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Adversary Cecesses in the American Criminal Trial

Gordon Van Kessel

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Adversary Excesses in the American Criminal Trial

Gordon Van Kessel*

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I. INTRODUCTION

The American criminal justice adjudication system typically produces numerous rapid-fire convictions based on pressurized guilty pleas and a few complex, lengthy and highly adversary trials that often provide more entertainment than justice. Yet, we are unable or unwilling to make the fundamental reforms necessary to create a system that would be fair and effective for its consumers, i.e., victims, witnesses, defendants, and the general public.

In evaluating our criminal jury trial system and considering reforms, we would benefit by examining the less adversary ap-

proaches of the great majority of civilized countries today.¹ Judges and lawyers² would be better able to evaluate their roles in the trial process if they were fully aware of the excessive dominance of our lawyers and the excessive passivity of our judges when compared to their counterparts in Europe, and, indeed, in nearly all civilized countries. Similarly, we might have a different view of our lay jury system if we realized how extreme our approach to lay participation in fact-finding appears when compared to the course taken by most of the world. The common law lay jury, for example, while still surviving to some degree in England and in Commonwealth countries, today flourishes only in the United States. We conduct more than ninety percent of the total number of the world's criminal jury trials, and nearly all of its civil jury trials.³

This Article will focus on the criminal jury trial, and will first put our system in perspective by looking to the criminal trial systems of countries that utilize the less adversary or modified "inquisitory" model. For the sake of convenience, I will refer to this model as the "nonadversary" approach.⁴ I will outline the funda-

1 Even this modest hope may be too optimistic. The comparative approach to reform, which looks "across the pond," is a well-traveled course that has done little thus far to dispel the misconceptions of lawyers and judges concerning the character and operation of foreign procedures. Despite this "well-trodden path" (MIRJAN H. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 3 (1986)), judges and lawyers still do not have an accurate picture of the less adversary approaches used by most of the civilized world. For example, they will often assume Continental systems provide no right of silence or right to counsel, and that the accused is presumed guilty and must prove innocence. See *infra*, part II.A.

2 These terms refer to both genders, but, for the sake of convenience and consistency, the pronoun "she" will be employed for reference to judges, and the pronoun "he" will be used with regard to lawyers and defendants.

3 Gerald Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 135-36 (1972). In their well-known work on the American jury, Kalven and Zeisel chronicled the abandonment of the lay jury by numerous countries in the 19th and early 20th Centuries and estimated that today the United States accounts for not less than 80% of all of the world's criminal jury trials. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 12-14 (2d ed. 1971).

4 Use of the terms "adversary," "nonadversary," and "inquisitory" can be misleading. Just as our current accusatory system has little in common with the brutal and unjust systems of ancient England, current Continental systems cannot fairly be compared with their inquisitorial ancestors. Furthermore, there is no single established model of either system: our adversary procedures differ substantially from the English adversary form, and there are significant differences between the various nonadversary systems in Continental countries. See DAMASKA, *supra* note 1, at 4; Thomas Volkman-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1, 10 (1981). In some contexts, adversary and nonadversary systems appear to be in the process of converging. See Lidstone & Early, *Questioning Freedom; Detention for Questioning in France, Scotland and England*, 31 INT'L & COMP. L.Q. 488, 489 (1982).

mental attributes of the nonadversary model, using the Continental system as the prime example. For another perspective, I will use the English trial to illustrate an alternative adversary approach and to suggest that our system stands at the extreme end of the adversary spectrum.⁵

Examination of our adversary system will reveal a number of unhealthy aspects that largely stem from our unquestioned worship of what we perceive to be the adversary ideal. We strive to preserve its purity by resisting all reforms in the name of defending against "inquisitorial" encroachments. Our insistence on extreme forms of the adversary model results in judicial passivity and lawyer domination of the jury trial, emphasis on the contest rather than on the outcome, over-reliance on the lay jury, and formal, restrictive evidentiary and procedural rules. The ultimate result is the

5 The modern English criminal adjudication system generally is regarded as reasonably effective while meticulously safeguarding the rights of the accused. See Philip B. Kurland, *The Administration of Criminal Justice in England: Some Invidious Comparisons*, 26 U. CHI. L. REV. 193, 193-94 (1958) (reviewing PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* (1958)); Roger J. Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U. L. REV. 749 (1964) (observing that English law displays "enduring attitudes conducive to a large-souled concept of fair trial"); see also Paul G. Kauper, *Judicial Examination of the Accused - A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1235 (1932) (noting that criminal procedure in England is characterized by "the tradition of scrupulous fairness to the accused"); Steinberg, *A Comparative Examination of the Role of the Lawyer in Our Present—Day Society*, 15 CASE W. RES. L. REV. 479, 483 (1964).

This view of English criminal procedure is not universally shared among American scholars. Some view aspects of the English system as strongly favoring the prosecution. See MICHAEL H. GRAHAM, *TIGHTENING THE REINS OF JUSTICE IN AMERICA* 228 (1983); Graham Hughes, *We Try Harder*, N.Y. REV. BOOKS, Mar. 14, 1985, at 18 (reviewing MICHAEL H. GRAHAM, *TIGHTENING THE REINS OF JUSTICE IN AMERICA* (1983)) ("English concerns for fair criminal procedure, whether in legal analysis or judicial practice, remain trivial. The calm of English courtrooms may resemble that of a desert."); cf. MONROE H. FRIEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 105-12 (1975). Moreover, the British justice system recently has come under increased criticism at home for abuses in the prosecution of alleged terrorists. See Craig R. Witney, *Faith in British Justice Shaken by Abuses and False Jailings*, N.Y. TIMES, June 2, 1991, A1, at 10. Nevertheless, most of the criticism centers, not on English trial procedure, but on pretrial procedures relating to terrorist cases, for which Parliament has passed special laws. Prior to reform legislation passed in 1984, criticism also focused on obtaining confessions by dubious means. Significant protections for the accused were added by the Criminal Evidence Act 1984 and the Codes of Practice issued by the Home Office and approved by Parliament in 1985. For a description and analysis of the Act and the Codes of Practice relating to police questioning of suspects, see Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 109-29 (1986). For studies of the effect of the Act and the Codes on police interrogation, see BARRIE IRVING & IAN K. MCKENZIE, *POLICE INTERROGATION: THE EFFECTS OF THE POLICE AND CRIMINAL EVIDENCE ACT 1984* (1989).

most uncompromisingly adversary criminal trial structure in the world.

We pay a high price for these excesses. In the past few decades, criminal jury trials have become so lengthy and complex that we cannot, or will not, provide them to the vast majority of defendants. Instead of offering a fair and expeditious procedure in which the trier of fact has the opportunity to hear substantially all relevant evidence and come to an informed decision, our system relies on pleas of guilty that entirely displace the trial. This system requires that the accused be subjected to threats of increased punishment for going to trial. The few trials that do take place often fall short of the primary goal of achieving a fair, expeditious, and reliable resolution of the charges. Excessive trial length itself often diminishes the quality of the trial. Lawyer control, highly contentious advocacy, and rigid procedural rules tend to shift the focus of the trial from the accused and from truth-determining objectives to the contest between counsel. Over-reliance on the lay jury and on formal and technical rules of evidence and procedure hinder the prompt and reliable adjudication of guilt.

In the second part of this Article, I explore barriers to reform stemming from our Constitutional system of government, our political institutions, and our national character. I discuss whether deficiencies in our trial system should or can be corrected by importing aspects of other systems or by moderating or altering our current system while maintaining its essential adversary character.

Contrary to many other observers who have embarked upon this comparative sea,⁶ I conclude that, at least in serious criminal cases, we should reject as both impractical and undesirable radical changes to our trial system through wholesale or piecemeal adoption of the main nonadversary procedures of Continental systems. However, less radical reforms are both possible and desirable. Without abandoning the essential adversary character of our criminal trial, we should take measured steps to restrain our lawyers, and encourage judges to exercise greater authority. Judges should control abuses by directing the course of the trial in such areas as

6 See, e.g., LLOYD L. WEINREB, DENIAL OF JUSTICE 138-46 (1977); Albert W. Alschuler, *Implementing The Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1003-11 (1983); William T. Pizzi, *Judge Frankel and the Adversary System*, 52 U. COLO. L. REV. 357, 366 (1981). For a recent polemical critique of the American adversary system and praise of the nonadversary approach, see Charles Maechling Jr., *Borrowing from Europe's Civil Law Tradition*, 74 A.B.A. J. 59 (1991).

case management, jury selection, and questioning of witnesses. We should also seek to shift the focus of the trial from the battle between the lawyers to the discovery of truth by modifying our complex rules of evidence, encouraging the defendant to contribute to the search for truth, and requiring full and open discovery from the prosecutor. Ambitious experiments with central features of the Continental model should be undertaken in minor criminal cases in those jurisdictions offering the strong promise of an independent and competent judiciary. For instance, misdemeanor trials before federal magistrates who are subject to merit selection and retention rules might prove a helpful testing site.

Finally, in endeavoring to moderate the extreme contentiousness of our lawyers and their desire to win at any cost, we should concentrate our efforts on changing those structural aspects of our adversary system that encourage and enable lawyers to frustrate truth-determining objectives in the pursuit of victory rather than pursuing reform primarily through modifying the ethical rules governing lawyer conduct. By reducing adversary excesses in our criminal trials, we will speed up the trial process and focus it more sharply on the central character of the trial—the accused—and on the most important issue—guilt or innocence.

II. FROM A DIFFERENT PERSPECTIVE

A. *Eliminating Our Biases and Gaining a Better Understanding of Nonadversary (Continental) Systems*

American courts and lawyers generally exhibit a self-righteous adoration of the adversary model and an aversion to any structure characterized as inquisitory, which is simplistically assumed to be anything nonadversary. Worshippers of the adversary system blindly assert that a clash of adversaries is "probably best calculated to getting out all the facts,"⁷ or "the most effective means of determining the truth,"⁸ or "one of the most efficient and fair methods designed for finding [the truth]."⁹ This reverence encompasses the Fifth Amendment privilege¹⁰ as well as the right of cross-examination,¹¹ both of which are regarded as essential underpin-

7 DAVID W. PECK, *THE COMPLEMENT OF COURT AND COUNSEL* 9 (1954).

8 Monroe H. Friedman, *Professional Responsibility of the Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966).

9 Monroe H. Friedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975).

10 *Miranda v. Arizona*, 384 U.S. 436, 459-60 (1966).

11 Courts and commentators usually accept without question Wigmore's assertion that

nings of the adversary model. In a sense, we have allowed ourselves to be held captive by a picture of a proper trial as being an adversary one.

In direct proportion to our worship of the adversary structure is our reactionary distaste for anything characterized as inquisitory.¹² Courts as well as common law lawyers often disparage anything inquisitory in nature by contrasting our adversary system with the inhumane practices of the inquisition in medieval England and Europe which relied on various forms of coercion to extract confessions from suspects. In *Rogers v. Richmond*¹³ the Supreme Court declared, "[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."¹⁴ In extolling the virtues of the Fifth Amendment privilege, the Supreme Court in *Miranda v. Arizona*¹⁵ saw the privilege as a reaction against "the inquisitorial Court of Star Chamber"¹⁶ and characterized the privilege as "the essential mainstay of our Adversary System."¹⁷ Later, the Supreme Court in *Garner v. United States*¹⁸ pointed to "the preservation of an adversary system of criminal justice"¹⁹ and avoidance of inquisitorial practices of the

"cross-examination is the greatest legal engine ever invented for the discovery of truth." 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

Even Jeremy Bentham, a critic of many aspects of the English system, praised it for "giving the parties the power of examining the witnesses . . ." JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 105 (Fred B. Rothman & Co. ed. 1981) (1825).

12 The popular American prejudice against inquisitory systems has been recognized by many comparativists. See, e.g., Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L.Q. 1211, 1213 (1989) (recognizing an "emotional attitude" which makes the accusatory approach "the haven of guaranteed civil liberties" and the inquisitory method "the symbol of an investigatory and judicial technique that sacrifices those same civil liberties on the altar of law enforcement"); Mirjan H. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 557 (1973) ("inquisitorial" is surrounded with "the aura of dread and mistrust"); cf. RENE DAVID, ENGLISH LAW AND FRENCH LAW 64 (1980) (noting the widely entertained prejudice in England that a French prisoner is presumed guilty until he has proved his innocence).

13 365 U.S. 534 (1961).

14 *Id.* at 541.

15 384 U.S. 436 (1966).

16 *Id.* at 459.

17 *Id.* at 460.

18 424 U.S. 648 (1976).

19 *Id.* at 655; cf. *Andersen v. Maryland*, 427 U.S. 463, 470 (1976); *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

English Courts of Star Chamber and High Commission as "the fundamental purpose of the Fifth Amendment."²⁰ Still later, the Court placed the involuntary confession rule squarely on the Due Process Clause of the Fourteenth Amendment and suggested that it was bottomed on the distinction between accusatory and inquisitory systems:

Although these [coerced confession] decisions framed the legal inquiry in a variety of different ways, usually through the "convenient shorthand" of asking whether the confession was "involuntary," . . . the Court's analysis has consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," . . . and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.²¹

On occasion, even English judges fall into the same trap of disparaging anything "inquisitorial." Lord Simon's speech in a House of Lords case noted that "[o]ur national experience found that justice is more likely to ensue from adversary than from inquisitorial procedures—Inquisition and Star Chamber were decisive, and knowledge of recent totalitarian methods has merely rammed the lesson home."²²

This aversion to anything inquisitory largely arises from a failure to distinguish between ancient and modern inquisitory sys-

In rejecting the argument that admission of documents seized from the defendant would "convert our accusatorial system of justice into an inquisitorial system," the *Andersen* Court listed the following "characteristics of the accusatorial system and, manifestations of its demands" which, it contended, would not be jeopardized by such admission: the requirement of proof beyond a reasonable doubt, the rule against admission of coerced confessions, the right to proper arraignment, and the right to assistance of counsel. 427 U.S. at 476. The Court mistakenly suggested that it is the existence of these rights that sets accusatorial apart from inquisitorial systems of justice.

20 *Garner*, 424 U.S. at 655.

21 *Miller v. Fenton*, 474 U.S. 104, 109-10 (1985) (citation omitted). The Court also suggested that the presumption of innocence distinguishes our system from those utilizing "inquisitorial means." *Id.* at 116. See also *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), in which Justice White, writing for four members of the Court, emphasized that the rule against coerced confessions is founded on the distinction between accusatorial and inquisitorial systems. Taking the view that the harmless error rule should not apply to coerced confessions, he contended that "permitting a coerced confession to be a part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an inquisitorial system of criminal justice." *Id.* at 1256.

22 *D. v. Nat'l Soc'y for the Prevention of Cruelty to Children*, 1978 App. Cas. 171, 231 (Simon, L.J.).

tems, as well as inaccurate assumptions about the character of contemporary Continental structures. It is true that inquisitory systems deserving our contempt have existed. During the 13th century, a system of judicial torture replaced trial by ordeal and other old modes of proof based on divine intervention. Judicial torture prevailed in most countries on the Continent, and ordinary criminal courts regularly employed it in the prosecution of routine crimes.²³ Until the 19th century, Continental systems featured forms of compulsory interrogations, secret trials based on an investigating magistrate's written summary of the case, and presumptions of guilt.²⁴

In the middle of the 18th century, however, the leading states of Europe abolished judicial torture in a generation.²⁵ As a result of events set in motion by the French Revolution and the liberalizing influence of 18th century writers, Continental systems discarded other pernicious aspects of old inquisitory trials and at the same time adopted many aspects of the English accusatory system.²⁶ Most Continental systems replaced secret proceedings based on writings with a form of the English jury trial open to the public and based on oral evidence.²⁷ Although the all-lay jury was abandoned during the first half of the 20th century, lay participation has been maintained in serious cases through the mixed professional-lay court.²⁸ Nearly all Continental countries now afford an accused the right to counsel in serious cases and provide a form of the right to silence and a presumption of innocence that requires a level of persuasion similar to our reasonable doubt standard.²⁹ As Judge Frankel points out, "all judicial 'systems' in

23 JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 3-10 (1977).

24 See ADHÉMAR ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* 288-350 (John Simpson trans., 1913); Damaska, *supra* note 12, at 556-57; Volkman-Schluck, *supra* note 4, at 2-3.

25 LANGBEIN, *supra* note 23, at 10.

26 This is the traditional explanation. See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 *BUFF. L. REV.* 361, 363 (1977). However, Langbein argues that the abolition of judicial torture was the result of liberalized rules of proof which did away with the need for torture rather than public or political enlightenment. LANGBEIN, *supra* note 23, at 4, 61.

27 E.g., Schlesinger, *supra* note 26, at 363; Volkman-Schluck, *supra* note 4, at 3.

The jury trial has been modified by most of Continental Europe in favor of a mixed tribunal of professional and lay judges. Casper & Zeisel, *supra* note 3, at 135; John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 *AM. B. FOUND. RES. J.* 195-98.

28 Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 *VA. L. REV.* 239, 240-51 (1970); see *infra* part III.B.2.

29 See JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 72 (1977)

the Western world are today 'adversary' in the minimal sense that parties in contention, including parties contending with the state, are entitled to be heard through independent, trained, partisan legal representatives."³⁰

Indeed, most Continental structures endow an accused with important protection absent in our system of justice. For example, criminal proceedings do not usually begin, as in this country, with an arrest and continuing detention unless the defendant is able to post sufficient money bail. The question of pretrial detention depends on many factors, but is distinct from the charging process.³¹ Also, the defendant invariably enjoys broad discovery rights. At an early stage of the proceedings the defendant has an absolute right to inspect all of the evidence collected by the police, the prosecution, and the investigating magistrate.³² Even the

(The Continental right of silence varies from country to country, but usually plays a less significant role than the American privilege against self-incrimination.); Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962) (All Continental West-European countries today recognize the accused's privilege against self-incrimination in one form or another.); see also CARLETON KEMP ALLEN, *LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE* 253 (1931); RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 486 (5th ed. 1988); Lidstone & Early, *supra* note 4, at 508-509; Symposium, *The Privilege Against Self-Incrimination Under Foreign Law*, 51 J.C.L. CRIM. & P.S. 161 (1960).

German law adheres to a standard of proof not materially different from our "beyond a reasonable doubt," though the burden is placed on the court rather than on a party. Langbein, *supra*, at 201. The French burden of proof rests with the prosecution and requires that the judges be inwardly convinced of the guilt of the accused: "Avez-vous une intime conviction?" Wallace Mendelson, *Self-Incrimination in American and French Law*, 19 CRIM. L. BULL. 34, 47 (1983); see also G.E.P. Brouwer, *Inquisitorial and Adversary Procedures—a Comparative Analysis*, 55 AUSTL. L. J. 207, 209, 218 (1981); George W. Pugh, *Administration of Criminal Law in France: An Introductory Analysis*, 23 LA. L. REV. 1 (1962); Edward Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 166, n.122.

In one respect the German burden of proof is more protective of the accused than our rules. If the defendant asserts facts which raise a colorable defense such as insanity or self-defense, the burden of proving the contrary is not upon the defendant as it may be in our country. Jescheck, *supra* note 28, at 709; cf. *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977) (upholding a New York law placing the burden of persuasion on the defendant to prove an insanity claim once the state has proven its case "beyond a reasonable doubt").

30 MARVIN E. FRANKEL, *PARTISAN JUSTICE* 7 (1978).

31 SCHLESINGER ET AL., *supra* note 29, at 480.

32 *E.g.*, *id.* at 481-82 (defense counsel's basic right to timely inspection of the entire dossier has become an article of faith throughout the civil law world—and, indeed, in the socialist orbit as well); Damaska, *supra* note 12, at 533-34; Jescheck, *supra* note 28, at 246 (the German defense counsel has access to the prosecutor's entire file and may even take it to his office for study and preparation). Richard Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and*

Italian Code of Criminal Procedure, which recently has been restructured to incorporate many accusatory elements, retains generous discovery rights for the accused.³³ Contrast this feature with the American system's aversion to unlimited pretrial discovery in criminal cases. Professor Schlesinger has noted this country "stands virtually alone"³⁴ in this regard. Finally, neither Continental prosecutors nor judges, with positions similar to career civil servants, are subjected to the political pressures inherent in periodically having to stand for election,³⁵ and this greater independence frees them to be more sensitive toward procedural fairness and the rights of the accused.

Nevertheless, across the Atlantic, recognition of the revolutionary changes in the inquisitory procedures of Continental countries has come slowly, and the myth of the cruel inquisitory process remains dominant. Thirty years ago, the Supreme Court pointed out that "the Continental countries which employ inquisitorial modes of criminal procedure have themselves long ago given up reliance upon [systems of torture]" and noted "the careful procedural safeguards which the inquisitorial system now maintains"³⁶ However, this recognition was buried in a footnote to support the textual assertion of the standard myth, namely, that the rule against coerced confessions "set off the accusatorial system from the inquisitorial."³⁷ The Court perpetuated the myth as recently as 1985 in *Miller v. Fenton*.³⁸ But in 1991, in a footnote to an opinion holding that a defendant's request for counsel at a judicial bail hearing did not constitute an invocation of his *Miranda* right to counsel,³⁹ Justice Scalia cogently responded to the dissent's charge that the majority revealed "a preference for an inquisitorial system of justice."⁴⁰

Why Should We Care?, 78 CAL. L. REV. 539, 672-73 (1990) (the French defense counsel has an absolute right to pretrial inspection of the full dossier).

33 See Amodio & Selvaggi, *supra* note 12, at 1218, 1223 (the new Code requires mandatory pretrial discovery of the entire police and prosecution work product); Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245, 264, 277 (1991).

34 SCHLESINGER ET AL., *supra* note 29, at 483.

35 Mirjan H. Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 502-03 n.4.; Volkmann-Schluck, *supra* note 4, at 11.

36 *Culombe v. Connecticut*, 367 U.S. 568, 582 n.24 (1961).

37 *Id.*

38 474 U.S. 104, 109-10 (1985).

39 *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991).

40 *Id.* at 2214 (Stevens, J., dissenting).

We cannot imagine what this means. What makes a system adversarial rather than inquisitorial is not the presence of counsel, . . . but rather, the presence of a judge who does not (as the inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.⁴¹

Though the case concerned only pretrial procedures, hopefully the Court will recall the distinction it made in this rather obscure footnote when dealing with cases involving the trial process.

The misleading label attached to Continental systems impedes serious consideration by American lawyers, judges, and politicians of any proposal to import aspects of the Continental model.⁴² To avoid misconceptions which may hinder efforts to find fair and workable reforms, some scholars advocate assigning the words "inquisitory" and "inquisitorial" to antiquity and using "adversary" to denote the Anglo-American model and "nonadversary" for the Continental-European model.⁴³ However, in view of the many adversary aspects of modern Continental systems, the term "nonadversary" also is misleading. No modern civilized country has a pure adversary or nonadversary system. All are mixed to some degree, the Continental system even more so than ours. In fact, because of the vast differences between the old and the modern inquisitory systems, the modern incorporation of adversary aspects, and the considerable differences between the systems of individual civil law countries, Europeans and comparativists generally object to the "inquisitory" label and tend to describe Continental systems as "mixed."⁴⁴ Indeed, it would be more accurate to describe the

41 *Id.* at 2210 n.2. The Court recognized that our system has always been inquisitorial at the investigation stage. *Id.*

42 To Anglo-Americans, adversary and inquisitory concepts are suffused with value judgments. "[T]he adversary system provides tropes of a rhetoric extolling the virtues of liberal administration of justice in contrast to an antipodal authoritarian process—such as the system of criminal prosecutions on the Continent prior to its transformation in the wake of the French Revolution." DAMASKA, *supra* note 1, at 4.

43 See Volkmann-Schluck, *supra* note 4, at 3 (citing and adopting Damaska's suggestion).

44 See Damaska, *supra* note 12, at 558-60; Abraham S. Goldstein, *Reflections of Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1974); Volkmann-Schluck, *supra* note 4, at 9-10; Wolfgang Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 55 AUSTL. L. J. 390, 391, 400 (1981).

According to Damaska, "Continental lawyers place their contemporary systems of prosecution somewhere midway between 'inquisitorial' (pre-revolutionary) and 'accusatorial' (reformed) forms. In contrast, common lawyers often refer even to contem-

Continental approach as "less adversary" than as "nonadversary."⁴⁵ However, if the former term were used for the Continental system, one could argue that "more adversary" or "super adversary" would better describe our system, with both terms referring to some undefined and unknown "neutral" standard. To avoid this problem, and to be consistent with the language of most current comparative literature, the term "nonadversary" will be used here to describe the Continental system, and "adversary" will be used to describe our system, while recognizing that they each contain elements of both the "inquisitory" and the "adversary" models.⁴⁶

We should also rid ourselves of inaccurate assumptions about the fundamental nature of adversary and nonadversary systems. American courts have suggested that our adversary system contrasts with inquisitory ones because we offer the privilege against self-incrimination, due process, and the presumption of innocence.⁴⁷ However, these guarantees, though often in different form, also are found in most modern nonadversary systems.⁴⁸ The essence of the modern nonadversary (Continental) system lies not in the presence of these guarantees, but in its nature as a *judicial* inquiry in which the primary responsibility for presenting the evidence and conducting the trial rests with the judge rather than with opposing parties.⁴⁹ The nonadversary system is characterized by

porary Continental systems as 'inquisitorial': from their standpoint both pre- and post-revolutionary Continental forms easily seem like branches of a common parent stem." DAMASKA, *supra* note 1, at 4 n.4.

45 I owe this suggestion to my colleague, Professor Rudolf Schlesinger.

46 There are other possibilities. Professor Zeidler prefers "investigatory." Wolfgang Zeidler, *Court Practice and Procedure Under Strain: A Comparison*, 8 ADEL. L. REV. 150, 151 (1982). On the other hand, one may wish to emphasize the dominant position of the judge by referring to Continental systems as "judicial."

47 See *Miller v. Fenton*, 474 U.S. 104, 109-10 (1985); *Miranda v. Arizona*, 384 U.S. 436, 459-60 (1966); *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

48 Lidstone & Early, *supra* note 4, at 508-09. As far as the pretrial stage is concerned, "there is no real distinction between inquisitorial and accusatorial systems," and the assumption that the right of silence is a central element of an accusatorial system should be recognized as "yet another myth." *Id.* at 511.

49 E.g., SCHLESINGER ET AL., *supra* note 29, at 475-80; Damaska, *supra* note 12, at 510; Mirjan H. Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088-90 (1975); Zeidler, *supra* note 44, at 391.

Damaska notes some ambiguity in current definitions of the two systems and concludes that

[o]nly the core meaning of the opposition remains reasonably certain. The adversarial mode of proceeding takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The nonadversary mode is structured as an official inquiry. Under the first system, the two adversaries take

an activist judge familiar with the facts of the case who calls and first questions the witnesses. The other important characteristics of the current Continental nonadversary system include a mixed tribunal composed of professional and lay judges as the fact finder in serious cases and the absence of formal or technical rules of evidence.

A clear picture of the major distinctions between adversary and nonadversary systems makes it apparent that one system is not inherently more fair or reliable than the other; rather, each has its own particular attributes and deficiencies. Some argue that nonadversary procedures show less respect for the individual⁵⁰ and are apt to be less accepted by the parties.⁵¹ Damaska suggests that the greater barriers to conviction established by the adversary system reflect "a conscious sacrifice of factfinding accuracy for the sake of other values."⁵² However, the fact that we may find it easier to create obstacles to truth finding in pursuit of these "other values" may merely indicate that we seek those values by different means, not necessarily that we rate them higher. It is arguable that by allowing the defendant full discovery of the state's case, an opportunity to give unsworn narrative testimony, and a right to written reasons supporting the fact finder's decision, the nonadversary system shows greater respect for the accused. In terms of the fundamental differences between the two systems, surely there is nothing sinister or presumptively unfair in a procedure which depends upon an "inquiry" into the facts by a neutral and informed judge rather than upon presentation of evidence by interested "advocates" to an unprepared fact finder.⁵³

charge of most procedural action; under the second, officials perform most activities.

DAMASKA, *supra* note 1, at 3.

This judicial authority is the consequence of the principle that the court in a nonadversary system has "independent responsibility for the accuracy and the justness of its decision." LANGBEIN, *supra* note 29, at 9.

50 See, e.g., STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE*, 48-51 (1984).

51 See John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1486 (1966).

52 Damaska, *supra* note 12, at 525.

53 Indeed, in one of the principal "incorporation" cases of the 1960s, the Warren Court recognized that a criminal process using no juries could still be fair and equitable. The Court speculated that such a system "would make use of alternative guarantees and protection which would serve the purposes that the jury serves in the English and

Similarly, the adversary system is not by nature more reliable. Some contend that a contest is inherently more likely to reveal the truth than an inquiry. By presenting their case to an impartial judge or jury, proponents of conflicting views will be as thorough and persuasive as possible. The fact finder will be "given the strongest case that each side can present" and will be "in a position to make an informed, considered, and fair judgment."⁵⁴ Also, some argue that a passive and uninformed judge is more likely to avoid bias, because a judge who studies the case file developed by the police and prosecutor prior to trial may tend to reach a conclusion at an early stage and be impervious to contradictory evidence later developed at trial.⁵⁵ While these arguments appear to point out strengths of the adversary system, they fail to consider its many weaknesses. For example, the adversary system usually involves partisan advocates, burdened by a lack of discovery and restrictive rules of evidence, besieging an ignorant fact-finder.

Furthermore, arguments that the adversary system is a better truth finder are based more on faith than on fact. Few researchers have sought to compare the relative advantages of adversary versus nonadversary modes of proof, and those that have made the attempt have not provided satisfactory answers. For example, Thibaut, Walker, and Lind set out to determine which of the two systems is better at counteracting the decision-maker's bias.⁵⁶ However, as Damaska pointed out, their experiments did not include the essential aspect of the nonadversary model—the active and probing decision-maker.⁵⁷ Professor Samuel Gross also ob-

American systems." *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968).

54 Friedman, *supra* note 9, at 1065; see also Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 481 (1962).

55 A classic presentation of this thesis was advanced by Professor Lon L. Fuller. See Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 39-40 (H. Berman ed. 1971) (quoting from the *Report of the Joint Conference on Professional Responsibility of the American Bar Association* 1958) (An adversary presentation seems the only effective means for combating the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.); Heir Kotz, *The Reform of the Adversary Process*, 48 U. CHI. L. REV. 478, 486 (1981) ("The European judge faces the difficult task of avoiding the appearance of partiality while playing an active part in the proceedings."); see also Stephan Landsman, *The Adversary System*, AM. ENT. INST. 49 (1984) (The inquiring judge is more likely to act upon his biases than is his adversary counterpart.).

