.[127]

This section discusses some of the powerful and persuasive pop cultural teachers of adversarial ideology.

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[124] This is an application of the well-known "availability" heuristic which suggests that we are heavily influenced in our behavior or opinions by the most recent and most vivid information available to us. People will be most concerned by risks that have been heavily publicized, such as shark attacks or the Washington DC sniper, despite the extremely low probability of being a victim of sharks or the sniper. See, e.g., Cass Sunstein, What's Available? Social Influences and Behavioral Economics, 97 Noprthwestern U LR 1285 (2003). The stock stories of pop culture stories are highly "available" to TV or film consumers, sicne they are likely to be recent, repeated, and vivid.

[125] See Michael Asimow, *Bad Lawyers in the Movies* 24 Nova L. Rev. 531, 553-61 (2000) for discussion of studies supporting the existence of the cultivation effect. That article suggests that the recent trend toward negative portrayals of lawyers in the movies could be one of the reasons for the precipitous decline in the public's opinion of lawyer character that occurred around 1980. The 2003 survey of UCLA first year law students asked about the sources of information the students found helpful in deciding whether they preferred the adversary system or the inquisitorial system. Students could mark each source from 1 (very unhelpful) to 5 (very helpful). By far the most helpful was classes in school (60% marked 4 or 5). News coverage of trials came in second (22% marked 4 or 5). Popular culture--novels, movies, or television--came in third (21% marked 4 or 5). Discussions with friends tied for third (also 21%). These four sources came in far ahead of friends and family who are lawyers (14%), personal experience in court (13%), and being on a jury (4%).

[126] See, e.g., John Fiske, *Television Culture* (1987) London:Routledge.

[127] See Podlas, Kimberlianne, Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias our Juror Citizenry. 39 *American Business Law Journal* 1 (2001) (documenting sharp differences concerning the appropriate role for judges as between people who frequently watch *Judge Judy* and those who rarely or never watch it). An earlier study of small claims court litigants indicated that many of them were relying on what they had learned from watching Judge Wapner on "The People'e Court." This was the very popular show which still runs on TV (presided over by Judge Wapner's successors) and which inspired Judge Judy and the many similar afternoon judge shows. William M. O'Barr & John M. Conley, Lay Expectations of the Civil Justice System, 22 Law & Society Rev. 137, 152 n.11 (1988). For discussion of the TV judge shows, see Michael Asimow,"'Justice with an Attitude' Judge Judy and the Daytime Television Bench, 38 Judges' Journal 24 (Fall 1999).

A. Perry Mason and his descendants

I believe that we sit at the feet of that revered teacher of trial advocacy, the greatest lawyer role model, who ever lived: the immortal Perry Mason. Mason, played by Raymond Burr, starred in 271 hour-long TV shows from 1957 to 1966. These shows were commercially successful when they were first shown and have remained popular in syndication to this very day.[128] Thirty made-for-TV movies between 1985 and 1995 featured the return of Perry Mason (played by an aging Raymond Burr).[129] These movies were also commercially successful[130] and remain available in syndication. Thus a great many TV watchers, particularly those who are middle aged and older, have seen the great cross-examiner at work at one time or another.[131]

Perry Mason on television was asexual, stolid and humorless.   He was a combination detective and lawyer (and the work thus fits into both the detective story genre and the courtroom genre).[132] Mason seemed completely indifferent to collecting fees or to any aspect of human life other than representing his clients.   He *always* represented innocent clients who were being wrongly charged by the police and prosecuted by the DA. He *always* succeeded, by brilliant detective work plus resourceful cross examination, in disclosing the identity of the real killer who usually broke down on the stand. The judicial proceeding (usually a California preliminary hearing, occasionally a jury trial) provided the mechanism for revealing the true killer and thus resolving the mystery story. The formula never varied--never.[133]

Although modern viewers might view Perry Mason shows as campy[134] and lawyers groan at the mention of his name, I believe that the show has gone far in cementing the myth of the lawyer as truth-discoverer.[135] Television, after all, stands