56 John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972).

57 Damaska, *supra* note 49, at 1095-1100. According to Damaska, the results of the research merely supplied empirical support for the proposition that "[i]n close cases a bilateral summation of established facts is better suited than a unilateral one to counteract the decision-maker's inclination to render a judgment in accordance with his expectation

jected that the college and first-year law students who performed the simulations could not possibly have had the professional training of American advocates and Continental judges, and that "[e]ach system justifies itself in large measure on the basis of the performance of *professionals* who are experienced and skilled in these roles, and neither can be judged on the basis of studies that fail to take that into account."⁵⁸ In a later publication,⁵⁹ Thibaut and Walker asserted that other studies confirmed that "the adversary procedure is superior to other classes of procedure."⁶⁰ However, the authors based their findings primarily on the "operating capabilities" of the adversary system and on "subjective and normative appraisals of its performance."⁶¹

Thibaut and Walker advanced the usual arguments for the adversary system—that it inspires the parties to uncover all evidence in their favor and moderates the biases of decision-makers. They concluded that the adversary system was "judged fairest and most trustworthy both by persons subject to litigation and by those observing the proceedings."⁶² Yet there was no attempt to determine whether in actual practice an impartial judge, unbound by formal rules of evidence, could uncover and present (through a neutral inquiry of the witnesses) a broader or more realistic picture of the facts. Also, assessments by litigants and observers may have little value in view of the pre-existing biases which most share. Indeed, Thibaut and Walker have since taken the position that one should distinguish between the objectives of "truth" and "justice."⁶³ The authors now claim that although the adversary process is most effective in seeking "distributive justice," they qualify their support with the claim that a procedure "which delegates both process and decision control to a disinterested third party seems most likely to produce a correct view of reality"⁶⁴ Experimental studies of simulated adversary and nonadversary systems have not been helpful, and, most likely, comparative re-

that the defendant is probably guilty." *Id.* at 1100.

58 Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740 n.22 (1987) (emphasis in original).

59 JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

60 *Id.* at 118.

61 *Id.*

62 *Id.*

63 John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978).

64 *Id.* at 566.

search focusing on accuracy or justice in actual cases would be even less so. As English scholar John Jackson has argued, "it is hard to see how it could be empirically proved that one system is better at truth finding, for the simple reason that it is impossible to know in any particular system how many truly guilty are convicted and how many truly innocent are acquitted."⁶⁵

The individual characteristics of a particular trial system may be more significant than its style as adversary or nonadversary. For example, in our adversary system the strength with which each side is able to present its case depends in large part on the freedom of the parties to ascertain and present to the trier of fact all relevant evidence. A trial system based on a clash of adversaries before a neutral fact-finder, which prohibits pretrial discovery and imposes draconian exclusionary rules of evidence, would not be a great legal engine for discovering the truth. The effectiveness of the adversary system as a finder of historical facts is not guaranteed by its nature, but depends on many independent factors.⁶⁶

65 Jackson, *Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach*, 10 CARDOZO L. REV. 475, 485 (1988). Jackson also points out that differing epistemological conceptions about the meaning of truth may doom any quest for the best truth-finding system. *Id.* at 484.

66 Nor should we look upon our adversary system as a bequest from the common law to be nurtured and treasured principally for its historic value. Our current adversary style is a late-comer, being largely a product of the late 18th and early 19th centuries when lawyers displaced judges as the dominant forces at trial. Damaska, *supra* note 35, at 542 n.156; John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 272, 307-11 (1978); *see also* Landsman, *supra* note 55, at 18-23 (The adversary system came into its own in the 18th and 19th centuries.).

B. Summary of Continental (Nonadversary) Systems⁶⁷

1. The Pretrial Process

In most Continental countries, as in our own, the police, and less often the prosecutor, conduct the pretrial investigation. In France, an investigating judge or magistrate (*juge d'instruction*) supervises the investigation of serious cases. In Germany and Italy, this office has been abolished and the prosecutor is in charge of the investigation. However, in virtually all countries, the police usually conduct the actual investigation in terms of interviewing witnesses, interrogating suspects, and gathering physical evidence.⁶⁸ The prosecutor or magistrate develops a comprehensive

67 See generally LANGBEIN, *supra* note 29; SCHLESINGER ET AL., *supra* note 29, at 475-80; Damaska, *supra* note 49, at 1088-90; Damaska, *supra* note 12, at 528-30; Jescheck, *supra* note 28, at 240-51.

This short summary capsulizes the most significant aspects of the usual Continental trial, but it is not meant to accurately describe an individual country. Although Continental systems provide simple models of procedure, there is no single model to which all countries conform. See Volkmann-Schluck, *supra* note 4, at 10, 31. Indeed, Italy recently engrafted many fundamental elements of the accusatory system onto its civil law procedural trunk. See *infra* part III.B.2.c.

American legal literature includes a number of controversies, as well as false assumptions, about the nature of the Continental system. For example, a European writer found that the inquisitorial model implied by Professors Goldstein and Marcus "is not only inaccurate, it simply does not exist except in their minds." Volkmann-Schluck, *supra* note 4, at 9. Professor Alschuler pointed out the erroneous assumption that the West German system depends on the pretrial work of an examining magistrate. Alschuler, *supra* note 6, at 989 n.274. But he then suggested that the English had abolished the hearsay rule in criminal cases, which they have not. *Id.* at 976. The lesson drawn from these missteps is that it is not easy for Americans to "get it all right" when describing foreign legal systems.

68 Police are becoming de facto primary investigators. While the German prosecutor theoretically manages all pre-accusatory investigations, the police, in modern practice, initiate and develop investigations, including questioning witnesses and interrogating the accused. In Germany and France, police usually conduct pretrial investigations. See LANGBEIN, *supra* note 29, at 11-12; Volkmann-Schluck, *supra* note 4, at 11-12.

Even in France, direct judicial supervision of the investigation rarely occurs. In most cases, the police operate under the supervision of the prosecutor. In those serious cases where the *juge d'instruction* is in command, its investigative powers are usually delegated to the *police judiciaire*. The result is "an increasing police monopoly over the pretrial criminal process, in particular the questioning of suspects." Lidstone & Early, *supra* note 4, at 490; see also Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240, 250-51 (1977) (stating that only about 14% of all crimes and delits are sent to the *juge d'instruction*); Frase, *supra* note 32 at 667, n.640 (in recent years, the percentage of matters referred to examining magistrates has been falling, and proposals have been made to abolish the practice of pretrial investigation by magistrates).

Italy recently abandoned the investigating magistrate in favor of the American-style passive pretrial judge who plays a limited role in the investigation. For example, Italian

case file (dossier) which, under traditional civil law practice, is submitted to a three-judge panel to determine whether there is reasonable cause for trial.⁶⁹ The defendant is afforded full opportunity to inspect the case file.⁷⁰ Once the prosecutor or magistrate decides to prosecute, formal proceedings are commenced by filing, with the court, the entire case file consisting of the charges and supporting evidence. From this point, the court becomes the supervisor of the case, replacing the prosecutor.⁷¹

2. *The Trial Process*⁷²

The Continental court usually consists of a single professional judge in minor cases and a mixed bench, usually one professional and two lay judges or, in more serious cases, three professional and two to nine lay judges.⁷³ The court, comprised of the professional judges and lay assessors, decides questions of guilt and punishment in one proceeding. The dossier resides with the presiding judge during the trial. The prosecutor and the defense attorney will have reviewed the dossier, but it will not be available to the

magistrates typically issue warrants for arrest and wiretapping. See Amodio & Selvaggi, *supra* note 12, at 1218; Fassler, *supra* note 33, at 251-52.

69 Virtually all European countries provide some form of judicial review of the prosecutor's decision to bring criminal charges. For example, France maintains the traditional, separate three-judge screening chamber, while Germany entrusts the screening function to the professional trial court judges. LANGBEIN, *supra* note 29, at 12; Brouwer, *supra* note 29, at 215. The new Italian Code restructured the functions of the pretrial judge, leaving her without an active role in the investigation but giving her the responsibility for determining, at the conclusion of the investigation, whether probable cause exists for filing a criminal charge. See Amodio & Selvaggi, *supra* note 12, at 1218; Fassler, *supra* note 33, at 261-62.

The grand jury is unknown in civil law countries.

70 See LANGBEIN, *supra* note 29, at 12; SCHLESINGER ET AL., *supra* note 29, at 481; Jescheck, *supra* note 28, at 246.

71 LANGBEIN, *supra* note 29, at 8. Once the German prosecutor determines probable cause, he loses control of the case. John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 209, 237 (1979).

72 A trial must take place even if the defendant confesses and seeks to waive it. Pleas of guilty are unknown, although some countries maintain procedures with plea bargain characteristics, particularly in minor cases. See, e.g., LANGBEIN, *supra* note 29, at 96-98 (discussing the German "penal order" procedure applicable to misdemeanors).

Italy is the exception. In 1988, Italy substantially revised its criminal procedures to include adversary elements and now allows plea bargaining. See *infra* part III.B.2.c.

73 In serious cases, the German bench usually consists of three professional judges and two lay judges, while the French bench consists of three professional and nine lay judges. RENÉ DAVID, ENGLISH LAW AND FRENCH LAW 68 (1980); LANGBEIN, *supra* note 29, at 61-63; Brouwer, *supra* note 29, at 216 (describing the make-up of France's Assize Court).

lay judges. Furthermore, the dossier cannot be admitted into evidence or considered by the court in reaching its verdict.⁷⁴

The Continental trial is conducted with less formality than its English or American counterparts. For example, the presiding judge sits closer to the parties and to the public, and the lawyers address the presiding judge with greater familiarity.⁷⁵ The trial commences with either the presiding judge or the prosecutor reading the charges. The defendant then answers questions asked by the presiding judge,⁷⁶ giving an account of his personal background, including his address, family, and occupation history. The presiding judge then turns to the accusations and advises the defendant of his right to remain silent, and asks if he wishes to say anything. The defendant almost always agrees to speak.⁷⁷ He is not placed under oath and may give his side of the case in narrative form. After the defendant has spoken, the presiding judge questions him extensively about the charges and evidence, referring often to the dossier with which she has familiarized herself in preparation for trial. After the examination by the presiding judge, the prosecutor and defense counsel may ask additional questions, either directly or through the presiding judge.

When the examination of the defendant is complete, the presiding judge calls witnesses⁷⁸ and questions them in a similar

74 SCHLESINGER ET AL., *supra* note 29, at 478. The presiding judge will have become very familiar with the dossier, but is expected to ignore any dossier information that was not read and admitted into evidence at the trial. Lay judges are not trusted to be able to perform this task and are not allowed to even examine the dossier. LANGBEIN, *supra* note 29, at 67. However, parts of the dossier, such as documents and statements of witnesses, may be admissible evidence. For example, if a trial witness suffers loss of memory or contradicts his prior account of the events, his statements in the dossier may be admissible, to refresh recollection, to impeach, or even as substantive evidence. SCHLESINGER ET AL., *supra* note 29, at 484.

75 See Zeidler, *supra* note 44, at 397.

76 Other than the rule that the court must hear first from the accused, the German code does not limit the trial court's discretion in the sequence of its proof-taking. Langbein, *supra* note 71, at 208, 220; see also LANGBEIN, *supra* note 29, at 74 (taking evidence follows the examination of the accused).

77 LANGBEIN, *supra* note 29, at 72 (stating that German defendants virtually always speak); Damaska, *supra* note 12, at 527 (stating that almost all Continental defendants choose to testify); Tomlinson, *supra* note 29, at 173 (stating that it would be most unusual for counsel to advise his client not to answer the judge's questions)

78 Since the court has independent responsibility for the accuracy and justness of its decision, the court, rather than the parties, determines the sequence of proof and may call witnesses on its own. However, the court must examine all witnesses nominated by the parties unless their testimony would be inadmissible in evidence. LANGBEIN, *supra* note 29, at 9, 74.

manner. Each witness presents a narrative account and then responds to questions asked by the presiding judge and by counsel.⁷⁹ Questioning is informal, with few, if any, objections by counsel and with the opportunity for lengthy explanations and narrative responses.⁸⁰ In contrast to the formal, highly structured examinations which occur in American courtrooms,⁸¹ the typical Continental examination takes on the character of an informal discussion between the presiding judge and the accused or the witness. The prosecutor and defense attorney occasionally join in this conversation. Since the Continental system does not divide the questioning into direct examination and cross-examination, the questioning process is not encumbered with technical rules governing the order of proof.⁸² In the Continental system, most of the information is obtained through the presiding judge's informal inquiry.⁸³ In addition, physical and other non-testimonial evidence may be produced and considered throughout the course of the trial.

After all the evidence has been presented, counsel deliver their closing arguments in which the prosecutor opens and the defense counsel responds and concludes.⁸⁴ Also, the defendant has the opportunity to make a final statement on his own behalf.⁸⁵ Thus, unlike American practice, the prosecutor does not have the last word. Instead, the defendant personally has the opportunity to present his side of the case both at the outset and at the conclusion of the trial.

79 German judges generally allow counsel to pose questions directly to witnesses. In France, counsel may direct questions through the presiding judge, but in practice, the presiding judge usually merely signifies to the witness to respond to counsel's question. Brouwer, *supra* note 29, at 218.

Lay judges may participate in the questioning. In Casper and Zeisel's study of German trials, lay judges questioned witnesses in almost one-half of all cases. Casper & Zeisel, *supra* note 3, at 149.

80 In Germany, a witness is allowed to give a relatively uninterrupted narrative of his evidence before being questioned closely by the presiding judge. LANGBEIN, *supra* note 29, at 74.

81 Damaska, *supra* note 49, at 1089; LANGBEIN, *supra* note 29, at 74.

82 Jescheck, *supra* note 28, at 710.

83 Damaska, *supra* note 49, at 1089.

84 This is the usual procedure. See Damaska, *supra* note 49, at 1090. France is representative. The defense has the last word, and the presiding judge is not allowed to sum up. Brouwer, *supra* note 29, at 218. In Germany the prosecutor may reply to the defense summation. LANGBEIN, *supra* note 29, at 65. But German lawyers have told me that the prosecutor rarely exercises the privilege. In all cases, the defendant has the last reply. *Id.*

85 See Zeidler, *supra* note 44, at 399.

After the defendant completes his statement, the court, which includes both the professional and the lay judges, retires to deliberate. In most countries, the votes of lay and professional judges carry the same weight, and a unanimous verdict is not required. If the court finds the defendant guilty, the judgment will include both the conviction and the sentence.

C. Adversary Excesses in the American Trial

The following factors contribute most to our adversary excesses: extreme judicial passivism coupled with lawyer domination of the trial process, contentiousness of our lawyers, emphasis on the contest rather than on the discovery of truth, over-reliance on the lay jury as fact-finder, and formal and technical rules of evidence.

1. *Judicial Passivism and Lawyer Dominance. Our Extreme Approach*

(a) *An Historical Perspective.*—The current adversary style of English and American criminal trials is largely a product of the latter 18th and early 19th centuries when lawyers displaced judges as the dominant force at trial. Reviewing Old Bailey records of ordinary criminal cases, Langbein found that English judges did not allow counsel to appear in court and examine witnesses until the 1730s, thus beginning the process of displacing judicial authority over the trial process.⁸⁶ According to Langbein, English judges prior to 1730 performed functions resembling those of the presiding judge of modern Continental systems. Lawyers, when present, were “peripheral forensic figures” as they are on the Continent today.⁸⁷ In contrast, Damaska placed the mastery of lawyers and the advent of the modern adversary system somewhat later: In England until the middle of the 19th century,

the pretrial phase of the process was essentially a type of judicial investigation along inquisitorial lines conducted by justices of the peace. Nor was the trial an adversary battle of counsel. Lawyers would seldom appear for the prosecution, and defense counsel were not admitted in ordinary felony cases until 1837. In this situation the judge called witnesses and examined them, and in the century prior, had also interrogated the defendant

Evidentiary and procedural finesse, so characteristic of the adversary process, could not develop in the context of a trial without lawyers.⁸⁸

Throughout the latter part of the 1700s and the first part of the 1800s, judges in ordinary criminal cases allowed counsel to examine witnesses. Starting in 1836, English law allowed all felony defendants to be represented by counsel who was permitted to address the jury.⁸⁹

⁸⁶ Langbein, *supra* note 66, at 307.

⁸⁷ *Id.* at 315.

⁸⁸ Damaska, *supra* note 35, at 542 n.156; see also LANDSMAN, *supra* note 50, at 18-23 (It was not until the 18th and 19th centuries that the adversary system came into its own.).

In ordinary criminal cases, neither side had counsel, but for centuries in state trials (usually involving political crimes) the prosecution was represented by counsel and the defense was denied it, causing great disparities. Langbein, *supra* note 66, at 282, 307-11.

⁸⁹ See Langbein, *supra* note 66, at 311-13; David Wolchover, *Should Judges Sum Up on*

The restrained power of American judges is rooted in our general distrust of judicial authority which can be traced to the revolutionary period, or earlier, when the colonists held in contempt judges who formerly held office at the pleasure of the Crown. In addition, judicial distrust may be related to the fact that nearly all post-Revolution judges were laymen to whom the colonists were reluctant to entrust substantial powers.⁹⁰ Furthermore, the attraction for Jeffersonian democracy led to the desire for elective judicial offices.⁹¹ As a result, the judiciary had a limited status as well as a limited role in the trial process. An English observer noted that in the early years of the United States, judges were "deprived of almost all the powers which together constitute judicial status as we know it."⁹²

(b) *The Inferior Status of American Judges.*—The status of state trial judges in America generally is inferior to that of their English cousins. An important reason for this lower position is the fact that most state judges must fight for their judicial positions in the elective process. Subjecting the judiciary to the elective process reduces its status and contributes to its diminished authority. English High Court judges, on the other hand, are appointed for life and can be removed only by both Houses of Parliament.⁹³ Even English judges of lesser status, such as recorders sitting as Crown Court judges, are appointed by senior judiciary and are not subject to the elective process.

In comparison to the English and American systems, Continental judges are career civil servants and cannot claim the same distinguished status as English judges, or possibly even the status of our federal and senior state judges.⁹⁴ However, the Continen-

the Facts?, 1989 Crim. L. Rev. 781, 783. Furthermore, prior to 1898, the defendant was incompetent as a witness but was allowed to address the court with unsworn narratives.

90 See PATRICK DEVLIN, TRIAL BY JURY 119 (1966).

91 J.C. Smith, *The Personnel of the Criminal Law in England and the United States*, 1955 CAMBRIDGE L. J. 80, 85.

92 *Id.* at 86.

93 *Id.* at 85.

94 Nearly a decade ago, Professor Zeidler remarked that becoming a judge in Germany is the beginning of a career, rather than a reward for a long and successful legal practice. Zeidler, *supra* note 44, at 397. He also compared the judge's legal education and status to public prosecutors and described German judges as "career persons of good but not exalted, social prestige," whose professional status "is clearly lower than that of his common law brethren." *Id.* See also *id.* at 154. However, recent conversations with young German lawyers lead me to believe that, due to intense competition for judgeships in the last few years, both the quality and the status of German judges may be rising.

tal system generally focuses on merit, rather than on an elective process when choosing its judges, and Continental judges are promoted using a hierarchical system which rewards meritorious performance.⁹⁵ After a probationary period, Continental judges ordinarily gain tenure which they hold until retirement.⁹⁶

Nearly all states require some form of election for judicial office.⁹⁷ The requirement of election leads to diminished independence and authority. Justice Brennan has remarked that because state judges often are elected, or, at least, must succeed in retention elections, as opposed to federal judges who are guaranteed a salary and lifetime tenure, they "are often more immediately 'subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.'"⁹⁸ Thus, federal district court judges, not surprisingly, command greater respect from trial lawyers and have better control of their courtrooms than state trial judges.⁹⁹

The pressures associated with re-election also affect the trial arena. The politics of the elective process often involve lobbying bar associations and other lawyer interest groups. Thus, judges subject to re-election may feel indebted to lawyers and lawyer interest groups and may hesitate to risk incurring the displeasure of prominent trial lawyers who appear before them. The weakness of American judges, when compared with their English brethren, to control the press in publishing material on criminal cases, in-

95 See David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a "Rechtsstaat"*, 61 S. CAL. L. REV. 1795, 1801, 1839 (1988); Zeidler, *supra* note 44, at 397 (By limiting the role of politics in Germany's judicial selection and promotion process, Germans believe that they can accomplish the goal of finding and advancing the best legal talent.); see also DAMASKA, *supra* note 1, at 232.

96 After a three-to-five-year probationary period, West German judges attain lifetime tenure (until mandatory retirement age), except for Constitutional Court judges who are appointed for a single term of 12 years. Clark, *supra* note 95, at 1816-27; see also Zeidler, *supra* note 44, at 397.

97 In 1980, only seven states had a system of choice by executive appointment which did not include resorting to the electorate. LARRY BERKSON, ET AL, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1980). For the great majority of state trial judges the method of initial selection and retention is by either partisan or nonpartisan election. U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1113-14 (1988).

98 William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986).

99 Damaska's examples of American judges deviating from the passive style only concern federal judges. Damaska, *supra* note 35, at 524-25 nn.113-14.

cluding speculations and criticisms of the participants, exacerbate these pressures.¹⁰⁰

The status of judges directly affects the quality of advocacy. The English scholar C.P. Harvey suspected

that much of the crudity of American advocacy derives from the inferior position occupied by American judges. So far from being irreproachable and unreprieved, they are elected . . . instead of being appointed, and have to 'run for re-election' from time to time if they wish to remain in office. This inevitably results in a depreciation of their status. The equivalent in England to the judge in an American court seems not to be the judge in an English court but the referee on a football field.¹⁰¹

(c) *Contrasting Roles of Judges and Lawyers in American and Continental Systems.*—American judges generally act as passive umpires of the trial process. While in many ways they are more autonomous than Continental judges and exert considerable authority in pretrial and sentencing phases of the criminal process, during the trial they usually are limited to overseeing and regulating the battle between the parties. The responsibilities of the Continental presiding judge—to study the case file, to decide the order of witnesses, and to call and question witnesses and present evidence—belong to the lawyers in Anglo-American procedure.¹⁰² While our trial judges technically retain the power to call and question witnesses,¹⁰³ it is used sparingly and often discouraged by reversals. Despite the Supreme Court's description of the federal judge as "not a mere moderator, but . . . the governor of the trial for the purpose of assuring its proper conduct and determining questions of law,"¹⁰⁴ and the Court's admonition

100 See Smith, *supra* note 91, at 83-84.

101 C.P. HARVEY, *THE ADVOCATE'S DEVIL* 160 (1958).

102 See LANGBEIN, *supra* note 29, at 62; cf. Damaska, *supra* note 35, at 524-25 (Damaska also points out that at certain junctures in the trial process, i.e. pretrial hearings, sentencing, in camera examinations, Anglo-American judges have inquisitorial powers beyond those of Continental judges).

103 The Federal Rules of Evidence continue the well-established authority of judges to question witnesses called by the parties and to call and question witnesses not called by the parties. FED. R. EVID. 614. The Advisory Committee recognized, however, that the judge's authority to question witnesses "is, of course, abused when the judge abandons his proper role and assumes that of advocate." The Committee noted that its failure to define the manner or extent of such authority "in no sense precludes courts of review from continuing to reverse for abuse." FED. R. EVID. 614(b) advisory committee's note.

104 *Quercia v. United States*, 289 U.S. 466, 469 (1933) (citing *Herron v. South Pac.*

that "[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial,"¹⁰⁵ appellate courts often find error in direct or extensive judicial questioning of witnesses.¹⁰⁶

Furthermore, appellate courts restrict judicial authority by prohibiting lower court judges from interfering with lawyer advocacy through exercise of the courts' summary or comment powers. Since the Revolution, states have curbed the authority of judges to summarize and comment on the evidence,¹⁰⁷ and currently in most states, judges in a criminal trial are prohibited from expressing an opinion on the weight or credibility of the testimony of witnesses or on the merits of the case.¹⁰⁸ Even in federal courts where there is no direct prohibition on judicial summary or comment, judges use their common law discretionary powers very sparingly in view of the lack of explicit statutory authority, as well as the controversial nature and unclear boundaries of such author-

Co., 283 U.S. 91, 95 (1931)).

¹⁰⁵ *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978). See also *Geders v. United States*, 425 U.S. 80, 87 (1976), where the Court stated, "If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings." Nevertheless, the court held that the judge violated the defendant's Sixth Amendment right to counsel by prohibiting him from consulting his lawyer during an overnight recess between his direct and cross-examination. *Id.* at 81.

¹⁰⁶ See, e.g., *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974) ("Sound and accepted doctrine teaches that the trial judge should avoid extensive questioning of the witness and should rely on counsel to develop testimony for the jury's consideration. *Id.* at 440 (footnote omitted)), *cert. denied*, 420 U.S. 911 (1975); *Blumberg v. United States*, 222 F.2d 496, 501 (5th Cir. 1955) (It "is far better for the trial judge to err on the side of obstention [sic] from intervention in the case rather than on the side of active participation in it.").

Professor Merryman wonders why our judges are so docile when coming from the ranks of advocates, and points to their close connection to the practicing bar.

One would suppose that judges who are former practicing lawyers, often with trial experience, would be quick to detect and deal appropriately with unjustified delay, expense, and the variety of other abusive practices to which we have become accustomed. But in practice, our judiciary is often complaisant, indolent, or timid and interposes its authority only in extreme cases. Is solidarity with practicing lawyers the problem?

John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1875 (1988).

While such relationships contribute to our judicial passivity, so do appellate court admissions and reversals when trial judges venture outside their role as umpire.

¹⁰⁷ See Johnson, *Province of the Judge in Jury Trials*, 12 AM. JUD. SOC'Y 76, '78-81 (1928); Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 163-65 (1988).

¹⁰⁸ Wolchover, *supra* note 89, at 784.

ity. Judge Marvin Frankel accurately described the current approach when he noted that "[i]t is not a regular thing for the trial judge . . . meaningfully to 'comment upon' the evidence."¹⁰⁹

As approved by the Supreme Court in 1972, the Federal Rules of Evidence allowed the judge to "fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses,"¹¹⁰ but Congress struck the rule after the House Committee on the Judiciary recommended its deletion. The Committee noted that the authority of the judge to comment on the weight of evidence and credibility of witnesses was "highly controversial" and was "not granted to judges in most State courts."¹¹¹ Furthermore, the limits of the comment powers of federal judges are not precisely defined, but are less than those of English judges. As noted by the Supreme Court's Advisory Committee, the federal judge's comment powers also are limited in that the judge "cannot convey to the jury his purely personal reaction to credibility or to the merits of the case; he can be neither argumentative nor an advocate."¹¹² In summary, although both the House and Senate Committees indicated that the proposed rule was consistent with the common law and with current practice in the federal courts, it is apparent that our federal judges do not approach the practice of English judges in summing up and commenting on the evidence.¹¹³ Yet an important effect of judicial comment on such matters is that "it affords the opportunity of 'rescuing the case from the false glosses of powerful advocates.'¹¹⁴ With few "rescue" powers, judges are often powerless to control adversary abuses.

Lawyers in the United States produce, direct and dominate the trial process. A central difference between the adversary and nonadversary systems is that in the latter the judge controls the process rather than the lawyers.¹¹⁵ Lawyers control the adversary system. They are the "competing directors" of the "play" that is

109 Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042; Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility* 65 HARV. L. REV. 1281, 1283 (1952) (a federal judge can be viewed as "governor of the trial" with the right to comment upon the evidence).

110 FED. R. EVID. 105.

111 H.R. REP. NO. 650, 93d Cong., 1st Sess., at 5 (1973) (report of the House Committee on the Judiciary concerning superseded FED. R. EVID. 105).

112 FED. R. EVID. 105 (superseded) advisory committee's note.

113 This is apparent to English observers. See, e.g., Smith, *supra* note 91, at 87-88.

114 Wolchover, *supra* note 89, at 788.

115 LANGBEIN, *supra* note 29, at 8-9, 65 (the German system is de-lawyered).

put on before the trier of fact in which they are also "super-actors" who not only perform, but create their own part as the play progresses.¹¹⁶ Not surprisingly, American lawyers often refer to "trying a case," since they, in large part, put on the case themselves. The judicial position was clearly described by Judge Frankel: "Our courts wait passively for what the parties will present, almost never knowing—often not suspecting—what the parties have chosen not to present."¹¹⁷

As a result, the lawyers in the adversary trial process not only preempt the judge but also the principal subject of the proceedings—the accused. In the Continental model, the judge directs the proceedings and focuses attention on the accused. In our system the lawyers direct the proceedings and divert attention away from the accused. The prosecutor puts on the first act. The defense attorney then may present evidence, but always stands as a shield between the defendant and the prosecutor, the judge, and the jury. The physical courtroom arrangements and rules of courtroom conduct reflect this distinction. In an American courtroom the lawyers sit "center-stage" with the accused next to defense counsel. Many jurisdictions allow the lawyers to move freely about, approaching witnesses during their examination and hovering over the jury during argument. In contrast, the accused is usually placed in the center of the Continental courtroom while the lawyers are located off to the side and are restricted in their movements. These differences contribute to the focus and tone of the trial, and may even affect the outcome of the proceedings. It is not unusual in trial advocacy courses for experienced American lawyers to teach the importance of controlling or directing the trial process as much as possible through their physical presence and their movements throughout the courtroom.

The Continental system gives the judge control over the trial and relegates lawyers to a secondary position from which the heat of advocacy is moderated.¹¹⁸ Prior to trial, each lawyer usually

¹¹⁶ We are not alone in this characterization of trial lawyers. English judges have pointed out that every great advocate is a special kind of actor: "[H]e is an actor who creates the part he plays. He must select the words that make his lines . . . He must be ready in a moment to alter, to cut and to re-create, to suit the sudden and unforeseeable events of the day's hearing, and these changes of front he must make without their being apparent to anyone." HARVEY, *supra* note 101, at 47 (quoting from Mr. Justice Hilbery).

¹¹⁷ Frankel, *supra* note 109, at 1038.

¹¹⁸ The leading figure in a German trial is the presiding judge. He has the primary forensic role at trial that belongs to the opposing lawyers in American courts. LANGBEIN,

presents a brief to the court and to the opponent outlining the issues and arguments to assure that all participants will be prepared on the important points and to avoid "trial by surprise."¹¹⁹ During trial, witnesses are usually allowed to present their testimony in narrative form, and cross-examination is much less aggressive since the judge first questions witnesses extensively and only then asks counsel if they have any questions to add. Professional judges in Continental systems are part of the jury and often summarize the evidence at the commencement of deliberations. While German law does not require a judicial summation, and while it is sometimes criticized as an undue influence upon the lay judges, Casper and Zeisel found that summaries are given in two-thirds of minor cases and almost always in serious cases.¹²⁰

Continental pretrial rules also restrict lawyer discretion to a greater extent than in this country. For example, in Germany a rule of compulsory prosecution applicable to serious offenses commands the prosecution of "all prosecutable offenses, to the extent that there is a sufficient factual basis,"¹²¹ and plea bargaining, the device which so empowers our prosecutors, is generally forbidden by Continental systems in serious cases.¹²² Also, while German prosecutors make sentence recommendations, they are followed far less often than are prosecutorial sentence recommendations in the United States.¹²³ As a result of these restrictions, the Continental prosecutor has far less discretion than his American counterpart.

The English judge does not exercise the same degree of control over the trial process as the Continental trial judge, but does command more than her American counterpart. For example, fol-

supra note 29, at 62.

119 In Germany, subpoenaed witnesses are known to both parties, but the defense may surprise the prosecution with a witness who voluntarily appears to testify.

120 Casper & Zeisel, *supra* note 3, at 150-52.

121 Langbein, *supra* note 71, at 210; *See also*, Jescheck, *supra* note 28. The compulsory prosecution rule is not unqualified, but it does not compare with the "essentially unfettered charging discretion" of American prosecutors. Alschuler, *supra* note 6, at 983. *See generally* Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

122 *See* Langbein, *supra* note 71, at 210; *see also* Alschuler, *supra* note 6, at 983; Herrmann, *supra* note 121; Jescheck, *supra* note 28; Langbein, *supra* note 121.

123 Alschuler, *supra* note 6, at 980 n.243 (contrasting German and American studies); Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 55 (1983) ("The German prosecutor's influence on sentences imposed at trial is much less than that of his American counterpart." (footnote omitted)).

lowing the presentation of the evidence and arguments of counsel, both English and American judges will instruct the jury on general principles, such as burden of proof, as well as on the specific law applicable to the case. The American judge usually will stop at this point and give the case to the jury, avoiding any comment on the credibility of witnesses or the weight of the evidence.¹²⁴ English judges, on the other hand, not only are empowered, but are obligated, to provide the jury with "a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jurors are entitled to draw from their particular conclusions about the primary facts."¹²⁵ Particularly in a complicated and lengthy case, the judge is required to assist the jury by dealing with "salient features of the evidence,"¹²⁶ and a defendant in a serious case is entitled to have the defense "laid before the jury in a form that they can appreciate."¹²⁷ The considerable time spent by the English judge in summing up at the close of trial acts as a counterbalance to arguments of counsel for the parties.

Although the English judge's summary and comment powers have been criticized, an important argument in favor of these powers is that they afford the opportunity of "rescuing the case from the false glosses of powerful advocates."¹²⁸ Furthermore, since the English prosecutor is generally not allowed to answer defense counsel's final argument as in our system, the judicial summary takes the place of the prosecutor's closing argument. Since our trial system was largely derived from the English, it would be more accurate to say that we have replaced the balanced judicial summary and evaluation of the evidence with the prosecutor's closing argument—a partisan presentation which is probably the most powerful tool in the prosecutor's trial arsenal. Lawyer power has replaced judicial power. Balance has been sacrificed for partisan advocacy.

124 In fact, the summary and comment powers of American judges are severely limited. See *supra* notes 107-14 and accompanying text.

125 *Regina v. Lawrence*, 73 Crim. App. 1, 5 (1981) (Lord Hailsham).

126 *Regina v. Attfield*, 45 Crim. App. 309 (1961).

127 *Regina v. Hamilton*, 1972 Crim. L. R. 266. *cf.* *Regina v. Mills*, 25 Crim. App. 138, 140 (1936) (Judge did not sum up evidence satisfactorily); see generally, JOHN F. ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES § 4-423 (Stephen Mitchell ed., 41st ed. 1982).

128 Wolchover, *supra* note 89, at 788.

As for English barristers, their authority is more restricted in other aspects. Ethical rules prevent the barrister from interviewing witnesses, thereby guarding against the danger of counsel drilling or coaching his witnesses.¹²⁹ Barristers are severely limited in voir dire of jurors, as well as in approaching witnesses during questioning and other movements about the courtroom. Finally, while considerable prosecutorial discretion exists in the decision to charge and in plea bargaining, the incidence of plea bargaining is less in England than in the United States. Bargaining occurs only with respect to the charge, because prosecutors are not permitted to make recommendations as to sentence.¹³⁰

2. *Excessive Lawyer Advocacy*

American criminal trial lawyers are more aggressive and contentious than either Continental or English advocates. Our courtroom lawyers often regard the trial as "ritualized aggression"¹³¹ and themselves as prize fighters, gladiators, or, more accurately, semantic warriors in a verbal battle. This is true of both prosecution and defense lawyers who generally consider themselves aggressive advocates in pursuit of that most important goal—winning the case.¹³² For defense attorneys, courtroom victory usually translates into obtaining an acquittal, and they often regard discovery

129 Except for parties or experts, "gingering up the witness" by counsel is looked upon with great disfavor in England. While the solicitor may interview and prepare the witness, a barrister may not. Thus, if the witness is called, "his appearance in the witness box will be essentially unrehearsed." HARVEY, *supra* note 101, at 66.

130 Alschuler, *supra* note 6, at 973-76.

131 Seymour Wishman describes the lawyer as prize fighter:

[T]he trial was a battle between adversaries in which all trial lawyers were competitors. Winning the case meant beating the other guy, beating your brother, just as it sometimes meant beating your father, the judge. The verdict was clear and unequivocal, and it was announced in front of all those who had been observing you. A victory could provide an exhilaration like no other.

Seymour Wishman, *CONFESSIONS OF A CRIMINAL LAWYER* 201 (1981).

Wishman further described a trial as "less a search for the truth than a battle to be won, and in court rules and legal principles merely ritualized the aggression," *id.* at 223, in which "[a]ll emotions and skills . . . were supposed to be deployed for one purpose—winning." *Id.* at 233.

132 Prosecutors, theoretically committed to justice in the form of conviction or acquittal, are proud of the notches on their guns. Defense counsel equally enjoy winning. In short, the rewards of personal aggrandizement and self-satisfaction are powerful incentives in the combat zone of criminal trials. See Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversary Trial Ensemble*, UTAH L. REV. 799, 820-21 (1988); see also Frankel, *supra* note 109, at 1037-38.

of the truth as incidental or even irrelevant to this pursuit.¹³³ In most criminal trials, discovery of truth is the *last* thing a defense lawyer desires.¹³⁴ Pursuing acquittal of the guilty while avoiding presentation of clearly perjured testimony is admired as one of the greatest achievements of the advocate's art.

Excessive aggression of American lawyers is not limited to the courtroom. As an example of extreme acrimony between prosecutors and defense attorneys, one need only look to the current battle between the United States Department of Justice and the American Bar Association's House of Delegates (alleged to be dominated by the defense bar) over attorney subpoenas, forfeiture of attorneys' fees, and ethical rules restricting prosecutors from having *ex parte* contacts with persons represented by counsel. Former Assistant Attorney General Edward Dennis recently remarked that the ethical rule controversy is "just one of a number of areas . . . where there is a war going on between the private

133 The defense attorney is regarded as a gladiator battling for victory in which guilt or innocence is irrelevant. The following view is typical:

A client is entitled to my advocacy, not my judgment. As a prosecutor, I always had my own opinion as my guide. I could dismiss a case, if I felt a defendant was innocent. As a defense attorney, I have tried many cases and never even formed a personal opinion as to the guilt or innocence of my client. That is not my job; that is not my function; that is irrelevant to my responsibility.

William B. Enright, *The Much Maligned Criminal Lawyer and/or the Stake of the Profession in Criminal Justice*, 46 J. ST. B. CAL. 720, 723 (1971).

This general view is shared by Justice Byron White:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.

United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., dissenting) (footnote omitted).

134 The point is not discussed by many scholars, but is apparent to most lawyers and judges with criminal trial experience. Fifteen years ago Judge Marvin Frankel dared to state that "if one may speak the unspeakable, most defendants who go to trial in criminal cases are not desirous that the whole truth about the matters in controversy be exposed to scrutiny." Frankel, *supra* note 109, at 1037. I would add that even this statement is a bit mild and does not fully reflect the realities of the vast majority of criminal trials.

bar and the prosecutors," and that no longer are they merely adversaries on evidentiary and credibility issues. They are "now at the point of questioning the ethics of each side and the professionalism of each side."¹³⁵ He lamented that both sides are "losing that sense of professional unity."¹³⁶

Continental and English advocates also like to win, but they do not place as much importance on victory, and they do not pursue it as aggressively. Consider, for example, the Continental trial with the paternalistic judge who dominates the proceedings, holding the lawyers to a secondary role, and the English courtroom where lawyers rarely object to questions¹³⁷ and where one's adversary is referred to as "my learned friend."

This greater contentiousness of American trial lawyers finds its roots in a number of factors, including the passive role of our judges and the correlative control of lawyers in criminal trials. Both the rules of professional conduct and the high value we place on courtroom victory encourage this contentiousness.¹³⁸

Rules of professional conduct are vague on the question of proper limits of courtroom aggression, but the emphasis is clearly placed on zealous advocacy. The American Bar Association's Model Rules of Professional Conduct¹³⁹ provide that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf," but caution that "a lawyer is not bound to press for every advantage that might be realized for a client."¹⁴⁰ The Model Rules leave

135 Remarks during the Fifth Annual National Institute of White Collar Crime, sponsored by the ABA's Criminal Justice Section, San Francisco, California, March 7-8, 1991, reported at 48 CRIM. L. REP. (BNA) 1548 (March 27, 1991).

136 *Id.* Former United States Attorney Earl Silbert remarked that he has "never seen such antipathy and hostility between the Department and the private bar as within the last year." *Id.*

In a recent poll of California lawyers, 81 percent of those responding agreed with the statement that the use of hardball tactics and uncivil behavior among lawyers is growing. Fax Poll, CAL. LAW. 96 (March 1992).

137 American lawyers observing English trials are often puzzled by the lack of objections to questions of opposing counsel. HARVEY, *supra* note 101, at 116-17.

138 There are other reasons, among them our rules allowing attacks on trial lawyers for failing to object to evidence or for failing to assert all procedural rights on behalf of the accused. As noted by former Chief Justice Burger, "[l]awyers are competitive creatures and the adversary system encourages contention and often rewards delay; no lawyer wants to be called upon to defend the client's charge of incompetence for having failed to exploit all the procedural techniques which we have deliberately made available." Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970).

139 The Model Rules were adopted in 1983 and have provided a guide to state legislatures in setting ethical and disciplinary standards for members of the bar.

140 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1984) [hereinafter MOD-

the "means by which a matter should be pursued" to the lawyer's "professional discretion."¹⁴¹ The ABA's Model Code of Professional Responsibility¹⁴² is likewise vague on the question of aggressive conduct, but again, the emphasis is on zealous advocacy. According to the Code, the lawyer must "represent his client zealously within the bounds of the law"¹⁴³ and, with certain exceptions, the lawyer must not intentionally "[f]ail to seek the lawful objectives of his client through reasonably available means"¹⁴⁴ So dominant is the demand for zealous advocacy that the Code's drafters found it necessary to include the caveat that lawyers are not subject to discipline for "avoiding offensive tactics" or for treating others "with courtesy and consideration."¹⁴⁵ With such forceful exhortations, it is not surprising that American lawyers seek to satisfy their client's expectation of aggressive advocacy and victory.

The pressure on criminal defense lawyers to win their cases comes from a variety of sources, but chief among them is the close proximity of lawyers to their clients and often to their clients' "causes,"¹⁴⁶ together with a system of ethical rules and

EL RULES].

141 *Id.*

142 The ABA's Code was largely superseded by the adoption of the Model Rules in 1983, but many states in setting ethical standards for lawyers have adopted parts of either the Code or the Rules or both.

143 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1984) [hereinafter MODEL CODE].

144 *Id.* at DR 7-101(A)(1).

145 *Id.*

146 See Harris B. Steinberg, *A Comparative Examination of the Role of the Criminal Lawyer in Our Present-Day Society*, 15 CASE W. RES. L. REV. 479, 485-86 (1964); see also PETER COLLIER & DAVID HOROWITZ, *DESTRUCTIVE GENERATION: SECOND THOUGHTS ABOUT THE 60S* 64 (1981) (discussing the life and work of Fay Stender); *THE TRUE BELIEVER* (Columbia Pictures 1989) (glorifying the life of a San Francisco lawyer devoted to the defense of those in whom he "believes"); LLOYD P. STRYKER, *THE ART OF ADVOCACY* 58-59 (1954) ("Your sympathy for your client must be such that you step into his shoes, you become him Let the jury feel that you are not just a paid spokesman brought on to say a piece. You embody the defendant, you are the defendant.") Woollcott writes in an appendix to Stryker's book: "Stryker always does believe in the innocence of his clients." *Id.* at 290. Of course, a lawyer's personal beliefs or opinions technically are not evidence, nor should they even be expressed to the jury. But in practice lawyers often become so identified with the justice of their client's case that the trial reminds one of the English period when arguments of counsel were treated as the equivalent of testimony given under oath. See LANDSMAN, *supra* note 50, at 12.

Public admiration of the lawyer devoted to the client's cause was probably highest during the 1960s and 1970s. In 1968, Herbert Packer felt that "the media was making the defender of the accused into a folk hero." HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 242 (1968).

professional understandings which justifies—indeed praises—nearly every course of conduct in pursuit of the interests (desires) of the client.¹⁴⁷ American public opinion reinforces the identification of lawyers with their clients, often ascribing the same moral standards to both.¹⁴⁸ This is so despite the ABA's Model Rules, which provide that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities,"¹⁴⁹ and occasionally warn lawyers against losing "proper professional detachment."¹⁵⁰

Prosecutorial zeal is somewhat tempered by the ethical duty not to prosecute without probable cause,¹⁵¹ but once a prosecutor decides there is sufficient evidence to convict, that goal is pursued with fervor close to, and on occasion even exceeding, that of the defense attorney.¹⁵² Cases of prosecutorial over-reaching in the effort to obtain a conviction, often amounting to prejudicial

147 The unquestioned devotion of the defense lawyer to the cause of his or her client was described in terms of admiration by Alan Dershowitz:

"There are a lot of people out there whose job is to figure out what's best for society," he says softly. "They're called senators, they're called citizens, they're called governors and mayors. And there are a lot of people who are concerned with the victim. They're called family, they're called clergy, they're called friends. But there is only one person whose responsibility it is to think *unquestioningly* about the client, and that's the defense attorney. There's a lot of pain involved, and no criminal lawyer's ever going to win the Nobel Prize, but if you can't do it, and you can't do it unequivocally, then you better the hell find yourself another kind of job."

Stephen Bello, *How Can You Sleep at Night?*, ESQUIRE, Feb. 1983, at 76 (interview with Alan Dershowitz).

148 The greater distance between the English barrister and his client has been cited as contributing to the higher regard in which the barrister is held by the British public. James D. Cameron, *The English Barrister System and the American Criminal Law: A Proposal for Experimentation*, 23 ARIZ. L. REV. 991, 993 (1981).

149 MODEL RULES, *supra* note 140, Rule 1.2(b).

150 I ABA STUDY COMM. ON ASS'N STANDARDS FOR CRIM. JUSTICE, ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.1 (2d ed. 1980) [hereinafter ABA STANDARDS].

151 Both the Model Rules and the Model Code provide that the prosecutor must not institute criminal charges "when he knows or it is obvious that the charges are not supported by probable cause." MODEL RULES, *supra* note 140, at Rule 3.8(a); MODEL CODE, *supra* note 143, at DR 7-103(A).

152 See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98 (1975) (an empirical study finding a "conviction psychology" among prosecutors).

Judge Frankel stated that "most criminal defense counsel are not at all bent upon full disclosure of the truth" and suggested that "[t]o a lesser degree" neither are prosecutors. Frankel, *supra* note 109, at 1038. Recognizing the mixed enthusiasm of prosecutors for the principle that they must seek justice, not merely convictions, Frankel concluded that "it is the rare case in which either side yearns to have the witnesses, or anyone, give the whole truth." *Id.*

misconduct, abound in the United States.¹⁵³ Furthermore, the prosecutor occasionally pursues the conviction of one whose guilt is highly questionable. After having studied the case file, having convinced reluctant witnesses to testify, and having developed a trial strategy, the prosecutor often has a considerable investment in a case and may feel a powerful commitment to try the case and obtain a conviction. In this context, the aim of achieving justice can easily translate into a desire to convict regardless of the facts, particularly if the prosecutor rationalizes that the defendant is a "bad guy" who deserves imprisonment for having committed other crimes for which he was never convicted.

What accounts for this lack of balance on the part of prosecutors? I submit that it can be traced to our over-reliance on the adversary trial process. First, our permissive ethical standards allow for highly aggressive prosecutorial advocacy at the trial stage. The general obligation to pursue justice imposed on prosecutors by the Model Rules and the Model Code¹⁵⁴ imposes few limits on aggressive trial advocacy once the prosecutor believes the evidence warrants a conviction. The prosecutor must be assured that the defendant has an opportunity to exercise procedural rights,¹⁵⁵ and the prosecutor also must disclose material evidence which may exonerate the defendant.¹⁵⁶ Ethical rules, however, do not limit the prosecutor in pursuing a conviction with vigor equal to that of the defense attorney. In fact, adversary systems of competitive fact-finding might well be incompatible with a system of ethical rules that outlaws aggressive prosecution advocacy.¹⁵⁷

The widely-accepted primary duty of prosecutors to seek justice rather than to convict¹⁵⁸ does little to moderate prosecutorial advocacy once the prosecutor decides that justice in a particular

153 See, e.g., *Brown v. Borg*, No. 91-55148, 1991 U.S. App. LEXIS 28490 (9th Cir. Oct. 7, 1991); *United States v. Roberts*, 618 F.2d 530, 535 (2d Cir. 1980), cert. denied, 452 U.S. 942 (1981); *United States v. Vargas*, 583 F.2d 380, 388 (7th Cir. 1978); *United States v. Corona*, 551 F.2d 1386, 1391 (5th Cir. 1977).

154 MODEL RULES *supra* note 140, Rule 3.8 cmt. 1 (government lawyers are "minister[s] of justice"); MODEL CODE, *supra* note 143, EC 7-13 (government lawyers must "seek justice").

155 MODEL RULES, *supra* note 140, Rule 3.8(b) and (c).

156 *Id.* at Rule 3.8(d) and MODEL CODE, *supra* note 143, at DR 7-103(B).

157 See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?*, 44 VAND. L. REV. 45, 52-53 (1991) (Interpreting the "do justice" requirement as a denunciation of aggressive trial advocacy would create an internal contradiction in view of our adversary view of justice.).

158 The prosecutor is regarded as both an administrator of justice and an advocate, having a duty to seek justice, not merely to convict. See ABA STANDARDS, *supra* note 150.

case demands a conviction. In pointing out the prosecutor's duty to seek justice, the Supreme Court has recognized that prosecutorial zeal is a necessary part of our adversary system. In *Berger v. United States*¹⁵⁹ [the famous case on prosecution misconduct usually quoted by defense lawyers to appellate courts for the proposition that the prosecutor's interest "is not that it shall win a case, but, that justice shall be done"¹⁶⁰], the Court noted the prosecutor's twofold aim—"that guilt shall not escape or innocence suffer,"—and exhorted the prosecutor to pursue justice aggressively.¹⁶¹

He may prosecute with earnestness and vigor—*indeed, he should do so*. But, while *he may strike hard blows*, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction *as it is to use every legitimate means to bring about a just one*.¹⁶²

In today's world of criminal practice, prosecutors are not in the business of trying to convince a jury to convict someone whom they believe to be innocent. Our courts are crammed with enough guilty defendants and our prosecutors armed with enough weapons to pressure plea bargains from the "marginally guilty." Even the unprincipled prosecutor wishing to enhance his conviction record rarely is able to convince a jury to convict one whom he believes to be innocent. By the time a prosecutor brings a serious criminal case before a jury, it is exceedingly rare that the prosecutor has not become convinced of the defendant's guilt. In the vast bulk of criminal trials, prosecutors reasonably believe that justice means a conviction, and take to heart the Court's reminder in *Berger* that the prosecutor is obligated "to use every legitimate means to bring about a just [conviction]" and can strike "hard blows" in the course of prosecuting with "earnestness and vigor." Thus, in the reality of the courtroom, the Court's admonitions may be regarded as an encouragement to do battle as much as a warning against "foul" tactics.¹⁶³

159 295 U.S. 78 (1935).

160 *Id.* at 88.

161 *Id.*

162 *Id.* (emphasis added).

163 Lower courts occasionally recognize the right of both sides to aggressively participate in the heat of trial combat. See, e.g., *United States v. Kravitz*, 281 F.2d 581, 586 (3d Cir. 1960), *cert. denied*, 469 U.S. 941 (1961) (the court criticized the prosecutor's words, but recognized that "some latitude must be given to lawyers' language in a hard fought case.").

Second, our prosecutors are under considerable pressure to win cases. Lawyers and judges expect that prosecutors, unlike defense lawyers, will be successful in the great majority of their cases, and win-loss records can become an important mark of performance.¹⁶⁴ This expectation stems in part from the greater discretion of American prosecutors in the decision to charge and try cases. In contrast, the German system demands that the prosecutor charge to the extent that there is a sufficient factual basis and therefore "in the strongest and most inclusive form that the evidence will support."¹⁶⁵ But American prosecutors have broad discretion limited only by the ethical duty not to bring a case to trial which is not supported by sufficient evidence.¹⁶⁶ Placing their stamp of approval on the case by filing the charges and pursuing a conviction at trial imposes considerable pressures on prosecutors to be successful. Furthermore, the prosecution's inability to appeal may encourage the prosecutor to reach beyond the bounds of legal or ethical rules of advocacy to avoid an acquittal.

Finally, prosecutors often find it extremely difficult to stand apart from the overall contentiousness of the adversary trial process. With an aggressive opponent and a passive judge, prosecutors are likely to believe that justice will not be achieved unless they pursue their goals with devotion equal to that of the defense. From this author's experience as a trial attorney for both the prosecution and the defense, there seems to be little difference in the degree of advocacy once a case comes to trial.

Continental trial lawyers generally are not as aggressive, nor do they share the same commitment to winning their cases. In large part, the tempered advocacy of Continental lawyers is a natural result of the fact that, in view of the dominance of the presiding Judge, the cases are not regarded as the lawyer's to win in the first place. First, Continental lawyers do not have as close a relationship with their witnesses as do American lawyers, since witnesses technically do not belong to the parties, but are called by the

164 Elected state prosecutors often face bitter contests in which their win-loss record becomes a campaign issue. Our media reflects the public perception that good lawyers, particularly good prosecutors, always win their cases. In the movie thriller *THE JAGGED EDGE* (Columbia Pictures 1986), the defense lawyer (played by Glenn Close) had the reputation as a formidable trial attorney for having never lost a case when she had been a prosecutor. In the trial of Randall Adams, depicted in *THE THIN BLUE LINE* (Miramax Films 1988), the prosecutor is shown as proud of his long record of convictions.

165 Langbein, *supra* note 27, at 199.

166 See *supra* note 144; WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION* (Student ed. 1989).

court. In contrast to our pretrial practice, the parties in a Continental system generally are not allowed to "prepare" witnesses for trial.¹⁶⁷ Second, with the judge calling and questioning the witnesses, counsel naturally tend to be less contentious, and liberal rules relating to examination of witnesses and admission of evidence leave little room for objections, requests for side bar conferences, or other interjections by counsel that characterize the American trial.¹⁶⁸ Another reason for these differences lies in the fact that the trier of fact is a mixed bench rather than a lay jury. Continental lawyers seeking to convince professional judges (regarded as highly influential in the court's deliberations) are more likely to reject aggressive, passionate, or emotional presentations in favor of appeals to reason. Even in this country, lawyers adopt a more restrained and rational approach when appearing before a judge rather than a jury.¹⁶⁹

Given these differences, it is not surprising that Continental lawyers have been described as "advocates of somewhat muted adversary zeal."¹⁷⁰ This restrained advocacy is not a one-sided aspect necessarily favoring the prosecution, but may protect the accused against an aggressive, emotional prosecutor. For example, the French prosecutor's summation has been described as "probably more restrained and judicious than its American counterpart."¹⁷¹

English barristers also are not as uncompromisingly committed to the fray of trial combat as are American lawyers. English barristers work in an adversary system from which ours was derived and with which we still have much in common. Despite our same roots, English barristers are more restrained in their advocacy,

167 See Damaska, *supra* note 49, at 1088.

168 For example, terms such as objection, sustained, and overruled are never heard in German courtrooms. See Zeidler, *supra* note 46, at 156.

169 An experienced American trial lawyer recently drew sharp distinctions between performance before a judge and a trial jury:

Deferential, prepared, principled, dispassionate, courteous—these are the adjectives that should describe you in law and motion court. Before a jury, a little passion may be a useful thing. Before a jury, you may want to decry your opponent's tactics, perhaps even his character and his ancestry. But in law and motion, cool is the tool.

John Koslov, *Courtly Behavior*, CAL. LAW., July 1990, at 54, 56.

170 Hein Kotz, *The Reform of the Adversary Process*, 48 U. CHI. L. REV. 478, 481 (1981); see also Zeidler, *supra* note 44, at 394-95 (To the English, German lawyers "will appear to act with somewhat subdued adversary zeal.").

171 Pugh, *supra* note 29, at 26.

often appealing more to reason than to emotion.¹⁷² Barristers also want to win, but generally they do not feel as responsible for the result of the case as do American lawyers and are more willing to settle for a fair and just result than to press every advantage, object whenever possible, and demand enforcement of each and every rule in the hope of frustrating the opponent.

How does one account for these differences? One explanation centers on the fact that the English barrister generally does not become as close to the client and is much less likely than the American lawyer to "identify with" the client. Ironically, the greater independence of the barrister from his client stems from rules restricting the authority and ethical responsibilities of the barrister. First, rules associated with the division of the English legal profession prevent barristers from dealing directly with their clients. A client cannot hire a barrister directly, but must first see a solicitor who will then "instruct" a barrister for the client. Usually, it is the solicitor who chooses and pays the barrister, and ethical rules require that the solicitor be present whenever the barrister interviews the client. In essence, the English trial lawyer has two clients, the instructing solicitor and the litigant, and often it is the former who is more significant to the barrister for the prospect of future business. Satisfying a solicitor or the solicitor's clerk often is more important than pleasing the client who may never again become involved in litigation. Captivating the solicitor or his clerk by putting up a stubborn fight is often more important for the barrister than winning for his client.¹⁷³ Though the American lawyer may criticize a system in which the interest of the lawyer is not solely directed toward pleasing the client, greater separation between the American lawyer and the client may reduce the pressures to win at any cost. Of course, one may argue that since most criminal defendants are represented by a public defender or other government-paid lawyer, the distance between the American lawyer and the client can be great indeed. But even a public defender usually maintains a closer relationship with the client than does a barrister. In a well-operated public defender office, the trial attorney will have seen the client a number of times prior to trial, whereas a barrister usually sees the client for the first time on the

172 GRAHAM, *supra* note 5, at 235-40 (1983); see also FRIEDMAN, *supra* note 5, at 105-12; see generally 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 451-53 (London, MacMillan 1883) (historical explanations for the "calmer" advocacy of barristers).

173 HARVEY, *supra* note 101, at 69-71.

day of trial. Also, the barrister is never alone with the client, because ethical rules require the solicitor's presence anytime the barrister interviews the client. The courtroom arrangement, placing the accused in the dock during the trial (whether on bail or not) and placing the solicitor between the barrister and the accused, reinforces this distance.

Ethical rules preventing rejection of client representation and preventing direct involvement in the commencement and investigation of cases also contribute to the barrister's greater independence and reduced commitment to victory. It is the ethical duty of a barrister, if offered a brief with a proper fee in his line of work, to accept the brief, whoever may be the client.¹⁷⁴ Therefore, by selecting the particular client, the barrister does not implicitly vouch for the validity of the client's cause. Contrast the American private attorney who in most cases has the right to decline employment.¹⁷⁵

The difference between English and American prosecutors can be explained by a number of factors. First, ethical rules regard English prosecutors as administrators of justice rather than as advocates.¹⁷⁶ More important, since the prosecuting barrister can have no direct involvement in either the commencement of a prosecution or the investigation or preparation of cases, the barrister does not feel as responsible for the performance of his or her witnesses. The English system separates investigative and trial functions, with the solicitor charged with the former and the barrister prevented from interviewing witnesses though he often interviews his client in the presence of the solicitor.¹⁷⁷ The English barrister Harvey noted the American practice of preparing witnesses and

174 See Smith, *supra* note 91, at 97 ("[I]t is a convention that a barrister should not refuse a brief for the defence if he can possibly take it . . .").

175 The ABA Code of Professional Responsibility urges lawyers to "not lightly decline proffered employment" but provides that "[a] lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client . . ." MODEL CODE, *supra* note 143, at EC 2-26. This freedom is qualified by the duty to accept court appointments, which would apply to indigent defendants in criminal cases, but good cause exceptions allow the lawyer to reject clients in a number of situations, such as when "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." MODEL RULES, *supra* note 140, at Rule 6.2(c). In any event, the hired attorney retains complete freedom to refuse to represent any client.

176 "Prosecuting counsel should regard themselves as ministers of justice assisting in its administration rather than advocates." *Rex v. Banks* 2 K.B. 621 (1916) (citing and approving language from *Regina v. Puddick* 4 F.& F. 497, 499 (1865)).