[128] See the Perry Mason TV Show website, which contains synopses of all the episodes and has numerous links to other sites. http://www.oz.net~daveb/perry.htm (last visited May 27, 2003).
[129] In the last four of the made-for-TV movies, Burr was replaced by Paul Sorvino in one film and Hal Holbrook in the other three. Bounds 191. These four post-Burr movies pulled much lower ratings than the earlier made for TV films starring Burr. Bounds 159.
[130] Bounds ch 7.   Raymond Burr died in 1993.
[131] Older generations are far more likely to have consumed significant numbers of Perry Mason episodes. The 2003 survey of 1st year law students at UCLA indicated that none watched Perry Mason frequently but 19% watched it rarely. This is a respectable result given that Perry Mason is shown only in daytime syndication on cable channels in LA. More students watched Perry Mason than watched JAG which is shown on network TV (11% watch JAG frequently or rarely). The Perry Mason result was not too far behind Judge Judy (26% watch it frequently or rarely), and Judge Judy is the highest rated show on daytime television. Thus significant numbers of young people are exposed to Perry Mason at least occasionally. By comparison 54% of the 1Ls watched Law & Order frequently or rarely, 33% watch The Practice frequently or rarely, and 50% watched Ally McBeal frequently or rarely when it was on. (Ally was no longer running in 2003).
[132] Reel Justice; Legal Reelism; Machura Law & Cinema   Osborn & Greenfield Tony Chase
[133] Bounds ch 2
[134] Rosenberg 115-16
[135] Burr himself considered the show and its central character as a "public trust" with the actor serving as "chief executor." J. Dennis Bounds, Perry Mason (Westport CT Greenwood Press 1996) p 1.   When Burr died, People Magazine noted that Burr and Mason "had become not only America's Lawyer but the world's." Bounds 157.

alone in its ability to shape the opinions of mass audiences. An extremely popular, long-running, successfully syndicated, tenaciously formulaic TV series like *Perry Mason*, starring a beloved and respected actor surely must be among the most powerful opinion-makers and ideology-entrenchers in human history.[136]

Perry Mason originated in 82 best-selling novels written by the prolific lawyer-turned-author Erle Stanley Gardner (1889-1970). All were titled "The Case of the . . ." and they had all had the same formula as the TV shows.[137] Warner Brothers made six low budget[138] Perry Mason films between 1934 and 1937. Each was an adaptation of a Gardner novel, but he had no creative involvement in the filmmaking process and he hated the films. The Warners films tried, not too successfully, to emulate the wisecracking sensibility of William Powell in MGM's *The Thin Man.* Especially in the first four films, in which Warren William starred, the Perry Mason character drank heavily and often cut ethical corners.

Gardner retained creative control over the radio version of Perry Mason.[139] The show ran as a daytime serial for 15 minutes, six days per week, from 1944 to 1955--an awe-inspiring total of 3,221 episodes. On the radio, Mason functioned in a variety of legal roles, including as a compassionate counselor and office lawyer. Unlike the Warner movies, the radio show was serious and reflected solid family values. It was sponsored by Proctor & Gamble from beginning to end. Gardner also owned the production company that made the television shows for CBS and thus he continued to retain creative control. He supervised and edited every script.

The TV Perry Mason was quite different from the other pop culture heroes of the 1950's who were mostly cowboys and detectives.[140] Cowboys and detectives were loners who achieved justice at the point of a gun and in spite of the law which was

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[136] Dennis Bounds concluded his study of Perry Mason as follows: "Mason's activities are a confirmation of the culture. Here the collective ideal of justice within the American culture, embodied in the American judicial system, is identified, examined, and vindicated with every novel, film, episode, or made-for-TV movie. Crimes are committed, but the guilty are punished. The innocent client may be charged with the heinous crime of murder, but because of the adversarial system of law in this country the defense attorney stands ready to prove the innocence of his/her client. This is done in the most idealistic, and ultimately sure, way by not only proving innocence but by catching the truly guilty. Inferred from every version of Perry Mason is the idea that though the system may seem out of control, the presence of the defense attorney celebrates justices--only when a hero such as Mason is involved. . . As a system of ritual mythmaking and of contemporary ideology, Perry Mason supports, even when it appears to appears to prove the injustice of, the American judicial system. Mason is the ultimate lawyer--a defender who never rests. From this the audience can infer that the established system of law is fundamentally just--as long as a Perry Mason takes the case. 163-64. Steven Stark believed that Perry Mason, and the image of the bumbling police, helped pave the way for *Miranda.* Steven D. Stark, Perry Mason Meets Sonny Crockett: The history of Lawyers and the Police as Television Heroes, 42 U. Miami L. Rev. 229, 230 (1987).
[137] Bounds, ch. 2. See also Patricia Kane, *Perry Mason: Modern Culture Hero*, in Ray B. Browne et. al. (eds). (1972) Heroes of Popular Culture (Bowling Green, Ohio: Bowling Green Univ. Popular Press)
[138] Budgets for the six films ran from $127,000 to $207,000. See Bounds ch 3 for the story of Mason in the movies.
[139] Bounds ch 4.
[140] Rosenberg 117-18.