177 Cameron, *supra* note 148, at 992.

the assumption that if one's witness fell short on the stand, it was the lawyer's fault. He contrasted the English practice where the solicitor may interview witnesses, but the barrister cannot. As a result, the lawyer trying a case is not considered responsible for the performance of his or her witness, thus reducing the pressure to win cases.¹⁷⁸

The effect of distancing the barrister from the investigative function perhaps is most beneficial when applied to the prosecution. The independence of the prosecuting barrister from the day-to-day operation of the prosecutor's office, his noninvolvement in the decision to prosecute, and his lack of responsibility for the investigation makes it less likely that he will become emotionally involved, overly committed to obtaining a conviction, or even imbalanced in the sense of being "prosecution-minded."

Finally, the fact that most (though not all) barristers represent both the prosecution and the defense in criminal cases moderates any tendency toward excesses in advocacy. Although many barristers prefer a particular side, and a few refuse to prosecute (Rumpole only defends), the practice of most barristers includes both prosecution and defense work. On a given day, a barrister may go to court for a prosecuting solicitor in some cases and a defense solicitor in others. The result is a certain balance. Winning is not everything when the solicitor who hired your opponent may hire you for a future case. As a result of these differences, "the philosophy of the American advocate [to win a victory or bear the blame] is far removed from that of his English equivalent"¹⁷⁹ The barrister can more easily maintain a restrained and purer form of the art of advocacy, and the English criminal trial becomes less aggressive and less confrontational. Some might argue that nearly total commitment to the client furthers the interests of justice. However, particularly during a criminal trial, most observers would agree that justice is not promoted by ex-

178 HARVEY, *supra* note 101, at 63-65.

Continental countries generally impose similar restrictions on witness interviews by counsel. For example, German Bar Association Rules advise against questioning witnesses out of court except in special circumstances, and Zeidler has noted that "a German attorney will be highly reluctant to talk with prospective witnesses" since "a German judge would take a rather dim view of the reliability of a witness who had previously discussed the case with counsel." Zeidler, *supra* note 44, at 396.

179 HARVEY, *supra* note 101, at 65-66; *see also* Cameron, *supra* note 148, at 992 ("Because of his role in the system, the English barrister is an independent, able, and ethical advocate, bringing to the trial a detached, unemotional dedication to justice that is the hallmark of a professional.").

treme aggression or partisanship which values victory at any cost. Also, a more independent bar together with more restrained advocacy may enhance the standing of lawyers in the community. One of the principle criticisms of lawyers voiced by lay persons is that the advocate is paid to say things and take positions in which he or she does not believe. This problem was answered long ago by a portion of the Johnson-Boswell debates:

Boswell: But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?

Johnson: Why, no, Sir. Everybody knows you are paid for affecting warmth for your client, and it is therefore properly no dissimulation: the moment you come from the Bar you resume your usual behavior. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk upon his feet.¹⁸⁰

Lord Macmillan elaborated on Doctor Johnson's point:

In advocacy what the advocate says is not presumed to be, and ought not to be, the expression of his own mind at all, and those whom he addresses are not entitled to believe, and do not believe, anything of the sort. In pleading a case an advocate is not stating his own opinions. It is no part of his business, and he has no right to do so. What it is his business to do is to present to the court all that can be said on behalf of his client's case, all that his client would have said for himself if he had possessed the requisite skill and knowledge. His personal opinion either of his client or of his client's case is of no consequence.¹⁸¹

An American trial lawyer, however, while not allowed to state it expressly in court, often is giving his own opinion of his client and his client's case. More importantly, those whom he addresses frequently assume that the lawyer personally believes in his client's position. Out of court, lawyers (particularly defense lawyers) have attempted to try their cases on the courthouse steps. Doctor Johnson notwithstanding, in America the artifice of the bar is often

180 THE R. T. HON. LORD MACMILLAN, LAW AND OTHER THINGS 184 (1937).

181 *Id.* at 181.

carried into the common intercourse of society and the tumbling lawyer "will continue to tumble upon his hands when he should walk upon his feet."

3. Emphasis on the Battle Rather than on the Truth

Because of our strong attraction to the courtroom battle and our uncompromising worship of the adversary model, we have accepted the "Sport-Game Theory" of adjudication despite occasional judicial protestations to the contrary.¹⁸² The love of a good fight is an integral aspect of our national character, and we often value the adversary contest more for itself than for what it produces. The courtroom attracts us. A spirited battle between semantic warriors dedicated to opposing objectives is far more exciting and entertaining than a neutral inquiry by a dispassionate judge. Thus, trial lawyers recognize that jurors from today's TV generation demand stimulation and entertainment, and that to persuade them requires lawyers to "target the dominant emotion of the case" with "a simple slogan" or "a few vivid words that will stick in the jurors' minds."¹⁸³ While we demand that the fight be a fair one, this demand, though arising in part from empathy for the disadvantaged, in large measure is founded on the reality that a one-sided fight lacks interest.

The lawyer as actor also provides entertainment value. The American public has a love-hate attitude toward lawyers. While in recent years the public esteem of lawyers has suffered considerably, lawyers who are regarded as great performers in the trial arena often enjoy considerable respect and admiration. Even in England, the advocate who can spin a tale, inject a humorous note, or otherwise entertain is "positively treasured by laymen."¹⁸⁴

182 See *infra* notes 201-02 and accompanying text.

183 Roger J. Dodd, *Innovative Techniques: Parlor Tricks for the Courtroom*, TRIAL, Apr. 1990, at 38. The author emphasizes "how important it is to stimulate, impress, and sometimes entertain during the trial of a case. This is the TV generation, and mere words from the witness may no longer be enough to persuade or convince." *Id.*

184 HARVEY, *supra* note 101, at 13. The author notes that fairly often he has been regaled by retired military men with anecdotes like the following:

Marvelous chaps, some of you lawyers—I don't know how you do it. I remember there was a fellow in my regiment, quite a decent chap really—pretty useful polo player actually—but always getting himself into some sort of a mess. He was one of those chaps, you know—however much money they have they can always do with a bit more, what? Well, of course, when they made him Mess Secretary he just started helping himself out of the till. Didn't mean any harm I suppose—always thought he'd back a winner or something and put the money

Long ago Roscoe Pound traced what he called the sporting theory of justice to "the Anglo-Saxon bent for contentious procedure and love of a fair fight, and the desire of the pioneer American to see a forensic game of skill in backwoods court houses."¹⁸⁵ He found the sporting theory of justice "so rooted in the profession in America that most of us take it for a fundamental legal tenet."¹⁸⁶ Yet Pound strongly criticized the sporting theory on the ground that it leads to deciding cases "according to the rules of the game" rather than in accordance with a "search independently for truth and justice."¹⁸⁷ It leads to focusing on procedure rather than on substantive law—on the means as opposed to the ends:

Legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action. That procedure is best which most completely realizes the substantive law in the actual administration of justice Nothing is so subversive of the real purposes of legal procedure as individual vested rights in procedural er-

back again. But of course it didn't work out that way—ended with his being court-martialled. Well, it was an awful knock for his people—they had a place up in Shropshire—jolly good sort of family and all that, don't you know—his father commanded the 77th just before I went to Sandhurst. Well, in those days they had a bit of money—this was a decent time ago, mind you—so they got hold of Sir Edward Silvertongue to defend him. I shall never forget that court-martial. Of course, everyone knew the fellow was as guilty as Cain. But you should have heard old Silvertongue. He put up some story about the poor young fellow expecting a legacy from his uncle, or someone, and thinking he had got money in his bank when he hadn't—or thinking he was going to have it anyway—and then about how his future had all gone cock-eyed when he didn't get it; and then of course he started punting and drinking a bit and all that sort of thing, you know; and then how his girl chucked him over when she found out about the mess he was in; and heaven knows what else. By the time he had finished the tears were rolling down everybody's cheeks—seriously, the President was blubbing—never seen anything like it—and they were all thinking 'Poor devil, he never had a chance' and all that sort of rot; and of course this young fellow got off. Marvelous show! (Absolute scandal really of course.) After that he got a transfer to the 15th/54th but it didn't do any good—couldn't stay the course, you know—no one ever expected he would. In a few years he was nailed again—just the same thing. But the family coffers were getting a bit low by then; they couldn't afford Silvertongue again. I've forgotten who they got hold of but, anyhow, he was potted that time—cashiered, he was. But, my word, you ought to have heard old Silvertongue at that court-martial—miraculous show it was!

Id. at 11-12.

¹⁸⁵ Roscoe Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926).

¹⁸⁶ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906).

¹⁸⁷ *Id.*

rors.¹⁸⁸

Many others have echoed Pound's objection to the sporting approach.¹⁸⁹ My former colleague Professor Rollin Perkins pointed out that the sporting theory looks at every step in the criminal process as if it were a game to be played according to technical rules, and which decides cases based on whether the "technicalities in criminal procedure" have been observed.¹⁹⁰

At times, however, critics of the sport or game theory of justice are vague as to which practices offend them. They provide us no clear answer whether the fault lies in the nature of the adversary system itself or in absurdly technical rules which could be changed without altering the fundamental nature of the system of justice. For example, Professor Perkins pointed to convictions which were reversed because of some technical error in the pleadings or minor error at trial. His principal objection is not with the adversary system itself, but with undue insistence on compliance with legal technicalities and on the failure to apply harmless error standards on appeal.¹⁹¹ On the other hand, he saw the need for "a whole-hearted effort to get at the real truth of the matter"¹⁹² and for "the most sweeping changes both in the machinery to be used and in the mental attitude of lawyers and judges in regard to the use of this machinery."¹⁹³ The existing machinery, he observed, allows clever lawyers on both sides to play the game by using "all kinds of tricks and schemes and surprises and concealments"¹⁹⁴ with the assumption that "the result of this combat of wits will be that right will prevail, provided only the

188 Pound, *supra* note 185, at 543.

189 See, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80-102 (1949); ALBERT GUÉRARD, *TESTAMENT OF A LIBERAL* 114-15 (1956). In 1926 Professor Perkins cited numerous critics of our sporting theory of justice and suggested that we have lost our focus on the real objective of our system of justice:

We have been so deeply engrossed for so long a period of time in the effort to see that all of the rules of the game are duly observed under our "sporting theory of justice," that we have to an alarming degree lost sight of the real purpose of the investigation, which should be to determine whether the defendant is innocent or guilty.

Rollin M. Perkins, *Absurdities in Criminal Procedure*, 11 *IOWA L. REV.* 297, 324-25 (1926).

190 Rollin M. Perkins, *The Great American Game*, *HARPER'S MONTHLY*, November 1927, at 750, 754.

191 Perkins, *supra* note 189, at 300-22.

192 *Id.* at 333.

193 *Id.* at 335.

194 *Id.* at 332-33.

rules of the game are carefully observed."¹⁹⁵ It is difficult to determine whether Professor Perkins is merely pleading for the abolition of formal, technical rules that frustrate truth-seeking or is calling for a drastic overhaul of the adversary system into one which is not adversary at all, but one in which all participants are devoted to the inquiry for truth. In any event, as a result of our attachment to the game or contest, reliable fact-finding often becomes a secondary objective.

Our strong attraction to the courtroom battle goes hand-in-hand with our diminished respect for the discovery of the truth. Once the unquestioned primary objective of the criminal trial, truth-finding over the past few decades has been subordinated to a number of other values, often in situations where the reasons for sacrificing truth appear more speculative than compelling. Our significant reliance on exclusionary rules implies the value we place on discovery of truth. For the most part, our constitutional exclusionary rules are an American peculiarity. Our extensive use of rules which exclude relevant evidence in order to further extrinsic objectives reflects the lesser importance we place on accurate fact-finding. We are not the only country to exclude reliable evidence in order to further collateral objectives, yet the scope, complexity, and stringent operation of our exclusionary rules suggests that no other country has so little regard for the accuracy of its criminal trial results.¹⁹⁶

Illegally obtained evidence is generally admitted not only in Continental legal systems, but also in England and the Commonwealth countries.¹⁹⁷ For example, while England excludes confessions obtained by coercion, it rejects application of the fruit of the

195 *Id.* at 332.

196 Professor Damaska found that "exclusionary rules are more numerous and surely much more elaborate in America than they are in any civilian jurisdiction." Damaska, *supra* note 12, at 521. Furthermore, "[t]he volume of American constitutional law on exclusionary rules is clearly without precedent anywhere . . . [and the rules have] . . . a much greater practical significance than in any civil law country." *Id.* at 523. While some rules may be explained by a desire to improve factfinding reliability, he concluded that others clearly reflect "a conscious sacrifice of fact[-]finding accuracy for the sake of other values." *Id.* at 525.

Continental countries in particular place great importance on discovering the truth as the principal aim of the trial. Weigend, *supra* note 123, at 63 ("[T]he German system . . . looks in a less inhibited fashion to the desired end result: the emergence of the truth."). In part, this enhanced respect for the truth may be attributed to the fact that the court itself is charged with the responsibility of discovering it.

197 LANGBEIN, *supra* note 29, at 69. Langbein believes that our exclusionary rules are not an integral feature of adversary criminal procedure.

poisonous tree doctrine to knowledge of facts obtained as a result of extorted confessions.¹⁹⁸ Furthermore, English law does not require suppression of physical evidence on the ground that it was the fruit of an unlawful search, detention, or arrest.¹⁹⁹ In England and on the Continent, exclusionary rules are used primarily to protect against unreliable evidence and to enhance the integrity of the verdict. While most systems would suppress evidence obtained by extreme forms of police misconduct or by means that taint the reliability of the evidence, police illegality alone generally will not result in suppression, particularly of reliable fruits or products later discovered.²⁰⁰

Our Supreme Court has taken an ambivalent approach to the question of the importance of accurate verdicts. On the one hand, it has announced that "[t]he basic purpose of a trial is the determination of truth,"²⁰¹ and has cautioned that "a criminal trial is not a game."²⁰² However, the Court has not clarified the admonition nor explained its relevance to those numerous cases in

198 See *Rex v. Warickshall*, 1 Leach 263, 264 (1783); Police and Criminal Evidence Act, 1984, ch. 60, § 76(4) (Eng.).

199 *Regina v. Sang*, 1980 App. Cas. 402, 436 (1978) (appeal taken from C.A.); Police and Criminal Evidence Act, 1984, ch. 60, § 67(8)(10) (Eng.); *Fox v. Chief Constable*, 3 All E.R. 392, 396-97 (1985) (H.L.). See generally, Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HAST. L.J. 1, 32-33 (1986).

200 Jescheck, *supra* note 28, at 245-46. The exclusionary rules of Germany and other Continental countries generally are narrower and more flexible than ours. For example, the German and American systems converge in their treatment of coerced confessions obtained through brutality or deceit, but the failure to give Miranda-type warnings to suspects generally will not result in exclusion. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1064 (1983). German search and seizure rules are less stringent, and courts do not automatically suppress evidence that the police discover through violation of the rules. *Id.* at 1035-39. Rather, the court will attempt to strike a balance between protection of the defendant's rights and the interest in effective law enforcement, which will take into account the seriousness of the offense as well as the strength of suspicion. *Id.* at 1035, 1041. Even when evidence is suppressed, it nevertheless is known to the presiding judge who participates in determining guilt and sentence. *Id.* at 1063-64.

With respect to the French system, see Frase, *supra* note 32 at 586 n.254. (The Procedure Code contains only a few explicit exclusionary rules, and most violations give rise to exclusion only if they are found to have violated substantial provisions of the Code and to have resulted in prejudice to defendant's interests. Even then, evidentiary fruits are not necessarily excluded. Though the French exclusionary rules are narrow, Frase contends that ours are as well in light of the numerous limitations and exceptions adopted by the Supreme Court.)

201 *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

202 *United States v. Cronin*, 466 U.S. 648, 657 (1984); *Morris v. Slappy*, 461 U.S. 1, 15 (1983); see also *Williams v. Florida*, 399 U.S. 78, 82 (1969) ("The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.").

which it has established strict and often highly technical rules of procedure for the conduct of investigations and trials. Rather, the Court has placed great reliance on the Fourth and Fifth Amendment exclusionary rules, at the same time recognizing that they are not adjuncts to the ascertainment of truth. The Court said these exclusionary rules "derogate rather than improve the chances for accurate decisions."²⁰³ Currently, a *Roberson* extension of the *Edwards* extension of the *Miranda* rules bars the police from initiating interrogation concerning a separate investigation once the suspect requests a lawyer.²⁰⁴ The Court recently conceded that a violation of the *Roberson* rule "would not seriously diminish the likelihood of obtaining an accurate determination [of the facts] . . . indeed, it may increase it."²⁰⁵ Yet it later expanded *Edwards* in another direction on the ground that the gain in clarity and specificity of a absolute rule outweighs the adverse effects of "the suppression of trustworthy and highly probative evidence."²⁰⁶

The Supreme Court is not alone in its inconsistent approach toward the importance of truth-discovery. State courts and legislatures have also traditionally resisted free and open discovery in criminal cases, which often results in trials by surprise.²⁰⁷ Our aversion to full discovery for the defense stems in large part from constitutional barriers protecting the defendant from disclosure of evidence to the prosecution. Nevertheless, implicit in this insistence in mutuality of discovery is the assumption that a criminal trial is essentially a sporting contest between opposing counsel and, thus, no greater disclosure burden should be imposed on the prosecution than is imposed on the defense.²⁰⁸

203 See *Baxter v. Palmigiano*, 425 U.S. 319 (1975).

204 *Arizona v. Roberson*, 486 U.S. 675 (1988).

205 *Butler v. McKellar*, 110 S. Ct. 1212, 1218 (1990).

206 *Minnick v. Mississippi*, 111 S. Ct. 486 (1990) (When a suspect requests a lawyer, interrogation must cease, and police may not re-initiate interrogation without counsel present, even if the suspect has consulted with his lawyer.).

207 No American jurisdiction gives the accused the right to unlimited, Continental-style discovery. See *Damaska*, *supra* note 12, at 534. In California, discovery for the defendant was pervasive and discovery for the prosecution non-existent, but an voters initiative enacted two years ago placed new limits on defense discovery while expanding discovery for the prosecution. Section 23 of Proposition 115, effective June 6, 1990, adding Chapter 10 of the California Penal Code. 1990 Cal. Adv. Legis. Serv. 264. For California's previous "one-way street" approach, see Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964); Gordon Van Kessel, *Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation*, 4 HASTINGS CONST. L.Q. 855 (1977).

208 SCHLESINGER ET AL., *supra* note 29, at 485 n.28.

Continental systems uniformly reject this assumption. Even the recent Italian Criminal Code revision adopting many accusatorial characteristics retained mandatory full pretrial discovery for the defense. The rationale for retaining open discovery while moving toward an adversary style was explained by an Italian professor and a judge: "Such an expansive defense discovery reflects the purpose of rejecting the sporting theory of justice. To Italian lawyers, a trial by surprise would be an unbearable violation of the constitutional provision on due process of law."²⁰⁹

Our adversary system's absolutist approach toward jury independence reflects the low respect we hold for the accuracy of verdicts. In contrast to Continental systems, our courts reject any requirement that the fact-finder explain or otherwise provide the basis for its decision. We prohibit both special verdicts and interrogatories to the jury on the ground that their use would allow the judge to intrude upon the independence of the jury.²¹⁰ The judge must not be allowed to carefully guide the jury through the use of interrogatories,²¹¹ and the jury must be left "unfettered, directly or indirectly."²¹²

Our legal profession, as well, has not been entirely forthright in its attitude toward accurate fact-finding. Judge Frankel, a strong advocate of modifying the adversary ideal to enhance the importance of truth-discovery, recognized that "our profession has practiced some self-deception."²¹³ On the one hand, we proclaim that our adversary system is the best means for arriving at the truth, while on the other hand, we know "that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth."²¹⁴ Perhaps an honest assessment of our adversary system would lead one to Professor Saltzburg's conclusion that its goal is simply "to apply the substantive legal principles so that those who have rights may claim them and those who have liabilities must face them."²¹⁵ Professor Saltzburg contends that once the "search

209 Amodio & Selvaggi, *supra* note 12, at 1223.

210 *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969); *Gray v. United States*, 174 F.2d 919, 923-24 (8th Cir. 1949).

211 *Spock*, 416 F.2d at 180-82.

212 *Id.* at 182.

213 Frankel, *supra* note 109, at 1036.

214 *Id.*

215 Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 654 (1986).

for truth" is viewed as a poor description of the system, one should have no problem with the fact that litigants pursue victory rather than truth and that the system's rules often operate to frustrate truth-discovery. However, this approach of regarding the criminal process simply as a method of asserting established rights and liabilities without any higher goals begs the question of the importance of truth-finding relative to other values.

All will agree that there are times when "[t]ruth like all other good things may be loved unwisely, may be pursued too keenly, may cost too much."²¹⁶ Even Jeremy Bentham, an ardent opponent of exclusionary rules that frustrate truth-finding, recognized that "evidence, even justice itself, like gold, may be bought too dear. It always is bought too dear, if bought at the expense of preponderant injustice."²¹⁷ Judge Frankel also did not have a simplistic, rigid respect for truth, but acknowledged that "a simplistic preference for the truth may not comport with more fundamental ideals" which include "individual freedom and dignity."²¹⁸ Indeed, most debates over other fundamental values concern the relative weight rather than the existence of such values. Judge Frankel argues that "our adversary system rates truth too low"²¹⁹ when compared with these other values; whereas, Professor Milton Friedman objects that Judge Frankel gives these other values "substantially less than their due"²²⁰ Nevertheless, it is apparent that, when compared with nearly all other countries, we overrate the importance of the trial contest and considerably undervalue accurate fact-finding. In justifying the position that in our system "constitutional rights . . . serve independent values that may well outweigh the truth-seeking value,"²²¹ Professor Friedman contrasted our free society with totalitarian states. But he failed to mention the numerous democracies of Western Europe that maintain protection for the accused yet place much greater importance than we do on discovery of truth.

We might consider the California Supreme Court's language justifying discovery for the defendant and apply it to the general

216 *Pearce v. Pearce*, 63 Eng. Rep. 950, 957 (1846), cited in *West Virginia v. Douglass*, 20 W. Va. 770, 783 (1882) (discussing the attorney-client privilege).

217 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 482 (John Stuart Mill ed. 1827).

218 Frankel, *supra* note 109, at 1056.

219 *Id.* at 1032.

220 Friedman, *supra* note 9, at 1065.

221 *Id.* at 1063.

principal that, with few exceptions, the discovery of truth prevails even over the adversary ideal:

Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal.²²²

Leaving aside the question of the proper weight to be accorded truth relative to other values served by the criminal justice system, some have attacked the notion that objective truth can ever be the primary goal of the criminal trial.²²³ Criticizing those who describe truth-discovery as the primary function of criminal procedure, Professor Peter Arnella contends that equating truth with historical fact erroneously assumes a "pure guilt or innocence model of criminal procedure."²²⁴ The nature of the inquiry in criminal cases, he argues, is directed not merely toward the discovery of objective historical facts, but toward a mental element which involves value judgments regarding the defendant's moral culpability, something he distinguishes from truth-discovery.²²⁵

Our substantive criminal law requires a moral evaluation of the actor's conduct by including some mental element (e.g., purpose, knowledge, recklessness, or negligence) in its definition of most offenses and by its recognition of affirmative defenses that either justify the defendant's conduct or excuse it. Since substantive guilt includes both facts and value judgments about the actor's moral culpability, criminal procedure must provide a procedural mechanism that reliably reconstructs historical facts and morally evaluates their significance. The combination of these two procedural functions—reliable historical fact reconstruction and moral evaluation—cannot be equated with "truth discovery."²²⁶

222 *In re Ferguson*, 487 P.2d 1234, 1238 (Cal. 1971).

223 Peter Arnella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Court's Competing Ideologies*, 72 *Geo. L. J.* 185 (1983); see also, John D. Jackson, *Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach*, 10 *Cardozo L. Rev.* 475, 484 (1988) (There may be differing epistemological conceptions about the meaning of truth and the kinds of truths that are most important.)

224 Arnella, *supra* note 223, at 196-97, 208.

225 *Id.* at 197.

226 *Id.* at 197-98.

Arnella further argues that even when the issue is solely one of historical fact, as with an alibi or mistaken identity defense, the process of factual reconstruction "expresses an error deflection preference" by requiring a high standard of proof of guilt "which prefers erroneous acquittals over erroneous convictions."²²⁷ In this way, the process requires a moral evaluation of the defendant's conduct; consequently,

when commentators describe the primary function of criminal procedure as "truth-discovery," they provide an oversimplified and misleading account of how our system is designed to determine guilt. The "truth-discovery" label ignores the moral content and force of substantive guilt and the resulting need for a process that evaluates the moral quality of the defendant's actions.²²⁸

Though moral culpability certainly plays a critical role in the substantive law and is itself an ultimate goal of criminal procedure, Professor Arnella fails in attempting to separate truth from moral culpability. Few would contend that truth is always an objective which, like a scientific principle or an ancient ruin, is waiting to be discovered and verified. But most judges and lawyers would agree that the central issues in the great bulk of criminal cases involve the determination of historical facts. Examples include the identity defense (alibi and mistaken identification), self-defense (who was the first attacker), denial of criminal acts (consent of alleged rape victims, denial of assault against an officer, claim that the officer planted a gun or drugs on the defendant). Even when the ultimate issue concerns a mental element, it often can be regarded as a question of historical fact involving an identifiable state of mind. Examples include the existence of intent (such as an intent to assault, kill, or steal upon entering a building) and the existence of knowledge (such as an awareness of the presence or quality of a narcotic drug.).

In some cases (insanity, premeditation and deliberation, or honest but mistaken belief in the need for self defense), the state of mind element will not be simple or clearly defined and fixing boundaries of liability may involve what Arnella describes as moral evaluations of defendants' actions. Nevertheless, in all cases involving a mental element, a defendant's past state of mind still is an

227 *Id.* at 198.

228 *Id.*

historical fact. In any event, states of mind usually must be proven by circumstantial evidence which often involves resolution of historical fact disputes. For example, to determine whether a defendant intended to kill, the jury might be asked to decide whether the defendant had a business or personal dispute with the victim, or if the defendant had threatened the victim. The question of whether a defendant premeditated or deliberated prior to the killing might involve factual disputes concerning the time of the victim's death or the time between the first and final shot.

Without foundation is Arnella's further argument that our high standard of proof of guilt which "prefers erroneous acquittals over erroneous convictions" also leads to the conclusion that truth discovery cannot be the primary function of the criminal trial. The fact that our system, in accord with those of other civilized countries, demands that convictions be supported by strong proof of guilt certainly reflects a moral preference to favor the accused in cases in which guilt is not free from reasonable doubt, but this does not show a lack of respect for the truth-finding function. Our high standards for conviction do not demonstrate that truth discovery cannot be the primary function of the criminal trial, but merely reflect a greater aversion to convicting innocent people than to acquitting guilty ones and an acceptance of the fact that coming to an accurate result in most cases is not as important as avoiding erroneous convictions. We can regard the search for historical truth as the primary goal of the criminal trial while, at the same time, require that findings of guilt be avoided unless based on reasonable certainty. We take a similar careful approach to scientific research when offered to support new drugs or medical procedures, yet few would contend that such research is not aimed at discovering historical or objective truth merely because of stringent demands for proof of effectiveness and safety.

In conclusion, to contend that truth-discovery should be the primary function of the criminal trial is not to assert that our criminal trial reflects a pure guilt or innocence model in the sense that truth-discovery is its sole function or that truth-discovery always must prevail over other interests. Also, the jury's search for the existence of a mental element can be equated with a search for truth. In the vast bulk of criminal trials, defendant's legal responsibility is determined by the process of historical fact-finding, whether with respect to conduct, state of mind, or both. To describe the primary function of the criminal trial as truth-discovery in terms of the quest for an accurate result is not to oversim-

plify or to mislead, but to place collateral concerns in perspective and to focus on the main object of the criminal trial.

4. Over-Reliance on the Lay Jury

We are unique both in the extent to which we utilize the all-lay jury system and in the manner of its use. The vast majority of civilized countries have rejected the all-lay jury. Although it existed on the Continent for some time after the French Revolution, it was abandoned by Germany, France, Italy, and other countries during the first part of this century in favor of a mixed tribunal.²²⁹ At present, there appears to be a consensus on the Continent against the all-lay jury, and the open question is whether this negative view will lead to abolition of lay participation in the mixed court. Although the benefits of the lay jury are discussed on the Continent, the disadvantages are more often stressed and can be summed up by the following comment by Professor Graven of Geneva: "*Le jugement par jury c'est, indiscutablement, le triomphe de l'incompétence.*"²³⁰ Currently, the lay jury remains mainly in Britain, the British Commonwealth, and the United States. Of the three, we are by far the most enthusiastic user of the system. More than ninety percent of the world's criminal jury trials, and nearly all of its civil jury trials, take place in the United States.²³¹

The way we use our jury system is also excessive. Federal, California, and many other state courts maintain the traditional twelve-person and unanimity requirements, though the Supreme Court has allowed some flexibility in this area. However, the Supreme court is unlikely to extend this flexibility with approval of a Continental-style mixed court in which professional judges sit alongside lay jurors and participate with an equal vote in deliberations.²³² On the contrary, the Court has continued to heap praise upon our criminal jury trial as providing ordinary citizens the "honor and privilege" of participating in the democratic process through jury service and acting "as a vital check against wrongful exercise of power by the State and its prosecutors."²³³

229 In Germany the lay jury was introduced in the mid-nineteenth century, but was abolished in 1924. Other countries soon followed Portugal in 1927, Italy in 1931, Spain in 1936, and France in 1941. Jescheck, *supra* note 28, at 240-51.

230 Jescheck, *supra* note 28, at 244 (quoting P. GRAVEN, *REVUE PINALE SWISSE* 154a (1938)).

231 Casper & Zeisel, *supra* note 3, at 135-36.

232 See *infra* part III.A.1.

233 Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991) (citing *Batson v. Kentucky*, 476 U.S.