typically portrayed as corrupt and ineffectual.[141] But Mason (aided by his trusty investigator Paul Drake and secretary Della Street) always achieved true justice through the legal process and he never relied on gunplay or other vigilante alternatives. The criminal justice system in which Mason worked was inept but it was never corrupt.

Anyone who has learned their law from Perry Mason knows that you can never rely on the police, the prosecutor, or the judge for justice. Although these functionaries are honest and hard working, they are not too bright. They *always* go off in the wrong direction and prosecute the wrong person. It is only through the noble lawyer/detective that the legal system can achieve justice. It can do so only through adversarial fact investigation and cross examination. Most important, Mason always finds out *the truth.* His clients don't weasel out under reasonable doubt. They are proved affirmatively innocent because the real killer *always* confesses. The seductive over-simplification of the Perry Mason plot sold American TV consumers a way of thinking and believing that they have never deserted.

After Perry Mason, countless television shows have reinforced the idea that the way to justice lies through the work of a noble lawyer-champion. *Matlock* ran from 1986 to 1995 continues to do well in syndication. Starring the beloved Andy Griffith, *Matlock* reinvented the Perry Mason cliché in Southern drag.[142] In contemporary television, *L. A. Law, The Practice, JAG*, and many other TV series and mini-series endlessly repeat the basic message. Justice comes not from police, prosecutors, or judges, or from vigilantism, but only from the work of the dedicated, committed, zealous defense lawyers. If you're in trouble, you'd better have a lawyer by your side. You might hate lawyers in general, but when you need one, you'd better get the best.

I believe we have learned the lesson well from our master, Perry Mason,[143] and his countless TV descendants. We carry his teachings down to the present day. Only a system that empowers lawyers can discover the *real truth* about what actually happened when the crime was committed--who done it and why. Thus most people react with horror to the idea of a judge-controlled trial that would decenter the lawyer, particularly the criminal defense lawyer, and would thus devalue the truth-seeking function of the law.

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[141] Stark 235-42.

[142] See Gail Richmond, *Matlock*, in Prime Time Law ch. 5 (Robert M. Jarvis & Paul R.. Joseph eds. 1998). Unlike Perry Mason, Ben Matlock had a personal life. His daughters were his associate attorneys at different times and he had an unresolved relationship with prosecutor Julie March.

[143] *The Defenders* ran during the Perry Mason era (130 episodes, spanning the years 1961-65)--indeed it followed *Perry Mason* on CBS on Saturday nights. The show won 13 Emmys (compared to 4 for *Perry Mason*) and consistently maintained high levels of writing, acting, and production values. Unfortunately, this superb series has never gone into syndication. *The Defenders* portrayed a very different world from Perry Mason. The father-son team of Lawrence and Kenneth Preston attacked a different legal or social problem every week and always from a politically liberal point of view. *The Defenders* also championed the adversary system by reinforcing the message that ordinary people could confront the legal system only with the aid of noble lawyers. See David Ray Papke, *The Defenders*, in Prime Time Law ch. 1 (Robert M. Jarvis & Paul R.. Joseph eds. 1998).

B. The adversary system in the movies

Countless movies have valorized the adversarial lawyer. Often (especially in recent films) the lawyers are personally flawed and their ethics are dubious. Despite their efforts, the adversarial system sometimes fails. Nevertheless, without lawyer-champions, there would be no hope of justice, no way to uncover the truth.[144] Needless to say, this picture is wildly out of synch with the reality of legal practice in which the work of lawyers (civil or criminal) has absolutely nothing to do with securing justice or in revealing truth and everything to do with using craft to serve the interests of clients. Here it's possible only to suggest a few examples but readers of this symposium could instantly name many more.