Extensive use of voir dire and peremptory challenges distinguishes our jury selection procedure from the process of selecting the Continental mixed court or the English lay jury. Historically, Continental systems have not recognized peremptory challenges to either professional or lay judges. In Germany, for example, the grounds for challenging professional and lay judges are the same and are limited to what we categorize as "for cause" challenges.²³⁴ Lay members of the German mixed court are not selected for each case, but are assigned to particular courts randomly for fixed periods of time, and voir dire is unknown.²³⁵ English law also prohibits the litigants from questioning prospective jurors,²³⁶ and in 1988, England abolished all peremptory challenges.²³⁷

In this country, voir dire and the exercise of peremptory challenges often compose a significant part of the trial of criminal cases. In a serious case, our jury selection process can occupy a substantial portion of the guilt trial. For example, jury selection in capital cases in California has taken months.²³⁸ Occasionally, the selection process has lasted longer than the trial itself. In one capital murder case in Oakland which involved three defendants and seven lawyers (two for each defendant and the prosecutor), jury selection lasted over eleven months though the trial lasted less than two months.²³⁹

Yet voir dire time often is wasted. A content analysis of voir dire conducted for the University of Chicago Jury Project revealed that the bulk of voir dire time was spent preparing the jurors for the case rather than the actual selection process.²⁴⁰ Even without lengthy attorney voir dire, our jury selection process may take substantial time in particular cases because of the extensive use of peremptory challenges and the prosecutor's perceived need to

79, 86 (1986)).

234 LANGBEIN, *supra* note 29, at 142 n.1.

235 *Id.*

236 Graham Hughes, *English Criminal Justice: Is It Better than Ours?*, 26 ARIZ. L. REV. 507, 592 (1984).

237 See Samuel J. Cohen, *The Regulation of Peremptory Challenges in the United States and England*, 6 B.U. INT'L L.J. 287, 306-08 (1988). The prosecution retains jury vetting authority (the power to ask a juror to "stand by"), but such authority is restricted by Attorney General Guidelines. See also *The Exercise by the Crown of its Right of Stand By*, 88 Crim. App. 123, 125 (Attorney-General's Guidelines on Juries, January 5, 1989); ARCHBOLD, *supra* note 127, at § 4-139.

238 See *infra* part III.D.1.

239 *People v. McDonald, Robinson, and Evin*, Docket (Alameda Super. Ct. 1991).

240 HANS ZEISEL ET AL., *DELAY IN THE COURT*, 103 n.9 (2d ed. 1978) (citing study by Professor Saul Mendlovitz).

exclude those who would never convict, particularly in jurisdictions requiring unanimous verdicts. Also, the Supreme Court's recent well-intentioned but misguided effort to tame the use of racially motivated peremptory challenges in *Batson v. Kentucky*²⁴¹ has produced, in the words of Professor Alschuler, "cumbersome procedures that will generate burdensome litigation for years to come."²⁴² Indeed, "[i]f one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*."²⁴³ The Court has expanded *Batson* and allowed a defendant to object to a prosecutor's race-based peremptory challenge regardless of whether the defendant and the excluded juror are of the same race.²⁴⁴ However it has left unanswered such questions as whether its rules apply to peremptory challenges exercised by the defendant or to peremptory challenges based on sex, religion, age, economic status or "any other personal characteristic unrelated to the capacity for responsible jury service."²⁴⁵ Only further experience with *Batson* and its progeny will reveal its full impact on the jury selection process. Eventually, it may lead to the requirement that both the prosecution and the defense justify all peremptory challenges on narrow benign grounds; yet, even those challenges would have to be fully articulated, which would then make them similar to a challenge for cause.

Modification of our approach to the all-lay jury would not undermine the adversary system since the twelve-person jury, unanimity, and extensive voir dire are not among its essential ingredients. England maintains an adversary trial, yet has no significant voir dire²⁴⁶ and allows a ten-to-two verdict after two hours of deliberations.²⁴⁷ The denigration of our voir dire process has been

241 476 U.S. 79 (1986).

242 Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156-57 (1989) (arguing that *Batson* creates seven areas of litigation and that peremptory challenges are not compatible with the Equal Protection Clause).

243 William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 155.

244 Powers v. Ohio, 111 S. Ct. 1364 (1991).

245 *Id.* at 1381 (Scalia, J., dissenting). The Court recently agreed to decide whether the Constitution prevents criminal defendants from exercising peremptory challenges in a racially discriminatory manner. *Georgia v. McCollum*, 112 S. Ct. 931 (1992).

246 See Hughes, *supra* note 236.

247 See *Regina v. Thornton*, 89 Crim. App. 54 (1988); ARCHBOLD, *supra* note 127, at

attributed to our "addiction to all-out adversariness,"²⁴⁸ but the elimination of extensive voir dire would not change the basic adversary character of our criminal trial. There is nothing inherent in the adversary system that necessitates the American-style extended voir dire.

Finally, we should temper our worship of the traditional all-lay jury in view of the lack of evidence to support its reliability. Studies of the operation of the jury system generally conclude that defendants fare better than they would with a single judge, but do not show that overall jury verdicts are more accurate than bench verdicts.²⁴⁹ In fact, a principal argument made in support of the jury is that it may disregard the duty of accurate fact-finding and consequently, moderate the harshness of the written law. The jury, it is said, insures that the fact-finder can "dilute logic with mercy"²⁵⁰ such that we are governed by the spirit, rather than merely the letter, of the law. Even strong defenders of the jury recognize that, to a considerable extent, the jury forsakes both law and reason. Patrick Devlin described the English jury as follows:

In most systems the just decision is tied pretty closely to the law; the law may be made as flexible as possible, but the justice of the case cannot go beyond the furthest point to which the law can be stretched. Trial by jury is a unique institution, devised . . . to enable justice to go beyond that point. The essentials of the device are that the tribunal consists of a comparatively large body of men who have to do justice in only a few cases once or twice in their lives, to whom the law means something but not everything, who are anonymous and who give their decision in a word and without a reason.²⁵¹

This flexibility has its desirable qualities and is praised by the jury's defenders as much as it is criticized by its detractors. Referring to attitudes toward the jury trial, Kalven and Zeisel remarked, "[o]ne is tempted to say that what is one man's equity is another man's anarchy."²⁵² However, it shows our willingness to

4-444 (discussing Juries Act, 1974 s.17 (Eng.)).

248 Hein Kötz, *The Reform of the Adversary Process*, 48 U. CHI. L. REV. 478, 480 (1981) (book review).

249 For example, the well-known jury study by Kalven and Zeisel found that when compared with bench trials, jury verdicts favor criminal defendants 16% more often. KALVEN & ZEISEL, *supra* note 3, at 59.

250 HARVEY, *supra* note 101, at 4.

251 DEVLIN, *supra* note 90, at 154.

252 KALVEN & ZEISEL, *supra* note 3, at 9.

sacrifice accuracy for other values, and it shows that we realize accuracy of jury verdicts may not be its principal strength. Indeed, many trial lawyers believe that trying a case to a jury is often a crap shoot.²⁵³ The public generally assumes that jury trials are preferable to plea bargains and that many more cases should be tried if we could afford it. However, many criminal lawyers believe that the negotiating process does a better job of achieving justice than contested jury trials, and this view is shared by many judges. Though lawyers with an interest in disposing of cases through plea bargaining may tend to exaggerate its merits, the fact that many of those closest to the bargaining and trial processes believe that justice more often will be achieved through bargaining should tell us something about the integrity of our jury trial system.

5. Formal and Complex Rules of Evidence and Procedure

Lawyer domination of the trial and the excessive value placed on both the contest and the lay jury has contributed to the greatly increased formality and complexity of the rules of evidence and procedure over the past thirty to forty years. It is not surprising that Europeans, with their liberal rules of admissibility, generally look upon our complex system with bewilderment.²⁵⁴

Many of our formal and technical rules of evidence flow directly from the adversary character of our trial and, though designed to guarantee a fair contest and a just result, actually tend to delay and disrupt the presentation of evidence and to distract the jury from the discovery of the facts.²⁵⁵ For example, our formal rules of evidence prohibit narrative responses and encourage stilted direct examination, broken by objections, arguments of counsel, court rulings, and admonitions to witnesses and jurors. Our rules against hearsay and character evidence provide ample opportunity for objections to relevant evidence which might be

253 Alschuler also has noted the observations of practitioners that sending a case to a jury is "very much like rolling dice" or "a plunge from an unknown height." Alschuler, *supra* note 242, at 153.

254 See, Kötz, *supra* note 248, at 480-81 ([T]he development of arsenals of procedural swords and shields with advanced complexity and technicality has resulted in the ordinary criminal trial ceasing to be a workable institution.); Volkmann-Schluck, *supra* note 4, at 25 ("the jury trial has become too costly in time, labor, and money and too overloaded with complex rules and procedural safeguards . . .").

255 Moreover, evidence rules allowing liberal cross-examination by attorneys invite overly aggressive, sometimes vicious, attacks on witnesses which may dissuade victims from reporting crime and witnesses from testifying.

misused by the lay jury. Highly aggressive and contentious counsel who readily assert all possible objections and arguments make the trial process a long battle between semantic warriors which, though often entertaining, does little to further the trial's main objectives. Contentious trials tend to have fewer stipulations and, therefore, counsel spend more time proving collateral facts or foundations for the admission of evidence. Also, there are usually more objections to the questioning of witnesses, as well as arguments between counsel designed to impress the jury.

Contrast the Continental approach. There are no hearsay, character evidence, or other rules designed to protect the lay jury. Witnesses are called and initially questioned by the court, rather than by the parties, and therefore tend to be less identified with a particular party. There is no implicit understanding or commitment with respect to their testimony by reason of how they arrive in court. These procedures, together with rules prohibiting the pretrial preparation of witnesses by the parties, tend to make witness testimony less contrived as well as less partisan. This is particularly beneficial when it comes to expert testimony. The use of judicial experts could largely avoid our current battle of experts who are paid by the parties and who in many cases are merely hired guns totally committed to their party-employer.²⁵⁶ Zeidler remarked that in German courts experts "do not come into the proceedings with a partisan perspective, but as neutral assistants to the court, supplying it with technical knowledge not otherwise available to the judges themselves."²⁵⁷

The Continental-style witness examination is similarly less distorted by adversary excesses. The lack of strict rules of evidence, such as the prohibition of leading questions on direct examination, allows witnesses to give narrative and explanatory answers. The entire examination becomes more informal and more natural. It also tends to avoid turning the examination into a hostile confrontation between the lawyers, diverting the jury's attention away from the facts to the lawyer-contest and delaying the elicitation of testimony. Langbein described the German examination of witnesses by the presiding judge as follows: "The tone of the examination is crisp and business-like, but not hostile. Witnesses seldom emerge

256 LANGBEIN, *supra* note 29, at 75.

257 Zeidler, *supra* note 46, at 156. Zeidler noted, however, that special dangers do exist when judges overestimate the authority of court-appointed experts who regularly appear before them, but one may find ways to avoid such problems and may ask whether even greater dangers lie in our current forensic battles of partisan experts.

from a trial feeling mishandled, as is so often the case in the adversary procedure."²⁵⁸

Another factor contributing to the complexity of our adjudication process has been the development, beginning in the 1960s, of exclusionary rules of evidence. These rules are designed to serve collateral purposes, such as policing the police, which hide reliable evidence from the jury and undercut reliable fact-finding. Exclusionary rules are not a simple product of our adversary system; rather, they are the result of an active judiciary seeking to control the activities of law enforcement officials at the expense of achieving a reliable result in the judicial proceeding. Exclusionary rules are a police control mechanism rather than an integral part of the adversary system. They result, in part, from the perceived failure of other means to limit police authority. Yet adversary excesses such as over-lawyering, which emphasize the contest rather than the truth, contribute to these exclusionary rules. The motivation of our lawyers to win at all costs, together with the diminished value we place on the integrity of the result of the process, naturally lead to acceptance of complex and technical exclusionary rules.

D. *The Price We Pay for Our Excesses*

1. Lengthy Trials and Plea Bargaining

(a) *Our Monster Trial Process*.—The giant American criminal trial is a modern invention. Until very recently, criminal trials were short and efficient, with few technical rules of evidence and less reliance on lawyers.²⁵⁹ It was not until nearly the 19th century

258 LANGBEIN, *supra* note 29, at 74-75.

259 Although this Article focuses on the length of trial, excessive delay in overall case processing time also presents a serious problem in many jurisdictions. See KATHLEEN B. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING (1979); THOMAS CHURCH ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978); NATIONAL INST. OF JUSTICE, MANAGING THE PACE OF JUSTICE (1981); NATIONAL INST. OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS 1979, at 21-23 (1983).

It should be noted, however, that the length and complexity of trials and the collateral proceedings accompanying them greatly extend case processing time. A 1986 report on felony case processing time in 12 jurisdictions found that the average time from arrest to disposition was about twice as long (somewhat less than 8 months) for cases that went to trial as opposed to cases disposed by guilty pleas or dismissals. U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE DATA REPORT 32 (1986).

The fact that a case involves a capital offence also significantly extends case processing time. Delays in the imposition of the penalty of death are well known. The average time from sentence to execution for those executed in this country from 1986 to

that English trials developed any length or complexity. In late 17th century England there were few guilty pleas and virtually no plea bargains, and twelve to twenty full jury trials were conducted in the Old Bailey each day.²⁶⁰ This trial rate continued well into the 18th century, and it was not until 1794 that a trial ever lasted for more than one day.²⁶¹ Frequently, the jury was asked to hear evidence in two or three cases before retiring to deliberate.²⁶² These rapid jury trials occurred when trials were informal affairs. There were no lawyers, no jury voir dire, the rules of evidence were entirely undeveloped, and the accused participated actively. Judges discouraged guilty pleas.²⁶³

(b) *Trials Versus Guilty Pleas in America.*—Turning to America, we find some disagreement as to when guilty pleas began to increase and the number of trials began to decline. Most likely, the shift occurred sometime during the 19th century.²⁶⁴ A study of convictions in the state of New York found that in 1839, 22% were the result of guilty pleas. By 1869, this had increased to 70%, and by 1920, it was 88%.²⁶⁵ By the late 19th century, guilty pleas were a common method of case disposition in the United States. Nevertheless, most surveys demonstrate that during the early part of this century, more convictions were based on trials and fewer on guilty pleas than at present. An American Law Institute study found that in 1908, and for several years thereafter, only about 50% of all convictions in the federal courts were by plea as opposed to trial.²⁶⁶ Several 1920 studies of felony case dispositions disclosed trial rates (trials as a percent of convictions) in the 20%

1988 was over 80 months. U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1988, 10 (1989).

260 Langbein, *supra* note 66, at 277-78.

261 Langbein, *supra* note 27, at 216-17.

262 Landsman, *supra* note 55, at 17.

263 An exploration of the characteristics of ordinary criminal trials conducted at the Old Bailey between the mid-1670s and the mid-1730s can be found in Langbein, *supra* note 66, at 267-84; see also Alschuler, *supra* note 6, at 971. For accounts of a well-known political trial, see STEPHEN, *supra* note 172, at 324 (describing the trial of Sir Nicholas Throckmorton).

A description of a mid-16th century trial can be found in THOMAS SMITH, *DE REPUBLICA ANGLORUM*, 94-104 (Leonard Alston ed., 1906.)

264 See U.S. DEP'T OF JUSTICE, *THE PROSECUTION OF FELONY ARRESTS* 12 (1979); see also Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 8-10 (1979) (guilty pleas accounted for only a small minority of criminal convictions during the colonial period and through the first part of the 19th century).

265 RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 164 (1929).

266 Alschuler, *supra* note 264, at 27.

to 25% range. Pound and Frankfurter in their 1922 Cleveland Survey found that approximately 75% of the convictions in Cleveland's felony court in 1919 were by guilty pleas and about 25% were by trial.²⁶⁷ Looking at over ten thousand felony cases in the state of Missouri, the 1926 *Missouri Crime Survey* found that about 20% of felony convictions were from trials and 80% from guilty pleas.²⁶⁸ The 1931 Wickersham Commission Report cited case disposition figures from four jurisdictions during the 1920s which revealed that, as is the case today, dismissal was the most common disposition of criminal arrests and most convictions resulted from guilty pleas.²⁶⁹ However, the report disclosed trial rates averaging 26%. These rates are very close to the results of the 1922 Cleveland survey, and are considerably greater than what generally prevails in the United States today.²⁷⁰

A study of court dispositions in Connecticut Superior Courts from 1880 to 1954 disclosed lower trial rates. It concluded that the ratio of trials to total dispositions did not change appreciably over this 75-year period—the mean being 8.7%.²⁷¹ However, the study's disposition tables disclose a slow, though uneven, downward trend in the percentage of trials to total dispositions: from 1880 through the early part of this century, trials amounted to about 10% of total dispositions, whereas by the 1970s, the number of trials had dropped to around 4 percent.²⁷²

In California since at least 1970, there has been a clear shift away from trials and toward convictions by plea. In 1970, 72% of felony convictions in California were from pleas of guilty, but by

267 RAYMOND FOSDICK ET AL., *CRIMINAL JUSTICE IN CLEVELAND* 96, 236-37 (Roscoe Pound & Felix Frankfurter eds., 1922).

268 THE MISSOURI CRIME SURVEY 269, 298-301 (Missouri Ass'n for Crim. Justice ed., 1926).

269 WICKERSHAM COMM., *REPORT ON CRIMINAL STATISTICS* (1931), cited in KATHLEEN B. BROSI, *A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING* 4 (1979).

270 The percent of felony convictions from trials as opposed to pleas in the four jurisdictions were 14%, 50%, 24%, and 17%, for an average of 26%. *Brosi, supra* note 259, at 4.

Brosi's study of thirteen jurisdictions in 1977 based on the Prosecutor's Management Information System (PROMIS) data found "a striking similarity" between Wickersham and PROMIS figures for the same year, but a close look reveals that while there were similarities—dismissal and guilty pleas were the most common dispositions—the percent of convictions by trial was even less in 1977 (15% compared with 26%). *Id.* at 4, 7, 35.

271 MILTON HEUMANN, *PLEA BARGAINING* 28 (1978). Figures for 1966 to 1973 showed similar ratios. *Id.* at 27.

272 *Id.* Note that these figures are based on total dispositions which include dismissals, and that trial rates would be a bit higher if based on convictions alone.

1972, plea-based convictions amounted to 82% of total felony convictions.²⁷³ The increase in plea-based convictions continued into the 1980s despite public opposition to plea bargaining.²⁷⁴ In 1982, the voters restricted plea bargaining in serious felony cases through a state-wide initiative. Plea-based felony convictions, however, continued to increase and by 1983-84, only 10.1% of total felony convictions were from trials.²⁷⁵ Currently, trials are extremely rare for most crimes. Figures for the third quarter of 1989 show that 9.4% of robbery convictions were from trials but only 2.4% of second degree burglary convictions were from trials. All 223 convictions for passing fictitious or NSF checks were by plea, none were by trial.²⁷⁶

(c) *Length of Trials in America.*—While guilty pleas were a common method of case disposition in the United States from the late 19th century, as recently as the 1890s, one felony court could conduct a half dozen jury trials in a single day.²⁷⁷ In their study of criminal justice in Cleveland in 1922, Pound and Frankfurter found that several cases could be tried to the same jury in a single day.²⁷⁸ They described the operation of the prosecutor's office of Cuyahoga County (encompassing Cleveland) as follows:

The trial of two cases a day by the same prosecutor before the same court is habitual, the trial of three cases a day very frequent, of four cases not exceptional. In addition to the trials, there are generally each day several arraignments of accused "for receipt of the plea," and also the pleas of guilty with sentence thereon. The course of most trials is interrupted by these miscellaneous matters and by the receipt of the jury verdict in a previously tried case.²⁷⁹

With trials of such rapidity, the prosecutor often was unprepared and at some disadvantage. For example, the prosecutor did "not seem to exercise particular care in selection of the ju-

273 RALPH ANDERSEN & ASSOC., JUDICIAL COUNCIL OF CALIFORNIA, GUIDELINES FOR DETERMINING THE IMPACT OF LEGISLATION ON THE COURTS D-4 (1974).

274 CANDICE MCCOY & ROBERT TILLMAN, CONTROLLING PLEA BARGAINING IN CALIFORNIA 3 (1985).

275 *Id.*

276 CALIFORNIA JUDICIAL COUNCIL, SENTENCING PRACTICES QUARTERLY, Sept. 30, 1989, at tbl. 7.

277 Lawrence M. Friedman, *Plea Bargaining in Historical Perspectives*, 13 LAW & SOC'Y REV. 247, 257 n.16 (1979).

278 FOSDICK, *supra* note 267, at 161.

279 *Id.* at 161.

ry²⁸⁰ He would not investigate the jurors and would ask only two or three general questions. The prosecution's opening statement was "only a very scanty, vague, and uninteresting story."²⁸¹

(d) *Modern Trials.*—Rough estimates of current trial lengths suggest substantial increases in recent years.²⁸² However, there are few detailed, reliable studies of the length of trials in the United States today. A study of metropolitan trial courts in the Los Angeles area in 1953-54 calculated that felony jury trials averaged three days and misdemeanor jury trials took about one-half as long.²⁸³ A report prepared for the California Judicial Council concerning a proposed bill eliminating plea bargaining estimated that the average felony jury trial in Los Angeles County in 1971 lasted 24 hours and 12 minutes (4.84 court days), and elsewhere in California, 21 hours and 5 minutes (4.22 court days).²⁸⁴

The National Center for State Courts conducted the most recent detailed published study focusing directly on trial length.²⁸⁵ This study marked the beginning of serious efforts to reliably determine the length of American trials and the causes of trial delay. It was based primarily on information gathered during 1986 from more than fifteen hundred civil and criminal felony trials, both jury and nonjury, in three general jurisdiction courts in each of three states: California (superior courts in Oakland,

280 *Id.* at 162.

281 *Id.*

282 See LANGBEIN, *supra* note 23, at 3, 9 & n.11 for figures collected from various sources. In 1987, Eugene Thomas, President of the American Bar Association, observed that "it should not be necessary for cases that 15 years ago could be tried in two days to require now two months . . ." RECORDER, Aug. 12, 1987, at 7.

283 JAMES G. HOLBROOK, A SURVEY OF METROPOLITAN TRIAL COURTS 120-22 (1956). These figures probably over-state trial length since the study counted as "jury days" each day "for which an individual jury panel is used on any case." *Id.* at 120 n.131. Thus, they most likely include partial days as well as jury deliberation days.

284 ANDERSEN, *supra* note 273, at D-10, tbl. II. Misdemeanor jury trials took about one-fourth as long, and non-jury trials in felony cases took even less time—about one to two and one-half hours. *Id.* at D-11, tbls. III & IV. However, these figures may be open to some question since they were derived from weighted caseload data rather than measurement of actual trial time. Furthermore, the study did not explain its basis for conversion of trial time to court days.

285 NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 3 (1988) [hereinafter ON TRIAL]. (Except those devoted to single issues such as jury selection, the study found almost no pertinent literature regarding trials and trial time.)

Monterey, and Marin County); Colorado (district courts in Denver, Colorado Springs, and Golden); and New Jersey (superior courts in Jersey City, Patterson, and Elizabeth).²⁸⁶ Trial times were measured from commencement of jury selection through submission of the case to the judge or jury.²⁸⁷ The study of criminal trials focused on a wide variety of felony cases ranging from theft to homicide.²⁸⁸ Figures for capital cases were given separately and were not included in the general results. While some findings were not surprising,²⁸⁹ others were unanticipated and disclosed the complexity of the trial time question. For example, the study found a dramatic difference in trial lengths from state to state and even among courts in the same state. The median time for a criminal jury trial varied from 6 hours and 20 minutes in Elizabeth, New Jersey, to 23 hours and 16 minutes in Oakland, California.²⁹⁰

Further, the length of trial time per day was much less than estimated by either judges or attorneys.²⁹¹ For example, although judges and lawyers had given estimates ranging from five to six hours, the actual average trial day in Elizabeth was 3 hours and 1 minute and in Oakland 3 hours and 10 minutes.²⁹² Converting

286 *Id.*

287 The study omitted jury deliberation time.

288 ON TRIAL, *supra* note 285, at 29 tbl. 10.

289 The length of criminal trials greatly depended upon the seriousness of the offense. For example, homicide trials were the longest while theft trials were the shortest. Further, civil trials lasted longer than criminal trials and jury trials longer than nonjury trials. *Id.* at 6.

Nonjury trials were short, averaging between 1 and 8 1/2 hours, but the number of nonjury trials was exceedingly small. Out of over 1500 felony cases, only 46 nonjury trials were reported. These occurred mainly in Monterey, Colorado Springs, and Oakland. In the remaining 6 jurisdictions, nonjury trials were virtually nonexistent. *Id.* at 30 fig. 4.

Explanations for the choice between jury and nonjury trials centered on defense attorneys' assessment of many factors, including the nature of the case and the "reasonableness" of the judge. The general view, however, was that the defendant would have a better chance before a jury than before a judge. *Id.* at 20-21.

290 *Id.* at 19 tbl. 7. Earlier studies of civil jury trials also demonstrated remarkable differences in trial time. A delay study in the New York and New Jersey civil courts during the 1950s demonstrated that the New York courts require almost 80% more time to try a case than New Jersey courts. ZEISEL ET AL., *supra* note 240, at 96. A second study by the Chicago Law School Jury Project found that jury trials in New York City took nearly twice as long as those in the New Jersey Metropolitan areas. *Id.* at 96 tbl. 35.

291 ON TRIAL, *supra* note 285, at 82 fig. 7.

292 *Id.* at 79 tbl. 25. The short hourly trial day figures are consistent with a later study of civil jury trials in selected California cities from 1987 to 1989, which found trial days to involve 3.1 hours of trial activity. JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, A COMPARISON OF THE PERFORMANCE OF EIGHT- AND TWELVE-PERSON JURIES 83 (April 1990) [hereinafter JURY COMPARISON].

trial time into trial days for comparison purposes yields 2.1 days for Elizabeth and 7.3 days for Oakland. Taking into account the possibility of an understatement of actual daily trial time,²⁹³ and assuming a four-hour trial day, results in 1.6 days for Elizabeth and 5.8 for Oakland. Thus, a rough estimate indicates that the average felony jury trial in Elizabeth takes one and one-half to two days whereas the average felony jury trial in Oakland lasts a week to a week and one-half.

In addition, there was a startling increase in trial times for the top quarter of cases in some jurisdictions. Between the 75th and 95th percentiles, trial time increased 400% in Marin County and 550% in Patterson.²⁹⁴ Of course, trial time is substantially greater in serious cases. For example, the length of a noncapital homicide trial in Oakland was 44 hours and 35 minutes or 14.8 trial days (about three weeks).²⁹⁵ Capital homicide cases took much longer. The study included eight such cases, including five in California which has a bifurcated trial process for capital offenses.²⁹⁶ The average trial time for the guilt phase of the California capital cases was sixty-seven hours and thirty-five minutes or approximately 22.4 days.²⁹⁷ In the two California capital cases where a penalty phase was documented, a separate jury panel was used. Trial time for these cases was as follows:

293 The study suggested an understatement of actual trial times, because the first and last days of trial (which in reality often are less than a full day) were counted as full days. ON TRIAL, *supra* note 285, at 78-79 tbl. 25. However, the average length of a trial day was not altogether different from the results of Zeisel's study of civil jury trials in the 1950s, which found the average to be 4.1 hours in New York and 4.5 in New Jersey. ZEISEL ET AL., *supra* note 240, at 181-86. The shorter trial days in the recent study may be due to differences in study methods and standards. For example, jury deliberation time was not counted in the On Trial study (ON TRIAL, *supra* note 285, at 78); whereas, it was included in some of the calculations in the Zeisel study (ZEISEL ET AL., *supra* note 240, at 186-87 n.3). Also, the hourly estimates were likely to be more accurate in the On Trial study since they were made by data collectors who would "watch the clock" (ON TRIAL, *supra* note 285, at 90), rather than being made solely by judges and their clerks (ZEISEL ET AL., *supra* note 240, at 181). Nevertheless, it is rather startling to note the wide differences of the length of trial days between the New Jersey courts in the 1950s—4.5 hours per day—and the courts in the three New Jersey cities in the mid 1980s—less than 3 hours.

294 ON TRIAL, *supra* note 285, at 19.

295 *Id.* 30 tbl. 11. Trial days calculated at 3 hours and 10 minutes for Oakland. *Id.* at 79 tbl. 25. Trial days would be 11.1 if calculated at 4 hours per day. *Id.*

296 *Id.* at 32 tbl. 12.

297 *See id.* at 179 tbl. 25 (using 3 hour and 10 minute trial days).

Case	Guilt Phase (minutes)	Penalty Phase (minutes)	Total Time (minutes)
Monterey County	31:83	45:30	77:53
Oakland	98:05	118:25	216:30

This translates into approximately twenty-one days (one month) for the Monterey case and seventy-two days (three and one half months) for the Oakland case.²⁹⁸

Wide variations can occur in the trial of the same case depending on factors such as the extent of judicial control, the assertiveness of the attorneys, and the nature of the defense. For example, after a change of venue from one California rural county to another, a 1979 capital murder case was tried in two months. Following reversal for erroneous jury instructions, the case was retried in San Francisco in 1989. This trial lasted five months, with jury selection alone taking as long as the entire first trial. In addition to a different judge, both the defense attorney and the nature of the defense had changed. At the first trial, defendant had claimed diminished capacity. By contrast, at the second, his new lawyer asserted self-defense, charged police with aggressive conduct, and introduced expert testimony on racial and cultural prejudice.²⁹⁹

Figures for the length of federal jury trials are scarce, but the available figures indicate that they fall somewhere between the state court extremes. Annual Reports of the Administrative Office of the U.S. Courts provide sketchy outlines of trial days for various criminal cases completed in the U.S. District Courts in the years ending June 30, 1987 and June 30, 1988.³⁰⁰ Consistent with the *On Trial* study of state courts, nonjury trials were very short. Over 80% were completed in one day and over 93% in two days.³⁰¹ However, unlike the state courts, the number of nonjury trials was considerable (43% of total criminal trials in the federal sys-

298 See *Id.* at 79 tbl. 25.

299 Martin Halstuk, *SF Retrail Indian in '78 Cop Death*, SAN FRANCISCO CHRON., May 2, 1990, at 1. The new defense was successful and defendant was acquitted of all charges.

300 U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 539 tbl. 5.12 (1988) [hereinafter SOURCEBOOK-1988]; U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 487 tbl. 5.14 (1989) [hereinafter SOURCEBOOK-1989].

301 *Id.*

tem).³⁰² The Reports disclose that the median felony jury trial in the Federal District Courts in the years ending June 30, 1987 and June 30, 1988 lasted about three days.³⁰³

In some highly publicized or notorious cases in the United States, trial length has reached absurd proportions. The 1976 bank robbery trial of Patricia Hearst, for example, lasted forty days.³⁰⁴ In another example, during the 1970-71 New Haven trial of Black Panther Party member Bobby Seale, the voir dire alone took four months.³⁰⁵ On January 18, 1990, the longest trial in history ended in Los Angeles with no convictions. There were mistrials (hung jury) on some counts and acquittals on most. This Los Angeles felony child molestation trial had lasted over two and one-half years from the commencement of jury selection to the beginning of jury deliberations.³⁰⁶ On May 7, 1990, opening statements began in the retrial of one defendant on some of the mistrialed counts which were expected to last six months.³⁰⁷ While these

302 The greater proportion of nonjury trials in federal as compared to state courts is reflected to a lesser degree in civil trials. While figures for state trials varied widely, in most jurisdictions a substantial majority of civil trials were given to the jury. ON TRIAL, *supra* note 285, at 14-17. However, in the federal courts 52% to 58% of civil trials were nonjury. SOURCEBOOK-1988, *supra* note 300, at 538 tbl. 5.12; SOURCEBOOK-1989, *supra* note 300, at 486 tbl. 5.14.

303 Figures for jury trials (with percentages calculated):

Length of trial in days as a percent of total trials that year

	1-day trial	2 days	3 days	4-9 days	10-19 days	20+ days
Year-end 6-30-87 Total = 3911	468 or 12% of total trials	942 or 24%	819 or 21%	1331 or 34%	237 or 6%	114 or 3%
Year-end 6-30-88 Total = 4150	468 or 12% of total trials	1046 or 25%	924 or 22%	1381 or 33%	224 or 5%	96 or 2%

Id.

304 Langbein, *supra* note 27, at 217.

305 *Id.*

306 Robert Reinhold, *Acquitted of Child Molestation in Nation's Longest Criminal Trial*, N.Y. TIMES, Jan. 19, 1990, at A1. The inclusion of jury deliberations would extend the trial length to nearly three years. *Id.*

307 *Second Trial Opens in Preschool Molestation Case*, N.Y. TIMES, May 8, 1990, at 13. On July 27, 1990, the retrial of this defendant ended in a second mistrial when the jury announced it was "hopelessly and irreversibly deadlocked." Seth Mydans, *Seven Years Later*,

trial lengths are not typical of the usual felony case, they do reflect the process of the notorious or highly publicized criminal case in many jurisdictions. They further illustrate the extent to which even one full scale criminal jury trial can become an albatross on the neck of a local criminal court.

(e) *The Length of Continental Trials: The French Trial.*—The French trial (*audience*) is usually quite short. In large part, this is because in the vast majority of French criminal proceedings, the defendant has already fully confessed several times, and does not contest the validity of his confessions.³⁰⁸ Accordingly, the trial is abbreviated and its major function is the investigation of the character of the accused and the circumstances of the case in order to determine the proper punishment.³⁰⁹ Describing the French courtroom where in one morning “[a] single tribunal, acting without undue haste, often disposes of 20 or more cases,” Professor Schlesinger explains that defendants in the vast majority of cases have confessed prior to trial so the trial can be devoted almost exclusively to exploration of factors affecting punishment.³¹⁰

(f) *The Length of Continental Trials: The German Trial.*—In 1972, Casper and Zeisel published a report on the participation of lay judges in the German criminal courts. The study covered 570 criminal trials in various courts, measuring the length of deliberations and the overall trial.³¹¹ In these cases, mixed panels of professional and lay judges conducted the trials of serious cases and determined both guilt and sentence. In the lower felony court (*Schoeffengericht*), composed of one professional and two lay judges, the median time for trials of serious offenses was two hours. In the higher felony court (*Grosse Strafkammer*), composed of three professional and two lay judges, the median time for trials of serious offenses was one day.³¹² In the court hearing homicide and a few other grave offenses (*Schwurgericht*) the median trial took two days.³¹³ In both courts, deliberations lasted in hours what the trial lasted in days—one hour for the ordinary felony and two

McMartin Ends in a Mistrial, N.Y. TIMES, July 28, 1990, at A1.

308 Pugh, *supra* note 29, at 22-23.

309 *Id.* at 18-19; *see also* Mendelson, *supra* note 29, at 44-45.

310 Schlesinger, *supra* note 26, at 382.

311 Casper & Zeisel, *supra* note 3, at 143. The conclusions are discussed in Langbein, *supra* note 27, at 201.

312 CASPER & ZEISEL, *supra* note 3, at 150 tbl. 17.

313 *Id.*

hours for the most serious.³¹⁴ The trials, of course, dealt with both issues of guilt and punishment; however, the study did not break trial time down into that allotted for the determination of guilt and the time allotted for considering the appropriate sentence. However, figures were given on the median length of trials with and without full confessions which indicate that trials of those who have confessed took about half as long as trials of those who did not: for the ordinary felony, three-fourths of a day versus one-and-a-half days, for the gravest offenses, one-and-one-half days versus two-and-a-quarter days.³¹⁵ Because nearly all defendants who confess admit the charges at trial,³¹⁶ we may presume that trial time is nearly doubled by an accused contesting guilt. Although not conclusive, this suggests that trial time expended solely on the question of guilt is much less than the median trial time, probably in the neighborhood of three-quarters of a day for the ordinary felony and about one day for the gravest offence.

(g) *Causes of Lengthy Trials in America.*—Our lengthy trials can be traced both to the adversary system itself and to the excesses which we have engrafted onto it. A process that relies on opposing parties using complicated rules of evidence and procedure to present facts to a lay jury is bound to be less efficient than an inquiry by a strong judge aided by extensive pretrial investigation and uninhibited by technical rules of evidence. Thus, it is not surprising that the Continental mixed jury is generally viewed as a more efficient trial vehicle.³¹⁷

However, history has demonstrated that the adversary process can be used in a reasonably efficient manner. For example, a few decades ago, trials in serious criminal cases lasted only one or two days; yet, they clearly were adversary contests. Though the adversary process results in some delay when compared to the nonadversary approach, the primary source of our current intracta-

314 *Id.* at 151 tbl. 20.

315 *Id.*

316 *Id.* at 147.

317 Langbein concluded that "the Anglo-American jury system has grown ever more cumbersome, while the Continental mixed court injects lay participation in a fashion that greatly accelerates trial procedure by dispensing with the trappings of jury control." Langbein, *supra* note 27, at 196.

While a defender of the adversary system asserted that "there is little evidence that adversary procedures cause more delay than nonadversary alternatives," he conceded that the adversary system "relies on mechanisms that appreciably slow litigation." LANDSMAN, *supra* note 50, at 35.

ble delay can be traced to our adversary excesses, including extreme lawyer dominance and aggressiveness and exceedingly complex rules of evidence and procedure.³¹⁸

Zeisel's study of New York and New Jersey civil trials in the 1950s suggests that the amount of judicial control and the degree of contentiousness of counsel profoundly affect the length of the trial.³¹⁹ Comparing New York and New Jersey trials with the same number of witnesses, Zeisel found that New York courts required almost 80% more time to try a case than New Jersey courts.³²⁰ A detailed comparison of trial transcripts in similar personal injury cases revealed that the number of transcript lines per witness was from 35% to 41% shorter in New Jersey.³²¹ Zeisel attributed New Jersey's more rapid trial time in part to its successful pretrial practice of limiting issues and exacting stipulations from counsel. Nevertheless, other comparisons led Zeisel to conclude that part of the difference was due to the manner in which the trials were conducted. Looking at cases within the same jurisdiction with the same number of witnesses, Zeisel found extraordinary differences in witness examination and, consequently, in trial lengths which were largely due to the degree of contentiousness of the trial. Comparing two similar New York cases, one was found to have fourteen times more objections and rulings per witness than the other. Similarly, when comparing two analogous New Jersey cases, one had about 4.8 times as many transcript lines per witness than the other. Zeisel found a striking contrast between these two New Jersey cases.

Although both were contested with vigor, the second was fought with a bitterness between counsel absent from the first. The trial of the second case, unlike the first, was punctuated by repeated outbursts of counsel. Colloquy between counsel and court consumed a larger proportion of the total trial. Repetitive examination of witnesses, particularly on cross-examination, was much more noticeable.³²²

318 England's enactment of the Police and Criminal Evidence Act 1984, and its implementation of the Codes of Practice governing search and seizure, police interrogation, and identification practices, with their considerable protection for the accused, also suggest that efficiency is not inconsistent with fairness. For information on police questioning under the new codes, see Van Kessel, *supra* note 5.

319 ZEISEL ET AL., *supra* note 240, at 181-86.

320 *Id.* at 96.

321 *Id.* at 98.

322 *Id.* at 101.

These findings suggest that the aggressiveness and contentiousness of lawyers greatly affects the trials process. The question remains whether such excesses can be eliminated merely by activating the judiciary, or whether more fundamental reforms are required which focus either on the ethical duties of lawyers or on the expectations of all trial participants. Zeisel speculated that in the contentious case, trial length could have been reduced by firmer judicial control, though he doubted that the differential between the two cases could have been eliminated entirely by this means.³²³

(h) *The Downside to Delay.*—Excessive trial time diminishes both the quantity and the quality of trials. Long, complex trials lead to fewer trials and increased plea bargaining. The generally accepted view is that caseload pressure is the most important explanation for plea bargaining,³²⁴ and that to a great extent our burdensome jury trial process creates the caseload pressures which lead to the avoidance of trials through plea bargaining.³²⁵

323 *Id.* He did speculate that the consistent increase in the length of trials during the 1950s "may reflect a certain loosening of the reins on the part of the trial judge." *Id.* at 102.

324 See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); authorities cited in MILTON HEUMANN, PLEA BARGAINING 24-25 (1978); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967).

The Supreme Court has largely accepted this view: "Properly administered, it [plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello v. New York*, 404 U.S. 257, 260 (1971).

Trial judges also take this position: "[I]f in one year, 248 judges are to deal with 35,517 defendants, the district courts must encourage pleas of guilty." *United States v. Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960).

325 THOMAS CHURCH, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 31 (National Center for State Courts, 1978) ("The extensive resources in time and money consumed by the typical jury trial provide considerable impetus for programs to encourage pretrial settlement of civil cases and negotiated pleas in criminal cases."); HANS ZEISEL, LIMITS OF LAW ENFORCEMENT 137 (1982) (The workload of a criminal court is primarily determined by the number of cases it must try. Time spent on cases that are pleaded guilty is measured in hours, often in fractions of an hour; trials are measured in days or weeks, even in months. For the prosecutor who must also count the time needed for preparation of the trial, the contrast is even greater.); Alschuler, *supra* note 6, at 970-71 (the American jury trial now has become so complex that our society usually refuses to provide it); Langbein, *supra* note 27, at 195, 218 (Procedural and evidentiary reforms "ultimately made jury trial so complicated and time-consuming that it became unworkable as a routine dispositive procedure."); Langbein, *supra* note 66, at 279 (in our own era jury trial is such a time-consuming process that, especially in the great cities, we have had to develop incentives to induce most accused to waive their right to jury trial); Volk-

While some dispute the effect of caseload pressures and argue that plea bargaining would naturally occur for other reasons,³²⁶ certainly lengthy, burdensome trials add to the pressures for plea bargaining and other alternatives to the formal trial process.³²⁷ The need for plea bargaining requires that greater, and often unconscionable, pressures be brought to bear on the accused to waive the right to jury trial. Langbein has convincingly argued that granting overbroad procedural rights to the accused can lead to pressures which effectively withdraw trial rights by coercing defendants to waive them. He points out that torture on the Continent was used to overcome unrealistically strict evidentiary rules and standards of proof.³²⁸ "Pressing"³²⁹ the accused into pleading guilty appears to be the modern form of judicially sanctioned torture in America.

Excessive trial length has numerous other costs, including adverse effects on the quality of the trial itself. Exceedingly

mann-Schluck, *supra* note 4, at 25.

Caseload pressures on the prosecutor have also been cited as a cause of plea bargaining. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 97 (1931).

326 NATIONAL INSTITUTE OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS 1979, 12 (1983) (case-load explanation for plea bargaining seriously questioned); *see also* MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT (1979) (a study of the disposition of minor cases in the lower courts in New Haven); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 156 (1978).

327 Case overload problems are strangling many state courts. Speaking of both civil and criminal litigation, Justice Marcus Kaufman, recently retired from the California Supreme Court, provided a frightening view of current caseload pressures at all levels of California's judicial system:

Clearly the most serious problem facing the California justice system is overload, which is adversely affecting the delivery of justice at all levels. In both the trial and appellate courts, the primary goal appears no longer to be justice for the litigants, but simply disposing of the crush of cases as fast as possible.

In the trial courts we are seeing an atmosphere close to coercive in settlement conferences, dismissals for nonprosecution with little regard for the reason for delay, and inflexible fast-track rules and time limitations that make the outcome of litigation dependent on the resources of litigants and their attorney.

Marcus M. Kaufman, *Crisis in the Courts*, CAL. LAW., Aug. 1990, at 28.

328 LANGBEIN, *supra* note 23, at 184 (1977).

329 The current method of inducing guilty pleas might be likened to the *peine forte et dure*, a form of physical coercion—laying on weights and "pressing" the accused into submission—which the English in the 13th century used to force a defendant to enter a plea of guilty or not guilty. A legal technicality made it necessary that defendant enter a plea of not guilty before he could be tried, and he had to be convicted before his estate could be forfeited to the Crown. It was done slowly to be as painful as possible, because the defendant might prefer to die without entering a plea to avoid forfeiture, so his estate could go to his heirs. *See* LANGBEIN, *supra* note 23, at 74-77.

lengthy trials lead to reduced concentration and recollection of events on the part of all participants, particularly witnesses and jurors. In very long cases, exhaustion may diminish everyone's performance. The quality and representative nature of the jury may be reduced by the fact that many citizens—often the most competent—are unable or unwilling to take the time to sit for cases lasting weeks or months. Public knowledge of such lengthy trials may result in an unwillingness of victims to report crime and of witnesses to testify, as well as a diminished public respect for the criminal justice system and the government in general.

The economic and social costs of trial delay should not be discounted. Citizens called for jury service often sit in jury rooms or courtrooms for days or weeks, yet never serve. A study of the actual pattern of one week's juror usage in a typical nine-judge city court found that less than 40% of jurors' time was used productively in voir dire and trial.³³⁰ Victims and witnesses are often forced to sit for hours or days waiting to testify, only to have to return again when the case is continued. Also noteworthy, but not subject to easy assessment, is the cost of crime committed by bailed defendants during lengthy trials.

While defenders of the adversary process usually admit that it moves slowly, they argue that a deliberate pace is needed to assure party control and the careful consideration of their claims.³³¹ We should recognize, however, that trials can be too long, as well as too swift, and that we are currently paying considerable costs associated with the excessive length of our criminal trials.

2. Perversion of the Trial's Focus and Purpose

Excessive advocacy tends to focus the trial on the lawyers rather than on the accused and the search for truth. At times, the accused may appear set apart or even isolated from the trial process. How did we come to separate and often disregard the most important individual in the trial?

The greater power of our lawyers, it appears, provides one explanation. In England, the increasing power of lawyers developed side-by-side with the distancing of the accused from the trial process. These changes occurred rapidly between the early 1700s

330 BIRD ENGINEERING-RESEARCH ASSOC., U.S. DEPT. OF JUSTICE, A GUIDE TO JUROR USAGE 2-4 (1974).

331 LANDSMAN, *supra* note 55, at 34.

and the early 1800s. By 1820, a Frenchman inspecting the English criminal justice process on behalf of his government observed that the judge "remains almost a stranger to what is going on" and the accused does so little in his defense that "his hat stuck on a pole might without inconvenience be his substitute at the trial."³³² Today, the defendant is even more isolated due to rules of evidence and procedure which equip lawyers with greater powers. This serves to both shield the accused from the proceedings and discourage him from participating in his defense.

The Continental trial focuses on the accused and emphasizes his side of the case. The defendant is called upon to speak first and is given the opportunity to speak last. The presiding judge focuses the inquiry on the accused, continuously involving him in the case. For example, the presiding judge will ask the accused if he wishes to respond to the testimony of witnesses throughout the trial.³³³

Focusing the trial on the accused usually helps the innocent but hurts the guilty. An innocent defendant has a good chance to present his case forcefully and continuously. It is obvious, however, that with a weak case the accused is more vulnerable. He cannot easily sit back and rely on his lawyer to attack the prosecution's case. His lawyer is given that opportunity, but the Continental trial expects that the accused will be an active participant and will assist in the presentation of his case.

In addition to the active, probing judge who focuses on the accused, Continental rules of evidence by not placing impediments in the way of the accused's testimony, add to the expectation that he will answer questions and participate personally in his trial. Because the Continental defendant is not sworn as a witness, he is not subject to prosecution for perjury. Further, admission of his prior convictions does not turn on whether or not he takes the stand. Finally, the Continental trial process usually strongly encourages the defendant to respond to questions by exacting a heavy price for remaining silent. In some countries, such as France, adverse inferences can be drawn from a defendant's refusal to respond to questioning.³³⁴ In others, such as Germany, no such inference can be drawn, but the practical effect of his unmasked

332 Langbein, *supra* note 66, at 307.

333 Alschuler, *supra* note 6, at 1006 n.344.

334 Brouwer, *supra* note 29, at 219; Mendelson, *supra* note 29, at 46; Tomlinson, *supra* note 29, at 174..

refusal is so damaging that "German defendants virtually always speak."³³⁵ It is not surprising that nearly all Continental defendants choose to speak at trial.³³⁶

The English trial focuses less on the accused than does the Continental trial, but a good deal more than our own. The arrangement of the courtroom and the relationship between the accused and his attorney reflect this difference. Unlike the usual Continental procedure, the English defendant does not sit in the center of the courtroom speaking for himself while being subject to judicial inquiry throughout the trial. He is more protected by his lawyer who makes an opening statement and examines witnesses, and he may not be questioned by the judge or the prosecutor without his consent. Nevertheless, the defendant is not separated from the proceedings and protected by his lawyer to the same extent as in our system. First, he must always sit in the dock, which usually is in an elevated and prominent position in back of the courtroom and, even if on bail, he must always remain in the custody of nearby bailiffs when in the dock. Also, as noted previously, English custom places limits on the defendant's relationship with his trial lawyer. Usually not having seen his barrister until on or near the day of trial, and then only in the presence of his solicitor, he is likely to have a purely professional and rather distant relationship with his counsel. This distance is emphasized in the courtroom, where he must sit in the dock typically near to his solicitor but separated from his barrister by several rows of seats. Though the principal actors of the English trial are the lawyers, the fact that the English judge wields more authority than her American counterpart means that the English lawyers possess less authority, thereby rendering the powers of the lawyers and the judge more balanced than in our system.

Most important, the English follow the Continental approach of using rules of evidence and procedure which encourage the defendant to take the stand and testify, and which create an expectation that the accused will participate personally in his trial. First, by merely testifying in his own behalf the defendant is not automatically subject to impeachment with prior felony convictions. Second, if the defendant fails to testify, the judge, though not the prosecutor, usually may comment to the jury on this fact.

335 LANGBEIN, *supra* note 29, at 72-73.

336 Damaska, *supra* note 12, at 527 (almost all Continental defendants choose to testify).

Our rules often operate to strongly discourage the defendant from taking the stand by saying to him, "If you testify, the jury will become aware of your felonious history and if you remain silent, neither your past nor your silence will be mentioned by the judge or prosecutor. If you wish, the jury will be cautioned against drawing adverse inferences." The threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand. A study of American jury trials found that a defendant was almost three times more likely to refuse to testify if he had a criminal record than if not.³³⁷ As a consequence of this shielding of the accused from the proceedings and dissuading him from testifying, as well as the greater authority we give our lawyers, our trials focus on the contest between counsel rather than on the accused and the search for truth.

3. Loss of Evidence From the Most Important Witness

Often the result of this perverse focus is loss of evidence from the most important witness in the case. As Professor Langbein has remarked in contrasting ours with the Continental approach:

In general the accused will virtually always be the most efficient possible witness at a criminal trial. Even when he has a solid defense, the accused has usually been close to the events in question, close enough to get himself prosecuted. It is one of the great peculiarities of modern Anglo-American procedure, on which Continental observers often remark, that we have so largely eliminated the accused as a testimonial resource.³³⁸

Others in this country protest our failure to focus more closely on the accused as a source of testimonial evidence,³³⁹ but thus far they are no more than voices crying in the wilderness.

³³⁷ KALVEN & ZEISEL, *supra* note 3, at 146.

³³⁸ Langbein, *supra* note 66, at 283-84.

³³⁹ See, e.g., THE MISSOURI CRIME SURVEY, *supra* note 268, at 362. The rule granting the accused immunity from testifying as well as from comment on his failure to do so was at its inception deemed a

protest against torture . . . of the most effective methods for the protection of the guilty. What could be more logical and sensible than to ask the defendant, who knows more about the question of his guilt than any one else, what he has to say, and if he will not tell what he knows why should not the state have the right to comment upon his failure to do so.

Id.; see also WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY 71 (1967); LLOYD L. WEINREB, DENIAL OF JUSTICE 147-48 (1977); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

Little is known concerning the extent of the loss—the number and types of cases in which the defendant failed to testify, and the value that would have been gained in the pursuit of truth by hearing from the defendant. While a defendant's willingness to testify depends on the particular charge, the nature of the evidence and the defense, and the defendant's criminal record, inquiries with trial lawyers and judges lead me to believe that the extent of defendant refusals to testify is considerable—from one-third to well over one-half in some jurisdictions. The contrast with English and Continental trials is striking. On the Continent, nearly all defendants choose to testify,³⁴⁰ and in England the accused invariably gives evidence. As Graham Hughes has remarked, in England the case in which the defendant fails to testify is "exceptional," whereas the defendant's silence "is becoming the common practice in trials in the United States."³⁴¹

The failure of American defendants to testify has become so common that even the public rarely notices when in notorious cases the defendant does not take the witness stand. For example, of those who have seen the movie *Reversal of Fortune*,³⁴² how many were aware, much less thought it unusual, that Claus von Bulow failed to tell his story to the jury in either trial?³⁴³ It seems that we have accepted the view that because we have reason to believe someone committed a crime, we should not expect to learn anything from him. Of course, we can take this approach, but we should realize that it is not without substantial cost.

4. Trial by Surprise

Ironically, part of the price for failure to use the defendant as a source of evidence is paid by the defendant himself. As pointed out previously, full and open pretrial discovery of the prosecution's case is a hallmark of Continental systems.³⁴⁴ Even the harsh justice system of the former Soviet Union provided to the advocate for the accused full access to the dossier which included full state-

340 See *supra* note 77 and accompanying text.

341 Graham Hughes, *English Criminal Justice: Is It Better than Ours?*, 26 ARIZ. L. REV. 507, 591 (1984).

342 Warner Home Video 1991.

343 Even the Rhode Island Supreme Court, in reversing his convictions for attempted murder, failed to mention the fact that he never took the stand at the trial. See *State v. von Bulow*, 475 A.2d 995 (R.I. 1984).

344 See *supra* part III.B.1.

ments of all witnesses.³⁴⁵ However, complete open discovery is at odds with the adversary model and is found in few if any American jurisdictions.³⁴⁶ In this country, the prosecutor's constitutional duty of disclosure is limited to material, exculpatory evidence³⁴⁷ and, in federal trials, is subject to the Jencks Act which forbids pretrial discovery of impeachment material that is not directly exculpatory in nature.³⁴⁸ Revisions to the Federal Rules of Evidence, recently adopted by the Supreme Court, would slightly expand the prosecution's duty to disclose defendant's oral statements and would require disclosure to defendant of the "general nature" of other crimes or bad acts intended to be used as similar acts under FRE 404.³⁴⁹ However, the Supreme Court's Advisory Committee cautioned that it did not intend that the revisions supersede current restrictions on disclosure, such as the Jencks Act, or require the prosecution to disclose directly or indirectly the names and addresses of its witnesses.³⁵⁰

Our system's rules that hinder the prosecution from using the accused as a source of testimonial evidence stand in the way of open discovery for the benefit of the accused. These restrictive rules support the argument that one-way-street discovery for the

345 See DINA KAMINSKAYA, FINAL JUDGMENT 52 (Michael Glenny trans., 1982) (Upon completion of the investigation, "the investigator must present to the accused . . . all the materials in the case for him to study, including the exact written records of the testimony given by all witnesses."); SCHLESINGER ET AL., *supra* note 29, at 482 (defense counsel's basic right to timely inspection of the entire dossier has become an article of faith throughout the civil law world—and, indeed, in the socialist orbit as well).

346 So far, not even the most liberal discovery states have been willing to adopt the A.B.A.'s 1980 standard proposing "open file" discovery. See YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1130 (7th ed. 1990).

347 See *Brady v. Maryland*, 373 U.S. 83 (1963). The Court has narrowly defined material evidence: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985); see also *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). For examples of the narrow reach of this constitutional duty, see *United States v. Phillip*, 948 F.2d 241 (6th Cir. 1991) and *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988).

348 One court has held that any *Brady* material covered by the Jencks Act, even if directly exculpatory, need not be disclosed until after the witness whose statements are sought has completed direct examination. *United States v. Hart*, 760 F. Supp. 653 (E.D. Mich. 1991).

349 *Amendments to Federal Rules of Evidence and Criminal Procedure*, 49 Crim. L. Rep. (BNA) 2093-98 (transmitted to Congress by the Supreme Court on April 30, 1991, amending FED. R. EVID. 404 and FED. R. CRIM. P. 16).

350 *Id.* at 2094 (Advisory Committee note to Proposed Amendment to FED. R. EVID. 404).

accused would give him an unfair advantage.³⁵¹ Fortunately, many jurisdictions now appear to be moving toward broader and more mutual discovery in criminal cases and away from rigid restrictions on the use of prior statements of unavailable witnesses.³⁵² This shift bodes well for eventually abandoning the surprise witness as one of the aspects of the American criminal trial. Meanwhile, we continue to condone the unfairness of trial by surprise that results from restrictive discovery rules, a practice which harms the innocent along with the guilty.

5. Undue Enhancement of Prosecution Powers

The Continental prosecutor enjoys less discretion than his American counterpart, both in the decision to prosecute and in the decision to reduce or drop charges. Continental systems mandate prosecution when there is sufficient evidence of a crime and outlaw plea bargaining in serious cases, thereby eliminating the devices which so empower our prosecutors. Also, sentence recommendations of prosecutors are followed far less often than are prosecutorial sentence recommendations in the United States. As a result of these restrictions, the powers of the Continental prosecutor in the most significant nontrial areas—bringing charges, plea bargaining and sentencing—are severely limited.

At trial, American prosecutorial power, rather than more neutral judicial authority, is enhanced and stands as a counterweight to aggressive defense advocacy. This occurs both in the examination of witnesses and in the final arguments. To balance aggressive defense cross-examination, the American prosecutor is afforded great control over the presentation and examination of witnesses. It is the prosecutor, rather than the judge, who decides whom to call and in what order. Also, in restrictive discovery jurisdictions, the defense is not provided the names of the witnesses before trial nor the statements of witnesses until after they have testified on direct. The prosecutor can control the elicitation of

351 See *infra* at

352 See KAMISAR ET AL., *supra* note 346, at 1130. For a recent list of states requiring pretrial disclosure of prosecution witnesses, see Cary Clennon, *Pretrial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 659 (1989).

Greater use of prior statements of unavailable witnesses was authorized in California by 1985 revisions to CAL. EVID. CODE § 1350 (Deering 1991) and CAL. PENAL CODE § 1335 (Deering 1991).

testimony and present a one-sided account of the facts through "guiding," though generally not "leading," questions. Finally, in jurisdictions following the common law, the defense may use inconsistent statements only for the purpose of impeaching or contradicting the witness. Contrast the Continental method, in which the judge calls and questions the witnesses, who may first respond in narrative, and in which there is no limit on the use of inconsistent statements. Of course, our defense lawyers have similar control over their witnesses. Nonetheless, as a practical matter, our prosecutors have the advantage of proceeding first, and in virtually all cases it is the prosecutor who calls the greatest number of witnesses.

The American prosecutor enjoys even greater advantages at the end of a trial. All American criminal trial lawyers are fully aware of the great significance of the prosecutor's opportunity both to open and to close argument to the jury, but few are aware that on the Continent, as well as in England, the prosecutor generally does not have the final word. In most nonadversary systems, the final argument is made by the defense lawyer, and then the defendant personally is allowed to address the court.³⁵³ In England the prosecutor cannot answer the final argument of a defendant's barrister,³⁵⁴ and if a defendant represented by counsel rests without presenting any evidence, the prosecutor's argument powers are further restricted.³⁵⁵

While both on the Continent and in England the defense has the last word, judicial intervention provides a counterweight to defense advocacy in the form of summation and comment on the evidence. In Continental systems, professional judges are part of

353 See *supra* notes 84-85 and accompanying text.

354 The power of the prosecutor's closing argument was demonstrated in the notorious case in which the traditional procedure was not followed—the trial of Oscar Wilde. After Wilde's first trial on morals charges ended in a hung jury, he was put on trial a second time, but on this occasion the prosecutor became more aggressive, insisted on having "the precious last word to the jury," and was successful. See STANLEY JACKSON, *THE LIFE AND CASES OF MR. JUSTICE HUMPHRIES* 40-41 (1952). Legislation later restricted the prosecutor's closing speech to the point after the close of the defense evidence and before the closing speech by or on behalf of the accused. Criminal Evidence Act 1898 61 & 62 *vict.*, ch. 36, § 1(b) (Eng.); ARCHBOLD, *supra* note 127, at § 4-420 (1982) (Criminal Evidence Act, 1898, 61 & 62 *Vict.*, ch. 36, § 1(b)(Eng.)).

355 See *Regina v. Bryant* 2 All E. R. 689 (1978); 67 Cr. Ap. R. 157, C.A. (When a defendant represented by counsel does not testify and calls no witnesses, the prosecution's right to make a closing speech should be spartly exercised, and on rare occasions when the right is exercised, should be brief.); see also *Regina v. Francis*, Crim. L. R. 150 (1988).

the jury and the presiding judge often summarizes the evidence at the commencement of deliberations.³⁵⁶ The strong comment and summation powers of English judges are used to balance the defense barrister's opportunity to give the closing argument to which the prosecution cannot respond. In this country, with our toleration of unrestrained advocacy on the part of the lawyers, the accused has little protection against the aggressive and emotional prosecutor during the final and unanswerable argument.