1. Cross-examination

A staple of lawyer movies is the brilliant cross-examination that destroys a lying, deceptive or mistaken witness and reveals the truth. Although many such movies are instantly forgettable, some are exceptionally vivid. Just to name a couple, take the immortal *My Cousin Vinny.* Vinny Gambini has recently passed the New York bar exam (after numerous failures) before traveling to Alabama to defend his young cousin and a friend in a murder trial. Vinny is clueless about Alabama culture and criminal procedure, but nevertheless turns into a brilliant trial lawyer. His cross-examinations are devastating. For example, one eye-witness claims he saw the two "utes" enter the Sack o' Suds grocery store and exit five minutes later in a green car. He knows it was five minutes because he looked up just as he started and just as he finished cooking his morning grits. Vinny points out that in the rest of the grit-eating world, it takes 20 minutes to cook grits. The witness is destroyed. Vinny also deploys his girlfriend Mona Lisa Vitto, an unemployed hairdresser, as an expert witness on auto mechanics to devastating effect.

In *To Kill a Mockingbird,* the immortal Atticus Finch cross-examines Mayella Ewell, the alleged rape victim. He shows clearly that his client, the defendant Tom Robinson, could not have done it since Mayella was obviously assaulted by a right handed person and Tom Robinson has no use of his right hand. Unfortunately, the all-white jury is not about to take the word of a black man over two white witnesses and convicts him of rape. We, however, know better. Brilliant cross-examination exposed the truth--even if the adversary system failed to produce a just result.

2. Advocates in civil cases

Numerous films have involved civil litigation. These films invariably pit a noble plaintiff's lawyer against a vicious corporation and its unethical and ignoble big-firm

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[144] Sometimes, as in *And Justice for All*, the lawyer must attack the adversary system itself in order to reveal the truth about his all-too-guilty client. See John Denvir's account of the film in this volume. Denvir's piece makes the broader point that the typical lawyer film shows the "good" lawyer wrenching justice from the "bad" system.

defense lawyer.[145] Take, for example, *The Rainmaker.* Novice lawyer Rudy Baylor finds himself locked in litigation with a major defense firm in an insurance bad faith case. It seems that Great Benefit sold medical insurance door to door. It collected premiums but never paid any claims. As a result, Donny Ray Black failed to receive a bone marrow transplant in time to save his life.

The defense firm, led by Leo Drummond, engages in all sorts of tricky and unethical behavior. Key witnesses are fired before Baylor can take their depositions. Great Benefit produces its claims manual, but only after removing the part that instructed employees to deny all benefit claims. Baylor personifies grit, tenacity, and client loyalty. He wangles a $50 million punitive damage award from the jury. Unfortunately, by that time, the insiders have looted Great Benefit which files for bankruptcy. But the message is clear: if you get sick or hurt, you have no chance without a tenacious and self-sacrificing plaintiff's lawyer to champion your cause. (Even then, because of the flawed system, you may you may get little or nothing). The same message is transmitted in *The Verdict, Class Action, A Civil Action,* and *Erin Brockovich* (which also features a heroic paralegal). Episodes of *L. A. Law* and *The Practice* included numerous civil cases driving home the very same message.

C. Heroic prosecutors.

Sometimes pop culture glorifies heroic and dedicated prosecutors. The phenomenally successful *Law & Order* provides a weekly seminar about the role of prosecutors in the justice system. "These are their stories." *Law & Order* teaches us that dedicated, selfless, and resourceful lawyers like Jack McCoy (and his numerous female sidekicks) protect us from predatory criminals. In every new (and repeatedly syndicated) show, the prosecutors unmask perjury and conspiracy in the courtroom and trounce slithery defense lawyers. Often the judges seem cynical and burned out; they've heard it all and just want to get through the caseload. The prosecutors, however, seek justice. They want the truth and they find it--not just a conviction or a plea bargain.[146] *Law & Order* has done more to burnish the image of prosecutors than just about any pop culture product in history but its message is really the familiar *Perry Mason* narrative: you need dedicated lawyers, working in an adversary system, to get at the truth.