III. THE ROAD TO REFORM

A. Barriers to Reform

Our legislatures and other law-making governmental institutions have not been able to implement significant reforms in our jury trial system. The paralysis of reform efforts can be traced in large part to the following factors: (1) A legal system of fixed rules made impervious to significant modification by Supreme Court decisions constitutionalizing or otherwise federalizing the rules of criminal procedure, (2) professional inertia on the part of many lawyers and judges who believe their interests lie in maintaining the status quo, and (3) our "national character" which distrusts centralized authority in favor of the individual.

1. *Constitutionalized Criminal Procedure*

Supreme Court constitutionalizing of the rules of criminal procedure, which began with Warren Court decisions in the 1960s, narrowed the scope of possible reforms at state as well as federal levels. In the name of creating a minimum floor of federal standards to which all states must conform, the Court significantly restricted states in experimenting with different procedural models. With respect to the trial process, the Court's imposition of rather inflexible constitutional boundaries, when it has encountered attempts to alter an aspect of what it views as the traditional adversary process, has prevented any significant experimentation with Continental-style trial procedures. Indeed, instead of speaking of a floor of constitutional protection,³⁵⁷ the Court's procedural

³⁵⁶ While German law does not require a summation, and it is sometimes criticized as an undue influence upon the lay judges, Casper and Zeisel found that summaries are given in two-thirds of minor cases and almost always in serious cases. Casper & Zeisel, *supra* note 3, at 150-51.

³⁵⁷ Justice Brennan recently described the *Malloy-Duncan-Benton* approach as "creating

boundaries in the trial context can be more accurately viewed as walls which prohibit any lateral movement toward procedures foreign to us, but accepted throughout most of the world.

In the midst of the depression, Justice Brandeis objected to the Court striking down state social and economic legislation as a violation of due process:

Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.³⁵⁸

In the criminal procedure context, flexibility at the state level remained through the first half of this century, but by the end of the 1960s, the high water point of the Warren Court criminal procedure revolution, the main barriers to experimentation with the traditional adversary trial had been erected. Objecting to the 1968 *Duncan v. Louisiana*³⁵⁹ mandate that states provide jury trials in all cases involving the possibility of a jail sentence over six months, Justice Harlan remarked that "the Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise."³⁶⁰

In large part, constitutional barriers to reform stem from our worship of the adversary process and our distaste of foreign procedures that do not share our English adversary tradition. In *Duncan*,³⁶¹ the Court not only applied the "bag and baggage" principle to selective incorporation of the Bill of Rights, it embraced "a new approach to the 'incorporation' debate,"³⁶² which

a federal floor of protection" allowing "diversity only *above and beyond* this federal constitutional floor." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (emphasis added).

358 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The majority rejected the freedom to experiment argument in words similar to those used today against experimenting with defendant's rights: "The principle is imbedded in our constitutional system that there are certain *essentials of liberty* with which the state is not entitled to dispense in the interest of experiments." *Id.* at 280 (emphasis added). Yet this principle does not define the "essentials of liberty" included within this protected category.

359 391 U.S. 145 (1968).

360 *Id.* at 193 (Harlan, J., dissenting).

361 391 U.S. 145 (1968).

362 *Id.* at 149 n.14.

to a substantial extent constitutionalized the Anglo-American adversary criminal process. In determining which procedural rights are fundamental and bind the states through Fourteenth Amendment due process, the Court noted that in earlier cases it had asked "[whether] a civilized system could be imagined that would not accord the particular protection."³⁶³ However, the Court abandoned this approach in favor of inquiring whether a particular procedure is fundamental given "the common-law system that has been developing contemporaneously in England and in this country"³⁶⁴ This entails asking whether "a procedure is necessary to an Anglo-American regime of ordered liberty."³⁶⁵ Further, the Court implied that it would focus on the existing American system, rather than historical adversary or even current English structures: "[I]t might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental *in the context of the criminal processes maintained by the American States*."³⁶⁶ The Court thus suggested that it would look with suspicion even on aspects of the current English system that do not correspond with our own, such as the extensive power of English judges to sum up and comment on the state of the evidence.

Nevertheless, in support of his proposal for a mixed court of the Continental style, Professor Alschuler suggests that neither constitutional amendment nor judicial reinterpretation would be necessary for substantial experimentation with the jury trial process.³⁶⁷ In support of this optimism, he contends that the following portion of a *Duncan* footnote leaves open a window of opportunity:

A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protection which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system.³⁶⁸

In view of this language, he contends that "[i]t would be strange and unfortunate if the federal [c]onstitution were read to

363 *Id.*

364 *Id.*

365 *Id.* at 150 n.14.

366 *Id.* (emphasis added).

367 Alschuler, *supra* note 6, at 995-98.

368 *Duncan*, 391 U.S. at 150 n.14.

preclude states from seeking workable alternatives to our existing regime of criminal justice,"³⁶⁹ specifically, one that "was fair and equitable but used no juries."³⁷⁰ However much I agree with Professor Alschuler that this interpretation would be unfortunate, I am less sanguine than he as to the outcome. First, the remaining portion of the footnote is of some relevance. It reads as follows:

Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.³⁷¹

The Court's emphasis on the unanimous adoption of the jury trial suggests that it would hesitate to approve anything less than the traditional jury system, at least in serious cases. Further, the Court's observation that every state has a criminal process which is structured and styled to "naturally complement the jury trial"³⁷² with "supporting framework and the subsidiary procedures"³⁷³ suggests that the Court would not look with favor on serious modifications of the jury process without concurrent changes in the structure and style of the criminal process as a whole. These necessary changes might be impossible given the existing restrictions imposed by the Court based on the Fifth and Sixth Amendments, such as those limiting the use of the defendant as a source of evidence.³⁷⁴ Further doubts concerning the possibility of significant modification of the lay jury structure arise from the Court's continuing praise of and reverence for the adversary system model, of which the all-lay jury is considered an essential part. It seems that even Professor Alschuler has become a bit more pessimistic. Although he continues to contend that *Duncan* may not be as restrictive as it seems, he recognizes that "for the moment, the prospect of employing mixed tribunals or other alternatives to the jury trial in American felony cases is 'probably a pipe dream.'"³⁷⁵

369 Alschuler, *supra* note 6, at 996.

370 *Id.* at 997 (quoting *Duncan*, 391 U.S. at 150 n.14).

371 *Duncan*, 391 U.S. at 150 n.14.

372 *Id.*

373 *Id.*

374 See *infra* notes 391-435 and accompanying text.

375 Alschuler, *supra* note 242, at 232.

Leaving aside any alteration in size or composition of the jury, enhancing the power of American judges vis-a-vis the jury also would face serious impediments imposed by appellate courts. For example, requiring that the jury provide reasons for its decision would violate the accepted principle that criminal juries may return general verdicts and may not be required to provide the reasons behind their verdicts.³⁷⁶ Also, federal courts allow special interrogatories to the jury in civil cases, but disfavor them in criminal trials on the ground that their use would undercut the defendant's right to full consideration of his case by the jury. The First Circuit has declared that "not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent."³⁷⁷ The First Circuit also condemned use of special interrogatories upon the ground that they could be used by the judge "to carefully guide the jury to its conclusion."³⁷⁸ The court admonished that the Constitution demands that the defendant be afforded "the full protection of the jury unfettered, directly or indirectly."³⁷⁹ More ominously, the court dashed hopes of innovations arising from the lower federal courts by cautioning that new procedures "should be adopted with great hesitation,"³⁸⁰ and cited with approval a sweeping statement by the Eighth Circuit that "[i]t is not the function of the courts subordinate to the Supreme Court to introduce innovations of criminal procedure."³⁸¹

The Constitution also presents a number of barriers to attempts to shift authority for the conduct of trials from lawyers to judges. Nearly one-half century ago, the Supreme Court declared that an "honest and actual *antagonistic* assertion of rights"³⁸² to be adjudicated is a "safeguard essential to the integrity of the judicial process,"³⁸³ and later described "cases and controversies" as limiting the business of the federal courts "to questions presented in an *adversary contest*."³⁸⁴ More recently, in the course of its

376 See *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969); *Gray v. United States*, 174 F.2d 919, 923-24 (8th Cir. 1949).

377 *Spock*, 416 F.2d at 181.

378 *Id.*; see also *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989).

379 *Spock*, 416 F.2d at 182.

380 *Id.*

381 *Id.* at 183 (quoting *Gray v. United States*, 174 F.2d 919, 924 (8th Cir. 1949)).

382 *United States v. Johnson*, 319 U.S. 302, 305 (1943) (emphasis added).

383 *Id.*

384 *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (emphasis added).

opinion explaining the Sixth Amendment competency of counsel standard, the Supreme Court defined fair trial in terms of the adversary process: "[A] fair trial is one in which evidence subject to *adversarial testing* is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."³⁸⁵ The Court appeared to regard the Sixth Amendment as guaranteeing that counsel play an adversary role in criminal trials: "[t]he Sixth Amendment . . . envisions counsel's playing a role that is critical to the ability of the adversary system to produce just results."³⁸⁶ Few arguments could reasonably be leveled against the proposition that, in our present adversary system, defense counsel must play an adversary role in order for the trial to be fair. An adversary defense is required to meet and balance an adversary prosecution. However, to the extent the Court's dicta constitutionalizes the process of "adversary testing," it erects substantial constitutional barriers against assigning to judges the powers traditionally held by lawyers in the adversary system.

As Professor Maurice Rosenberg pointed out, the Supreme Court's insistence on an adversary contest "does not mean that every departure from the detailed forms of the adversary process will be struck down as a constitutional violation, but a flagrant deviation does run that risk."³⁸⁷ In his view, "[j]udges who become overly aggressive in managing or directing important elements of lawsuits in their courts will be reversed on appeal."³⁸⁸ It is certainly true that our appellate courts tend to discourage trial judges from engaging in any significant or extensive questioning of witnesses, though judicial probing often is found to be harmless error. For example, in the Watergate prosecution of Gordon Liddy, the District of Columbia Circuit Court assumed that Judge Sirica erred in directly questioning witnesses, though the court found that "[t]he impact of the extensive questioning . . . was muted."³⁸⁹ The court declared,

Sound and accepted doctrine teaches that the trial judge should avoid extensive questioning of the witness and should rely on counsel to develop testimony for the jury's consider-

³⁸⁵ *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (emphasis added).

³⁸⁶ *Id.*

³⁸⁷ Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801, 806 (1988).

³⁸⁸ *Id.*

³⁸⁹ *United States v. Liddy*, 509 F.2d 428, 441 (D.C. Cir.), *cert. denied*, 420 U.S. 911 (1974).

ation [I]n general the trial judge would do better to forego direct questioning, and the possible impact on his objectivity, since he has available the alternative of suggesting to counsel the questions he believes ought to be pursued.³⁹⁰

Supreme Court interpretations of the Fifth and Sixth Amendments in specific procedural contexts also impede restructuring the proof-taking process to resemble the Continental approach. Not only is the judge prohibited from calling the defendant as the first witness, the defendant cannot be called as a witness at any stage by either the judge or the prosecutor, and neither may comment on the defendant's failure to take the stand voluntarily.³⁹¹ Moreover, both amendments prevent the judge from controlling the order of proof when the defendant decides to testify by requiring that he testify before other witnesses for the defense. In *Brooks v. Tennessee*,³⁹² the Supreme Court found that this requirement amounts to an "impermissible restriction on defendant's right . . . 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence,'"³⁹³ and violates defendant's right to "the 'guiding hand of counsel' in the timing of this critical element of his defense."³⁹⁴ *Brooks* severely limits the judge's discretion as to the order of proof when it comes to defendant's testimony. For example, a California court has held that the principles of *Brooks* were violated by a modification as slight as deferral of cross-examination of the defendant until after the defense psychiatrist had testified.³⁹⁵

390 *Id.* at 440 n.31.

391 See *Griffin v. California*, 380 U.S. 609 (1965). Further, the defendant is entitled upon request to an instruction that his or her silence must be disregarded. See *Carter v. Kentucky*, 450 U.S. 288 (1981).

Even before *Griffin*, most states forbade the prosecution from calling the accused as its own witness. 8 JOHN H. WIGMORE, EVIDENCE § 2268(2) (3d ed. 1940); 3 FRANCIS WHARTON, WHARTON'S CRIMINAL EVIDENCE 1960 (11th ed.).

California courts had prohibited the prosecution from calling the defendant as its witness on the ground that under the California Constitution and statutes "an accused has the right to stand mute, clothed in the presumption of innocence, until the prosecution, at the trial, has made out a prima facie case against him." *People v. Talle*, 111 Cal. App. 2d 650, 664 (1952). *Griffin*, in effect, deleted the final qualifying phrase.

392 406 U.S. 605 (1972).

393 *Id.* at 609 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

394 *Id.* at 612-13.

395 *People v. McDermid*, 162 Cal. App. 3d 770, 788-92 (1984).

Nor can the judge follow the unsworn statement procedure common to Continental courts by allowing the defendant to make an unsworn statement while prohibiting defense counsel from guiding his client through direct examination. A rule denying the accused the right to be placed under oath and to have his counsel question him to elicit his statement denies him "the guiding hand of counsel at every step in the proceedings,"³⁹⁶ as required by due process.³⁹⁷

Further barriers to reform of the adjudication process have been erected by the Supreme Court's interpretation of the Sixth Amendment's Confrontation Clause, which it views as embodying the elements of an adversary contest. In particular, the Court has held that confrontation guarantees that ordinarily the witness must give statements under oath, subject to cross-examination, and subject to observation by the trier of fact.³⁹⁸ Later, the Court found that the clause also "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."³⁹⁹ In 1990, the Court described the combined effect of these elements of confrontation as ensuring that evidence is "subject to the rigorous adversary testing that is the norm of Anglo-American criminal proceedings."⁴⁰⁰ Continental-style witness examination in which the presiding judge calls and examines witnesses and in which there is no American-style direct or cross-examination certainly is a far cry from the Court's description of the "norm" of Anglo-American procedure. It is very doubtful that the Court would view this "norm" as consistent with a neutral inquiry. The Court emphasized that the "central concern of the Confrontation Clause"⁴⁰¹ was ensuring reliability by subjecting the evidence "to rigorous testing in the context of an adversary proceeding before the trier of fact."⁴⁰² The Court further pointed out that "confront" means "a clashing of forces or ideas, thus carrying with it the notion of

396 *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961) (quoting *Powell v. Alabama*, 287 U.S. 45 (1932)).

397 *Id.* at 596.

398 *California v. Green*, 399 U.S. 149, 158 (1970).

399 *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

400 *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990). The Court found that "confront" means "a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Id.* at 3163. Furthermore, the Court declared that the Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Id.* at 3164 (quoting *Faretta v. California*, 422 U.S. 806, 818 (1975)).

401 *Id.* at 3163.

402 *Id.*

adversariness."⁴⁰³ Given the Court's characterization of the Confrontation Clause, any trial procedure which did not allow for a "clash" between the parties or which otherwise departed from the "norm" of Anglo-American presentation of evidence appears doomed to the scrap pile of unconstitutional alternatives.

The Court's use of the Confrontation Clause to constitutionalize the hearsay rules also presents obstacles to meaningful reform of our restrictive rules of evidence and discovery in criminal cases. In *Ohio v. Roberts*⁴⁰⁴ the Court rejected a literal reading of the clause which would have excluded any statement of a declarant not present at trial, yet it tied the clause closely to the hearsay rules. Noting that the Confrontation Clause and the hearsay rules are "designed to protect similar values,"⁴⁰⁵ the Court announced that a statement of an unavailable declarant is admissible under the clause only if "it bears adequate 'indicia of reliability,'"⁴⁰⁶ but concluded that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."⁴⁰⁷ In other cases the statement is inadmissible "absent a showing of particularized guarantees of trustworthiness."⁴⁰⁸ Later, the Court explained that where admission of a statement is based on a well-recognized exception to the hearsay rules, no special showing of trustworthiness is required.⁴⁰⁹ However, statements not falling within a firmly rooted hearsay exception are presumed unreliable and are inadmissible unless marked with such trustworthiness that "there is no material departure from the reason of the general rule."⁴¹⁰ The guarantees of trustworthiness must be demonstrated only from circumstances surrounding the making of the statement that render the declarant particularly worthy of belief, and do not include other evidence corroborating the trustworthiness of the statement.⁴¹¹

Justice Thomas, expressing for the first time as Supreme Court Justice his views concerning the relationship between the

403 *Id.*

404 448 U.S. 56 (1980).

405 *Id.* at 66.

406 *Id.*

407 *Id.*

408 *Id.*

409 See *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986).

410 *Cruz v. New York*, 481 U.S. 186 (1987).

411 *Id.*

Confrontation Clause and the hearsay rules, observed that the Court's interpretation of the clause has hobbled states that may wish to experiment:

The court has never explained the Confrontation Clause implications of a State's decision to adopt an exception not recognized at common law or one not recognized by the majority of the States. Our current jurisprudence suggests that, in order to satisfy the Sixth Amendment, the State would have to establish in each individual case that hearsay admitted pursuant to the newly created exception bears "particularized guarantees of trustworthiness," and would have to continue doing so until the exception became "firmly rooted" in the common law, if that is even possible under the Court's standard.⁴¹²

Justice Thomas feared that while the Court has repeatedly disavowed an attempt to "[c]onstitutionalize the hearsay rule and its exceptions," its decisions "have edged even further in that direction."⁴¹³ He suggested that the Court consider unhinging the Confrontation Clause from the hearsay rule by adopting Justice Harlan's view, which would largely limit the clause's application to witnesses who actually testify at trial, modified by a proviso that it also would cover extrajudicial statements that are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.⁴¹⁴ However, only Justice Scalia joined his concurrence. The majority rejected Harlan's reading of the clause, noting that such an approach would eliminate the clause's role in restricting the admission of hearsay testimony and was "foreclosed by our prior cases." The suggestion to follow Harlan came "too late in the day to warrant reexamination" of current rules.⁴¹⁵

Constitutionalizing the hearsay rules deters, if not forecloses, development of flexible, Continental-style admissibility rules that might reduce the importance of technical rules of evidence. As Professor Alschuler has pointed out, "[n]ow that common law pleading and its specialized forms of action have been abandoned, our law's grandest living memorial to common law refinement is the hearsay rule and its exceptions."⁴¹⁶ Casting these "refinements" in constitutional stone prevents experimentation with liber-

412 *White v. Illinois*, 112 S. Ct. 736, 748 (1992) (Thomas, J., concurring).

413 *Id.*

414 *Id.*

415 *Id.* at 738.

416 Alschuler, *supra* note 6, at 1021.

alized admissibility rules that might greatly simplify the trial process and which have been endorsed by both ancient and modern scholars.⁴¹⁷

Furthermore, rigid hearsay rules impede efforts to enlarge discovery for the accused because they limit the prosecution's response to possible abuse of discovery by defendant's harassment, intimidation, or elimination of witnesses. If, at the time of trial, a prosecution witness suddenly "stonewalls" or becomes unavailable, Continental systems will usually allow the witness' prior statement to be admitted as substantive evidence even though the witness has not been previously examined by the defense.⁴¹⁸ Under our Sixth Amendment confrontation principles, however, the witness' statement would not be admissible unless it was given in a trial-type context affording the defendant an opportunity to cross-examine, or the witness took the stand at trial and was subject to cross-examination concerning the statement, or the statement itself qualified under a "firmly rooted hearsay exception"⁴¹⁹ or demonstrated "particularized guarantees of trustworthiness."⁴²⁰ Thus, as a general rule, the American prosecutor, unlike his Continental counterpart, cannot rely on using even sworn statements given to officials if the witness later is dissuaded or prevented from testifying.⁴²¹ Facing this prospect, our prosecutors have a potent weapon against full and open discovery for the defense.⁴²² Judge

417 See 4 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 407-10 (1827); James H. Chadbourne, *Bentham and the Hearsay Rule—A Benthamite View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 936-37 (1962); George F. James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 U. ILL. L. REV. 788 (1940).

418 SCHLESINGER ET AL., *supra* note 29, at 484. The German principle of "free evaluation of the evidence," limited only by rules of privilege and of "logic," in exceptional cases even allows admission of informants' statements given to police when the informants are available, but are fearful of reprisals. See Zeidler, *supra* note 46, at 156-57.

419 *Idaho v. Wright*, 110 S. Ct. 3139, 3141 (1990).

420 *Id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1988)).

421 See *California v. Green*, 399 U.S. 149 (1970); *cf. Barker v. Morris*, 761 F.2d 1396 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986) (admission in state murder trial of videotaped witness who subsequently died did not violate confrontation clause, even though erroneously admitted under state law, since the confrontation clause is given a pragmatic rather than a rigidly literal construction). The Eleventh Circuit cautioned that only in exceptional cases will a witness' sworn testimony before the grand jury be admissible if the witness is unavailable at trial. *United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1990).

Some courts have found an exception where the prosecution can shoulder the often impossible burden of proving that defendant was the cause of the witness' refusal or unavailability. See *infra* note 426 and accompanying text.

422 Fear of improper witness contacts led Congress to reject a proposal for including

Frankel described this concern as "well founded"⁴²³ and "significant enough to warrant our exploring alternative arrangements abroad where investigation 'freezes' the evidence . . . for use at trial."⁴²⁴

Some partial solutions could be implemented without major changes in our confrontation principles, but each would have major deficiencies. For example, states could provide for greater availability of pretrial depositions, preliminary hearings, or other trial-like procedures, which would provide the defendant with the opportunity for cross-examination required for admission of the transcript as former testimony if the witness became unavailable.⁴²⁵ However, providing mini-trials in which all important prosecution witnesses would testify and be cross-examined would be highly inefficient and particularly burdensome to the witnesses. It may also prove somewhat ineffective because witnesses could be either dissuaded from cooperating or eliminated prior to the hearing. Another approach would admit past statements of prosecution witnesses in cases where the witness' unavailability or refusal to testify was caused by the defendant. These admissions are justified upon the ground that, by such conduct, the defendant has waived any confrontation or hearsay protection he may have had.⁴²⁶ However, in many, if not most, of these cases, the prosecution would find it difficult or impossible to prove that the defendant

mutual exchange of witness lists in the Federal Rules of Criminal Procedure. See the discussion of the Congressional debates over discovery of witness lists in Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 651-55 (1989).

423 Frankel, *supra* note 109, at 1054.

424 *Id.*

425 A 1985 revision of the California Penal Code authorizes the conditional examination of a prosecution witness when there is evidence that the life of the witness is in jeopardy. Act of Sept. 19, 1985, ch. 783, §§ 2-5, 1985 Cal. Stat. 2523 (amending CAL. PENAL CODE §§ 1335-41).

426 It seems reasonable to conclude that confrontation rights would not be denied if the witness' unavailability or refusal to testify was procured by the accused. See *United States v. Carlson*, 547 F.2d 1346, 1353, 1358 (8th Cir. 1976) (By intimidating a prospective prosecution witness into not testifying, the defendant waived his Sixth Amendment right of confrontation such that the court could admit the witness' prior grand jury testimony.). Without relying on waiver, *Carlson* found the prior testimony admissible under the "catch-all" exception of § 804(b)(5) of the Federal Rules of Evidence. *Cf. United States v. Mayes*, 512 F.2d 637, 648-51 (6th Cir.) (prosecution's reading of a prior confession of an expected prosecution witness who refused to testify due to pressure by the defendant was improper, but court would not allow defendant's counsel to complain of denial of confrontation since defendant caused refusal), *cert. denied*, 422 U.S. 1008 (1975).

was the source of the witness' disappearance or refusal to cooperate.⁴²⁷

An even more formidable barrier against revealing the prosecutor's case to the defense lies in the "lack of mutuality" argument. This argument rests on the proposition that constitutional rules so hinder the state from using the accused as a source of testimonial evidence that any pretrial discovery would of necessity be a "one-way-street" allowing the accused an unfair advantage. Armed with knowledge of the prosecution's case, the defense would be in a good position to prepare cross-examination of prosecution witnesses, shape the defense to meet the prosecution's case, and even fabricate and present perjured testimony, while the prosecution would face "trial by surprise." The argument is a powerful one and has convinced most American courts and legislatures. As Professor Schlesinger noted, "it does not seem likely that unlimited discovery—the hallmark of civilized criminal procedure—will be widely and effectively introduced into our system unless the 'one-way-street' argument can be laid to rest."⁴²⁸

In one context, the Supreme Court has taken a major step in this direction by upholding "two-way-street" pretrial discovery. In *Williams v. Florida*,⁴²⁹ the Court held that a state notice of alibi rule requiring that the defense notify the prosecution of alibi information and witnesses the defense intended to present at trial did not violate the Fifth Amendment because it did not involve compulsion, but only acceleration of the timing of disclosures.⁴³⁰ While the Court's timing rationale limits court-ordered discovery for the prosecution to that which the defense intends to offer at trial, its principles apply beyond the alibi rule and suggest that, in the context of pretrial discovery, the "one-way-street" argument is no longer viable.

427 Current hearsay exceptions of this sort are often so narrow that they are of limited use. For example, California Evidence Code § 1350(a) provides for the admission of a statement of an unavailable declarant only in "serious felony" cases and only if the prosecution proves by clear and convincing evidence that the declarant's unavailability was "knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant." CAL. EVID. CODE § 1350(a) (West Supp. 1992). Furthermore, the statement must have been memorialized in a tape recording or written statement signed by the declarant and notarized in an official's presence, and must be corroborated by other evidence. *Id.*

428 SCHLESINGER ET AL., *supra* note 29, at 485.

429 399 U.S. 78 (1970).

430 *Id.*

However, in the more significant context of gathering testimonial evidence directly from the accused, both during police questioning and at trial, the Court has erected substantial barriers which support arguments against full discovery for the defense. The extent to which an accused can take unfair advantage of pretrial discovery in large part depends upon whether he has committed himself to a specific factual defense at an early stage in the proceedings. Continental systems encourage the accused to waive the right to silence, and nearly all defendants provide a detailed version of the facts shortly after arrest such that "at the time when he or his counsel inspects the dossier, his position has assumed a sufficiently firm shape so that it can no longer be effectively improved by fabrications."⁴³¹ On the other hand, our complex interrogation rules based on the Fifth and Sixth Amendments discourage suspects from making statements to police, and, in a substantial number of serious criminal cases, the accused never gives his version of the events prior to trial or plea.⁴³² Furthermore, in England, suspects are given more encouragement to talk, and they tend to make damaging statements at a greater rate than their American counterparts.⁴³³ Thus, it is not surprising that statements by suspects assume greater importance in English prosecutions.⁴³⁴

Certainly, cultural differences in areas such as respect for authority and attitudes toward accepting responsibility for one's conduct play a large role in the extent to which suspects cooperate with police efforts to obtain statements. Nevertheless, our police interrogation rules have both the purpose and effect of encouraging suspects to remain silent and to refuse to respond to police questioning to a greater degree than do those of England or Continental countries. A system which fails to rely on informa-

431 SCHLESINGER ET AL., *supra* note 29, at 484. In France, the suspect is expected to give evidence and submit to pretrial questioning, and, nearly always, the suspect is an important source of information about the alleged crime. Part of the reason is cultural: "[t]he albatross of silence in the face of open accusation seems especially heavy in French mores." Mendelson, *supra* note 29, at 44.

432 For a summary and comparison of American and English studies on the effect of interrogation rules on obtaining suspect statements, and the significance of such statements in criminal prosecutions, see Van Kessel, *supra* note 5, at 109-29. American studies found that the percentage of American suspects who refused to answer any questions varied widely (from 9 to 60%), but overall, most studies found that a substantial (more than 10% but less than 50%) percentage of suspects questioned refused to make a statement. *Id.* at 117-19.

433 *Id.* at 126-29.

434 *Id.* at 127.

tion from the accused, particularly at or near the time of arrest, both forfeits valuable evidence and allows for a greater possibility of defense fabrication through improper use of knowledge of the prosecution's evidence. In this respect, "our legal system stands virtually alone"⁴³⁵ and exposed to the "one-way-street" argument which impedes development of liberal discovery rules.

2. Resistance to Change on the Part of Lawyers and Judges

Lawyers have a strong interest in maintaining the present system, which allows them to be the central figures in the great drama of the criminal trial. They will not easily yield their power to influence the outcome of trials while often being regarded as heroes in doing so. Furthermore, any interest they may have in expediting the trial process, such that there could be more trials and fewer guilty pleas, is diminished by their strong interest in maintaining the present plea bargaining system. Lawyer dominance over the disposition of cases through the plea bargaining process is even greater than lawyer control of the trial process.⁴³⁶ In fact, many lawyers prefer the negotiation and plea process to the alternative of trial for the very reason that they can better control the former, and the outcome is more predictable.⁴³⁷

Research based upon a 1976 Georgetown University study of plea bargaining in six jurisdictions found a process sharply in contrast to trial combat:

The decisions of prosecutors and defense counsel regarding whether to plea bargain a case and on what terms is not as haphazard as it may appear. There is considerable agreement . . . as to what factors are important and how much weight to attach to them in deciding the appropriate disposition of cases When presented with the same hypothetical

435 SCHLESINGER ET AL., *supra* note 29, at 487.

436 Although the client ultimately controls the decision whether to settle the case by pleading guilty, it is widely recognized that lawyers (particularly privately paid attorneys who usually have greater "client control") play a pivotal role by advising their clients of the strength of the case against them and the odds of acquittal and by seeking to persuade them to take a particular course. See, e.g., *Defiance Didn't Help Defendants, It Seems*, N.Y. TIMES, Apr. 24, 1990, at C7.