Justice-seeking prosecutors are rarer in the movies than on television, but one stands out: Kathryn Murphy in *The Accused* (1988). Sarah Tobias was gang-raped in a bar and Murphy quite rationally plea bargains the case against the rapists down to "reckless endangerment." Tobias thinks Murphy sold her out, so Murphy prosecutes the barflies who cheered on the rapists for "solicitation." Although it seems odd that the cheerleaders receive harsher sentences than the rapists, the message of the film is clear: a

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[145] Anthony Chase

[146] Virtually all of the 300-odd L&O shows follow this model. In an imaginative episode called "Absentia" (Feb. 12, 2003), the prosecutors lose a case when an eye-witness to a robbery-murder fails to turn up for a trial. The missing witness hasn't been rubbed out, however; he was convicted of murder in absentia 20 years before and was afraid to get involved in new legal proceedings. Overcoming various obstacles and defense stratagems, the prosecutors manage to try him again for murder. They convincingly establish what really happened twenty years before and win a conviction.

courageous prosecutor can buck the bureaucracy and achieved justice in the case of a vicious rape.

D. When judges get in the way

In most popular culture products, the trial is to a jury and judges are minor figures.[147] Once the trial begins, the judges pound their gavels, threaten to clear the courtroom if the spectators don't behave, rule on evidence objections, and otherwise try to stay out of the way. Normally movie and TV judges are as uninteresting and undramatic as baseball umpires.

Occasionally, we find judges who do get into the action. When this happens, it judicial intervention thwarts the search for justice. Thus in *The Verdict,* it's clear that Judge Hoyle is firmly in the defense's pocket. At one point, the judge takes over the questioning of plaintiff's not very qualified expert witness and destroys him. Spluttering in rage, plaintiff's lawyer Frank Galvin tells the judge "if you're gonna try my case for me, I wish you wouldn't lose it." In *A Civil Action,* another judge, who seems to be extremely pro-defendant; makes procedural rulings requiring a bifurcated trial. This makes the plaintiff's search for justice for its sick and dying victims all but impossible.

Occasionally, pop culture judges are vicious[148] or crooked[149] and sometimes they prove to be the real killer[150] In the ultimate anti-judge film, *The Star Chamber,* we find a group of judges who are fed up with freeing vicious criminals on legal technicalities. The judges investigate these cases and hire hit men to assassinate the criminals. But the judges go badly wrong in one case; the criminals whose deaths they've ordered are actually innocent. Thus the judges prove to be inept even as vigilantes, unlike the successful police vigilantes we've grudgingly admired in *Magnum Force* and *Dirty Harry.* In short, if you've learned your law from pop culture, you surely wouldn't want to give any more responsibility to judges.

IV. CONCLUSION

There are many reasons why Americans might resist changes to the adversarial justice system beyond the fact that they know nothing of the alternatives or are suspicious of change. Certainly, notions of individual autonomy and suspicions of government officials, particularly of American judges, provide sound reasons to oppose change. People may believe that adversarialism, like democracy, is the worst possible system except for the alternatives.

This paper identifies a deeply rooted, usually unquestioned, dominant ideology that legitimates the adversary system. We despise and distrust our lawyers, yet we rely

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[147] When the judge has power to make the decision, they often go badly wrong as in Losing Isaiah or Kramer vs. Kramer. .
[148] Paradyne Case; Let Him Have It
[149] Night falls on manhatten; penalty phase Presumed innocent
[150] Suspect, And Justice for All .

on them to uncover the truth and lead us to justice, and we want them by our side when we're in legal trouble. The dominance of the adversarial ideology owes a lot to its glorification in TV and film. Pop culture has taught generations of Americans (and many other people all over the world) that truth and justice can be delivered only by a lawyer-controlled system (even though lawyers deny that their function has anything to do with truth or justice). When trouble strikes, we want a lawyer committed to us and us alone to protect us. We wouldn't trust a judge to do that. So long as the media continue to propagate the message that this is what lawyers do, and that nobody else can do it, fundamental changes to the adversary system are unlikely to gather any popular support.