437 In this sense, it has been argued that plea bargaining is the natural result of bureaucratic or organizational concerns of key court participants. See ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE (1979) (The desire of both prosecutors and defense attorneys to control the criminal process makes them prefer the certainty of a conviction by plea as opposed to the uncertainty of a trial, and they are willing to cooperate to achieve this result.).

cases, prosecutors and defense counsel were in remarkable agreement in their estimates of the probability of conviction in those versions of the cases where the evidentiary strength of the case was strong. But in the weaker version there were significant differences among and between them.⁴³⁸

Although the researchers found an adversary component in the process, they regarded it as "of such a latent quality that it can easily be overlooked."⁴³⁹

A process which relies upon common understandings between adversaries has advantages for the participants beyond the power that comes from the ability to predict the outcome. Avoidance of combat often becomes a practical necessity for battle-weary soldiers. Even hardened trial lawyers have a limited capacity for the intense conflict of a criminal jury trial and very often naturally tend to cooperate in the disposal of cases by means other than full-fledged trial combat.⁴⁴⁰

Financial incentives also play a part. In the overwhelming majority of cases, private defense attorneys, whether they are paid by their clients or paid by the government, make more money disposing of cases by plea bargain than by trial. In the usual situation, a given case is worth a limited amount of money, and private lawyers make more by "volume practice," involving extensive plea bargaining, than by days in trial. In fact, private lawyers complain of "losing money by going to trial." Theoretically, public defenders are not subject to these pressures, but in practice they often face intense budgetary and administrative pressures to handle the indigent caseload, rather than declare themselves overburdened and unable to take more cases.

The power of organized lawyers to block efforts to reform our criminal justice system should not be underestimated. California, for example, experienced years of public frustration with its Supreme Court, which reversed the vast majority of capital punishment sentences while extending exclusionary rules and other rights of criminal defendants. Even widespread dissatisfaction with the justice system could not overcome a legislative paralysis due, in large part, to strong but opposing attorney organizations. Ultimately, prosecution lawyers and victims' organizations used the initia-

438 William McDonald, U.S. Dep't of Justice, *Pleas Bargaining: Critical Issues and Common Practices* v (1985).

439 *Id.* at 91.

440 See JAMES EISENSTEIN & HERBERT JACOBS, *FELONY JUSTICE* (1977).

tive process to by-pass the legislature.⁴⁴¹ A similar process took place in 1990 and resulted in the enactment of another prosecution-drafted "reform."⁴⁴² As a result, over the past two decades the most significant changes in the rules of evidence and procedure in criminal cases in California have come from the initiative process rather than from law revision commissions or the legislature. The legislative paralysis, caused at least in part by opposing lawyer groups, is particularly stifling to any effort to grapple with the complex and difficult questions involved in reducing adversary excesses, yet this is precisely the type of issue that should be debated by commissions and legislative committees rather than decided by an up-or-down vote of the electorate.

Inertia, as well as active resistance of American judges, may also pose serious obstacles to any alteration of the roles of participants in the trial process. Why, one may ask, would judges object to their activation and empowerment? First, altering the role of judges from umpires to active directors of the trial would require monumental changes on their part. In addition to becoming more active in the trial itself, trial-director judges would be required to become familiar with the facts of the case and the available evidence prior to trial, a practice that would demand considerably more effort as well as greater judicial competence.

The greater workload of Continental and English trial judges becomes immediately apparent to anyone who attends foreign trials. Clearly, the presiding judge at a Continental trial is the busiest because she must become familiar with the case file, call and examine the witnesses, and deliberate and render a verdict. Although the English judge has less authority to conduct the trial than the Continental judge, she also must work harder than her American counterpart. The duty of the English judge to sum up and comment on the evidence at the end of the trial requires constant attention throughout the trial, as well as an ability to take accurate notes rapidly, to synthesize the relevant facts, and to summarize for the jury factors relating to the credibility of witnesses.

441 1982 Cal. Stat. A-186. This initiative, commonly known as Proposition 8 and entitled "The Victims' Bill of Rights," was adopted by the voters on June 8, 1982.

442 1990 Cal. Adv. Legis. Serv. 264 (Deering). This initiative, called Proposition 115 and named the "Crime Victims' Justice Reform Act," was enacted by the voters on June 5, 1990.

Particularly during a witness' examination in chief, the judge will be writing almost continuously.⁴⁴³

The American trial judge, with neither the responsibility for examining witnesses nor summing up and commenting on the evidence, must listen to the lawyers present the evidence in order to rule on motions and objections (which are much more common here), but, generally, the judge's attention is not as important. A referee may miss calling a foul, but the game will go on. In fact, games may be played without referees. On occasion, one hears of an American judge falling asleep during the trial of a case, to be awakened only by a protective clerk or an attorney's objection.⁴⁴⁴ With an unconscious presiding judge, the conduct of a Continental trial would be impossible and continuation of an English trial unthinkable. Shifting from an umpire to a director would require much more effort on the part of our judiciary, yet to many judges, the secondary role of an umpire has its advantages. The lesser workload of an inactive observer may be appealing. It is easier to sit as a tennis umpire calling balls in or out than to become an active participant who is primarily responsible for a reliable and a just result.⁴⁴⁵

Finally, the fact that most state trial judges must stand for election makes an inactive role more attractive. The more responsible the judge is for the result of the contest, the more likely she will make someone unhappy and make the prospect of her reelection more difficult or uncertain.

443 HARVEY, *supra* note 101, at 67-68.

444 Having been degraded to mere moderators, American judges may not give their work the attention it deserves. "Not infrequently trial judges have been reported busying themselves with extraneous matters during testimony so that when called upon to rule on an objection, the pertinent portion of the record must be read back to them. With such a lack of interest in the proceedings displayed by the judge, the jury may be tempted to assume that the outcome is of little importance." David Wolchover, *Should Judges Sum up on the Facts?*, CRIM. L. REV. 781, 789-90 (1989).

As a trial lawyer, I have often witnessed judges busying themselves with extraneous matters during the presentation of evidence and, at times, have confronted afternoon "judicial napping."

445 California's recent implementation of judicially conducted voir dire may show that judges should be given greater authority and responsibility in the trial process. In 1990, California voters, through the initiative process, required judges to conduct the examination of prospective jurors, a task previously left to the attorneys. Initial reports indicate that many judges are eagerly embracing their newly granted powers, and that judicial voir dire is proving a success. Clyde Leland, *The New Criminal Process*, CAL. LAW., Aug. 1990, at 26. However, other reports suggest that many judges have become bored with the process and would rather leave it with the attorneys. At this point, it is probably too early to gauge the general judicial reaction to judges' empowerment in the jury selection process.

Consequently, as a practical matter, depowering the lawyers and empowering the judges in the Continental mode would be an uphill fight, facing strong resistance by lawyers, many of whom are powerful politicians. I suspect that many, if not most, judges also would object.

3. Our National Character

The basic assumptions underlying the nonadversary approach cut against the grain of our national character.⁴⁴⁶ The American-style adversary system—with its emphasis on the contest between the lawyers for the individual and for the state, rules designed to shield the accused from the process, and extensive use of the lay jury—has its roots in the individualism, populism, and pluralism that are natural ingredients of our character and that strongly influence our view of the proper structure and role of social and political institutions. A fundamental aspect of our individualism that stands in the way of reforms embracing nonadversary approaches is our antipathy toward authority: in particular, our fear and distrust of governmental power. These attitudes lead us to establish mechanisms—such as strong lawyers and the lay jury—that shield the individual from the authority of state institutions.

Historically, our attitudes arose near the time of our Revolution out of an aversion to English trial procedures that had been unfair to the accused.⁴⁴⁷ Over the years, this individualism and distrust of authority, particularly of governmental power, has become a part of our approach to life. It presents a formidable obstacle to the adoption of Continental-style procedures, which leave the accused exposed to the considerable authority of a civil servant—the presiding judge. Also, entrusting a good part of the powers of the lay jury to professional judges would conflict with the value we place in social pluralism, as well as with our tendency to place greater trust in the common person and less in professionals. Europeans, on the other hand, generally have greater respect for professionals and less fear of authority. As a result,

446 One foreign observer of our adversary criminal process remarked that “telling Americans to simply reduce that complexity is as fruitless as a medical prescription which cures symptoms instead of the disease itself . . . [and the most that the European experience can offer is] a guideline for American law reform, rather than . . . a substitute for American procedure.” Volkman-Schluck, *supra* note 4, at 32.

447 FOSDICK ET AL., *supra* note 267, at 595.

they are more willing to place considerable power in the hands of professional judges. Most Europeans would stand in shocked disbelief at the argument, widely accepted here, in favor of the Anglo-American lay jury: "Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men."⁴⁴⁸

4. The Result: A System Impervious to Reform

The constitutionalizing of our rules of criminal procedure, together with our general distrust of governmental authority and the natural resistance to change on the part of lawyers and judges, have combined to create formidable, if not insurmountable, barriers to any significant efforts to experiment with European alternatives to criminal trials. Researchers Felstener and Drew, in studying the applicability of foreign alternatives to our system of trial, lamented the lack of "empirical data" and emphasized "the need for experimentation with innovations in a few settings before major reforms can prudently be undertaken."⁴⁴⁹ Yet, our impervious rules of criminal procedure and other factors have stifled experimentation with nontraditional adjudication processes. In 1979, Professor Feeley reviewed then-recent studies and evaluations of the courts in the areas of pretrial release and diversion, adjudication, and sentencing that he considered to be innovative and important.⁴⁵⁰ On the subject of adjudication, he found one genuine experimentation and a number of studies of the plea bargaining process, but did not discover one evaluation of or experimentation with the trial process.⁴⁵¹ Even in the area of plea bargaining, he found significant gaps in the research, but felt it unlikely that this void would be filled in the future, noting that "[e]ven the most ardent proponents of experimentation are not likely to advocate experiments that would wreak havoc on the constitutional rights of the accused."⁴⁵²

448 GILBERT K. CHESTERTON, *TREMENDOUS TRIFLES* 86 (1915).

449 WILLIAM L.F. FELSTNER & ANN BARTHELMES DREW, U.S. DEP'T OF JUSTICE, *EUROPEAN ALTERNATIVES TO CRIMINAL TRIALS AND THEIR APPLICABILITY IN THE UNITED STATES* 41 (1978). The researchers concluded that "we will never be able to assess the systematic value of such innovations unless we give them a trial on a small scale and under experimentally-controlled conditions." *Id.* at 42.

450 Malcolm Feeley, U.S. Dep't of Justice, *The Impact of Innovation: Assessing the Evaluation of Courts*, in *HOW WELL DOES IT WORK? REVIEW OF CRIMINAL JUSTICE EVALUATION*, at 171, 174 (1979).

451 *Id.* at 183-90.

452 *Id.* at 185.

I would venture the more sweeping conclusion that researchers, not to mention prosecutors, defense attorneys and judges, would hesitate to go forward with any experiment or innovation which might in the least be viewed as intruding upon constitutional protections. In fact, the designers would likely make every effort to fit their programs within existing constitutional parameters. The uncertainty about the validity of any "experimentation" was cited by former Chief Justice Burger as a major reason for the lack of any incentive for legislative development of alternatives to the exclusionary rule.⁴⁵³ It is safe to say that legislatures would be even more hesitant to experiment with new trial procedures when the Court may later decide that they encroach on fundamental constitutional guarantees (rather than only procedural safeguards), requiring wholesale reversals and difficult, burdensome retrials. As a practical matter, exploration of significant modifications of our trial process in serious cases will be limited to the ivory towers of academia as long as many of our most important rules of evidence and procedure stand as constitutional Berlin Walls.

Professor Mary Ann Glendon has contended that a similar stifling of experimentation and reform in the area of abortion resulted from the Court's leap into constitutional rule-making in the name of individual privacy. "The judicially announced abortion right in 1973 brought to a virtual halt the process of legislative abortion reform that was already well on the way to producing in the United States, as it did all over Europe, compromise statutes that gave very substantial protection to women's interests without completely denying protection to developing life."⁴⁵⁴ However one views the virtues of the rules pronounced by the Court in watershed cases such as *Mapp*, *Miranda* and their progeny, it is difficult to contend that the imposition of such rules has not hindered political efforts to experiment and to find alternative solutions to the very complex problems they sought to address. It is telling that the recent, major restructuring of Italian criminal procedure took place after lengthy debates and compromises within the Italian Parliament and other institutions of government, during which time the Italian Constitutional Court avoided piecemeal constitutionalization of the criminal process.⁴⁵⁵

453 *Stone v. Powell*, 428 U.S. 465, 500-01 (1976).

454 MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 58 (1991).

455 See Fassler, *supra* note 33, at 273.

Greater flexibility could be gained by returning to the standards of fundamental fairness. However, there is little indication that the Supreme Court wishes to revive the incorporation debate. In *Apodaca v. Oregon*,⁴⁵⁶ one former member of the Court indicated a willingness to return to the touchstone of fundamental fairness, and in *Teague v. Lane*,⁴⁵⁷ the Court appeared to adopt *Palko*'s fundamental fairness test in the retroactivity context by describing an exception to the general principle of nonretroactivity on collateral review with respect to a new rule "if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty."⁴⁵⁸

However, later in *Butler v. McKellar*,⁴⁵⁹ the Court backed away from fundamental fairness, noting that *Teague* "discerned a latent danger in relying solely on this famous language from *Palko*."⁴⁶⁰ "Were we to employ the *Palko* test without more, we would be doing little more than importing into a very different contest the terms of the debate over incorporation Reviving the *Palko* test now, in this area of law, would be unnecessarily anachronistic."⁴⁶¹ Furthermore, the Court has stated that the basic elements of a fair trial guaranteed by due process are largely defined by the several provisions of the Sixth Amendment, and the Court has suggested that it is satisfied with looking to the specific provisions of the Bill of Rights rather than creating a second tier of constitutional rights based on due process concepts.⁴⁶²

456 406 U.S. 404 (1978).

457 489 U.S. 288 (1989).

458 *Id.* at 307.

459 110 S. Ct. 1212 (1990).

460 *Id.* at 1218.

461 *Id.* (quoting *Teague*, 489 U.S. at 312).

462 See *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) (dealing with the right to counsel); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); cf. *Graham v. Connor*, 490 U.S. 386 (1989) (in analyzing claims of excessive force by law enforcement officers, courts must look to the reasonableness standard of the Fourth Amendment, rather than to substantive due process).

However, the Court is becoming more sympathetic to Harlan's views on other matters. See *Teague v. Lane*, 489 U.S. 288 (1989) and *United States v. Johnson*, 457 U.S. 537 (1982), which adopt his retroactivity approach. Justices Scalia and Thomas recently expressed admiration for the views of Justice Harlan concerning the reach of the Confrontation Clause. See *White v. Illinois*, 112 S. Ct. 736 (1992) (Thomas, J., concurring). Justices Scalia and Thomas expressed substantial agreement with Justice Harlan's view that the Sixth Amendment Confrontation Clause was not intended as a general limitation on the admission of hearsay evidence.

We are left, then, with the hope that the Court might become more flexible when interpreting the individual guarantees of the Fifth and Sixth Amendments. With respect to the timing and character of pretrial procedures, such as arraignments, bail, and probable cause hearings, the Court has generally allowed "flexibility and experimentation by the states."⁴⁶³ Recently, the Court invited the states to experiment with different ways to provide those arrested without a warrant with prompt, probable cause hearings required by the Fourth Amendment, explaining that "the Constitution does not impose on the States a rigid procedural framework."⁴⁶⁴ Much could be gained if the Court would apply the same constitutional analysis to state trial procedures.

Professor Ronald Allen contends that due process jurisprudence has mirrored the national trend toward "a subtle devolution of political authority from the central government to the states" and predicts that as state officials become aware of their increasing autonomy, they will begin to adopt innovations.⁴⁶⁵ It is true that the Supreme Court has shown an increasing propensity to limit exclusionary rules⁴⁶⁶ as well as a growing reluctance to use federal habeas corpus powers to overturn final state criminal convictions.⁴⁶⁷ However, despite the Court's recent dicta that "[u]nder our constitutional system, the primary responsibility for . . . establishing procedures for criminal trials rests with the States,"⁴⁶⁸ the Court has not abandoned the rigid commands of its landmark decisions such as *Duncan*, *Griffin*, and *Miranda*, or of

At some point, even traditional liberals may back away from reliance on the central government, and on the Supreme Court in particular, for solutions to our criminal justice problems. Anthony Lewis recently recognized the "benefits" of the Brandeis view (*see supra* note 357 for a discussion of the Brandeis view) allowing individual states to "try novel social and economic experiments without risk to the rest of the country." Anthony Lewis, *Abroad at Home: E. Pluribus Unum?*, N.Y. TIMES, Sept. 6, 1991, § A1, at 17. Brandeis' regard for a state's freedom to experiment, and Harlan's regard for flexibility in Fourteenth Amendment due process jurisprudence some day could carry the day in the legal community and, ultimately, in the Supreme Court.

463 *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975) (leaving flexible the nature and timing of probable cause hearings).

464 *Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

465 RONALD J. ALLEN & RICHARD B. KUHN, CONSTITUTIONAL CRIMINAL PROCEDURE 122 (2d ed. 1991) (quoting RONALD J. ALLEN, PROCEDURAL DUE PROCESS OF LAW, CRIMINAL, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Supp. 1990)).

466 *See, e.g.*, *California v. Hodari*, 111 S. Ct. 1547 (1991); *Florida v. Bostick*, 111 S. Ct. 2382 (1991); *New York v. Harris*, 495 U.S. 14 (1990); *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York v. Quarels*, 467 U.S. 649 (1984).

467 *See, e.g.*, *McCleskey v. Zant*, 111 S. Ct. 1454 (1991).

468 *Payne v. Tennessee*, 111 S. Ct. 2597, 2607 (1991).

the lesser known rules of procedure and evidence that also lock in elements of the traditional adversary trial structure⁴⁶⁹ and which stand in the way of significant experimentation with nonadversary procedures. Given present constitutional restraints, state officials cannot confidently experiment with Continental-style procedures, and innovations will likely be confined within existing adversary structures.

B. Further Perspectives on Altering the Adversary System

1. Revising Standards of Attorney Conduct:
An Unpromising Approach to Curing Adversary Excesses

We should put aside the notion that our major adversary excesses can be eliminated, or even significantly reduced, merely by altering the ethical rules that govern lawyer advocacy. Judge Frankel, the most forceful and articulate spokesperson for this approach, contended that solutions to major problems of our adversary system could be found in modifying ethical rules that demand that lawyers place the zeal to win above truth and justice.⁴⁷⁰ Frankel argued that lawyers are too committed to contentiousness and not committed enough to truth. He suggested the following remedies: Modify the adversary ideal, make truth a paramount objective, and impose upon the parties a duty to pursue the truth.⁴⁷¹ He later pointed specifically to what he saw as "excesses" in our adversary system: "the tricks, stratagems, dodges, and ruses that wily advocates everywhere have learned and employed, in one form or another, to win unfairly, take unfair advantage, and achieve what detached observers would condemn, and have always condemned, as unjust results."⁴⁷² He described the following "widespread practices in need of change":

[K]nowingly presenting false testimony of clients or witnesses; trying by artful cross-examination or other techniques to block the truth, or to make what is known to be true seem false; and deliberately failing to reveal evidence that would help the court or jury to achieve an accurate understanding of the facts.⁴⁷³

469 See *White v. Illinois*, 112 S. Ct. 736 (1992); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Brooks v. Tennessee*, 406 U.S. 605 (1972).

470 Frankel, *supra* note 109, at 1035.

471 *Id.* at 1052, 1057-58.

472 FRANKEL, *supra* note 30, at 7.

473 *Id.* at 79. Judge Christensen agreed with Frankel that "the moral tone of legal

First, some conduct about which Frankel complains, such as knowingly presenting false testimony, would subject lawyers to discipline under existing ethical rules.⁴⁷⁴ Furthermore, the allegation that lawyers engage in tricks and deceptions to "take unfair advantage" and to "win unfairly," applies to some, but I believe not to most, prosecutors or defense attorneys, unless one defines "unfair" to include conduct well within the current bounds of competent advocacy. As one federal judge observed, restraints on unfair tactics designed to win at all costs already are imposed by many successful advocates, while ignored by others.⁴⁷⁵ However, Frankel's recommendation that lawyers become active pursuers of truth and reveal evidence that would assist in arriving at an accurate result is inconsistent with the practice of virtually all criminal defense lawyers. This recommendation strikes at the heart of our traditional view of a defense lawyer's function in our adversary system. As Justice White observed, although prosecutors must be dedicated to ascertaining the truth, "defense counsel has no comparable obligation to ascertain or present the truth."⁴⁷⁶ In fact, partisan justice is the mission of anyone who desires to be known as a skillful defense attorney. Changing ethical standards for the sake of accurate fact-finding by obligating defense lawyers to breach client confidences, or to reveal the names and statements of persons who would incriminate their client, but whom they do not intend to call as witnesses, would run counter to our entrenched tradition of partisan defense advocacy, not to mention fundamental constitutional and evidentiary privilege rules.⁴⁷⁷

advocacy" needed improvement. A. Sherman Christensen, *Some Reflections on the Nature and Future of the Adversary System*, 30 DEF. L.J. 325, 337 (1981). Other judges have criticized the poor quality of American advocates. See, e.g., Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 238 (1973); Irving R. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175 (1974).

474 See MODEL CODE, *supra* note 143, at DR 7-102 (a lawyer shall not knowingly use perjured testimony or false evidence); MODEL RULES, *supra* note 140, at Rule 1.2(d) (a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent). See generally *Nix v. Whiteside*, 475 U.S. 157 (1986).

475 Christensen, *supra* note 473, at 338.

476 *United States v. Wade*, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part).

477 Frankel's proposed rules would excuse lawyers from the duty to disclose when the lawyer is "prevented from doing so by a privilege reasonably believed to apply." Frankel, *supra* note 109, at 1057. However, Frankel noted the need for changes in evidentiary privilege rules, suggesting that "[t]he privilege for client's confidences might come in for reexamination and possible modification." *Id.* at 1056.

Consequently, such a radical revision of lawyer ethics would be extremely difficult to achieve. Lawyers understandably would strongly resist the requirement that they choose between their client's interest and notions of truth and justice based on some necessarily imprecise standard. For example, even traditional cross-examination would be suspect. Frankel apparently would have lawyers cross-examine witnesses with the objective of revealing all relevant facts, as opposed to the usual current practice of competent attorneys to conduct a tight, leading cross-examination and avoid "the disaster of asking one question too many."⁴⁷⁸ Furthermore, I doubt that Frankel's radical changes would be politically acceptable despite the present negative public regard for lawyers. It is telling that no state has adopted Judge Frankel's extreme approach as a cure for the ills of its legal system.

Moreover, even if attainable, changes in ethical rules alone would not go far toward curing defects in our adversary system. Given the pressures inherent in our existing adversary structures, it is doubtful that new ethical rules would substantially alter the conduct of lawyers. Certainly, most lawyers would agree with Alschuler that they "simply are not appropriate figures to correct the defects of our adversary system. Their hearts will never be in it, and more importantly, it is unfair to both their clients and themselves to require them to serve two masters."⁴⁷⁹

Not only is it unfair to impose on defense attorneys a truth-seeking duty that generally supersedes the obligation to serve their clients, it is also unnecessary to achieve Judge Frankel's purpose of revising our adversary system to place more emphasis on the truth.⁴⁸⁰ As I will suggest, our adversary procedures could be modified to place greater emphasis on the goal of achieving an accurate result. In fact, English and Continental systems demonstrate that structural components of the adjudication process, rather than ethical rules imposing conflicting obligations on lawyers, account for the greater value those systems place on truth. Privi-

478 FRANKEL, *supra* note 30, at 16. Frankel would require lawyers, unless prevented by a privilege, to "[q]uestion witnesses with a purpose and design to elicit the whole truth, including particularly supplementary and qualifying matters that render evidence already given more accurate, intelligible, or fair than it otherwise would be." Frankel, *supra* note 109, at 1058.

479 Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 354 (1981).

480 Frankel's primary "theme" is that our adversary system rates truth too low among competing values. See Frankel, *supra* note 109, at 1032.

lege rules that are similar to our own protect client confidences in the legal systems of England and Continental countries such that, as a general matter, defense lawyers are under no obligation to reveal, and are actually prevented from revealing, client confidences or incriminating information except in very limited circumstances.⁴⁸¹ Furthermore, in contrast to our system, the judge and prosecutor in Continental trials are obligated not only to reveal all evidence to the defense, but to present in court all evidence that favors the accused. Even with this greater contrast between the duties of the judge and prosecutor and the defense, Continental adjudication systems place more importance than our system does on the goal of attaining an accurate result.⁴⁸²

Not surprisingly, Judge Frankel's reliance on altering ethical standards to correct defects in our adversary system has received severe criticism as unworkable, ineffective, wrongly directed, and having too little regard for other values in our society.⁴⁸³ I agree with much of this criticism. Nevertheless, I share Judge Frankel's concern over the extreme partisanship of American lawyers. As noted previously, American criminal trial lawyers generally are considerably more aggressive and contentious than either Continental or English advocates. Furthermore, contrary to Frankel's critics, I believe that to some extent our rules of professional conduct contribute to lawyer contentiousness by their imprecision as well as their near-unqualified demand for zealous advocacy in the pursuit of the client's desires.⁴⁸⁴ However, our ethical rules are not the only, nor even the most significant, reason for this difference. Nor should we blame the character of our lawyers, assuming them to be on a lower moral level than advocates in other countries. Rather, the extreme partisanship of our lawyers has its deepest roots in and naturally flows from the unique forms of our adversary structure, principally the prominence and control our adversary system assigns to lawyers in contrast to judges. In a system in which lawyers direct and produce the evidence, it is perceived that trials are won or lost by the lawyer's conduct, and in many cases the assumption is accurate. Accordingly, our lawyers

481 With respect to the lawyer-client privilege under English law, see ARCHBOLD, *supra* note 127, at § 12-7.

482 See Damaska, *supra* note 12, at 513, 525.

483 See, e.g., Alschuler, *supra* note 479, at 354; Friedman, *supra* note 9, at 1060; Pizzi, *supra* note 6, at 365.

484 See *supra* notes 139-45 and accompanying text.

are under tremendous pressure to be victorious. In Continental systems, in which the lawyers have secondary roles, lawyers are under less pressure because it would not be accurate to assume that cases are theirs to win in the first place. Even in England, barristers are under less pressure to serve the client's desire for courtroom victory.⁴⁸⁵

As pointed out previously,⁴⁸⁶ other factors contribute to the strong pressures on our lawyers to be victorious, including the close connection between American lawyers and their clients. The discretion afforded prosecutors in deciding whether to prosecute may make them more committed to conviction once they have decided to go forward, and the free reign given both parties to prepare witnesses for trial often causes lawyers to feel that they have a personal stake in the outcome. In summary, while to some extent the demand of our ethical rules for zealous advocacy in the pursuit of the client's desires contributes to lawyer contentiousness, the rules are not the most important cause of the extreme aggressiveness of American advocates in the pursuit of victory. To a great extent, our ethical rules favoring partisan representation are merely a natural consequence of structural aspects of our adversary system that encourage lawyers to win at all costs.

Furthermore, if we are truly committed to enhancing the importance of truth in our adjudication system, we should seek modification not only of those structural aspects that *encourage* lawyers to seek victory above all else, but of those procedural rules that *enable* lawyers to frustrate truth-finding in doing so. For example, it is hard to imagine lawyer conduct more inimical to the correct resolution of a criminal case than advising the defendant—usually the most important witness—to remain silent, to refuse to cooperate with the police, and to decline to testify at the trial. Yet a competent American lawyer will nearly always advise the client to say nothing when questioned by the police or the prosecutor⁴⁸⁷ and will often recommend against testifying at the trial. English and Continental lawyers, on the other hand, very often

485 Not surprisingly, compared to our lawyers, barristers are judged more on the basis of professional performance than on the jury verdict.

486 See *supra* part II.C.2.

487 Justice Jackson's well known generalization over forty years ago still states the accepted rule for criminal defense lawyers in this country: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

will advise a suspect to tell the truth to the police and will usually recommend that the accused tell his side of the case at trial. The primary reasons for these distinctions lie not in contrasting ethical standards, but in differing procedures, which in England and on the Continent often, if not usually, make it in the best interest of the accused to talk to the police early in the investigation and to take the stand at the trial.⁴⁸⁸ In England, for example, if after being advised of his rights, a suspect refuses to talk to the police, the refusal is made known to the jury; whereas, in this country, the jury never learns of it.⁴⁸⁹ Continental defendants nearly always give their side of the case at the trial because a refusal to speak has clear negative consequences and choosing to speak does not open the accused to damaging prior conviction impeachment.⁴⁹⁰ In advising the accused to give evidence, barristers and Continental lawyers are merely doing what they perceive to be in the best interest of their clients given the particular evidentiary rules and procedural framework in which they operate.

2. Caution Signs on the Road to Nonadversary Procedures

How, then, might we modify the procedural and evidentiary rules of our adversary system to correct its excesses? In light of the substantial barriers to any reform of our traditional trial process, importation of major elements of the nonadversary system in serious criminal cases appears virtually impossible. However, even if we were free to construct the ideal adjudication procedure, strong arguments weigh against wholesale adoption of the Continental-style system in this country. The foremost among these relates to the weaknesses of a justice system that places so much responsibility in the hands of professional judges without selection and retention procedures that provide for a uniformly competent, motivated, and impartial judiciary. Obviously, as a general matter, the more active the judge, the greater the judge's impact on the trial process and on the verdict. Professor Zeisel contrasted the English judge's umpirage position with "the German judge [who] is the director of an improvised play, the outcome of which is not known to him at first but depends heavily on his mode of directing."⁴⁹¹ A system which greatly empowers judges necessarily de-

488 See *supra* part II.B.2.

489 See Van Kessel, *supra* note 5, at 10-15.

490 See *supra* part II.D.3.

491 Zeidler, *supra* note 44, at 394.

mands a highly competent, disciplined, efficient, and independent judiciary and becomes vulnerable to claims of unfairness when these characteristics are lacking.

(a) *Weakness of the Nonadversary Model in Its Dependence on the Presiding Judge.*—Serious criticisms regarding the quality of fact-finding have been leveled at the nonadversary model for its heavy reliance on the presiding judge. First, it is argued that the system suffers from inadequate pretrial fact-gathering as well as inadequate presentation of evidence at trial because both the investigating magistrate and the presiding judge lack the initiative to probe deeply enough into the facts. The pretrial aspect of this argument can be met by eliminating the investigating magistrate, as Germany has done, and delegating the investigative function largely to the prosecution and to the police. However, the trial aspect presents greater difficulty. The Continental system motivates the trial judge to thoroughly elicit all relevant facts by placing a legal duty on the judge to arrive at a correct result supported by written reasons and by implementing hierarchical discipline and evaluation by senior judges as part of a judicial form of civil service.⁴⁹² Although this motivation may work in the Continental system, even if we decided to impose a similar duty on our trial judges, we would find the structural factor extremely difficult to duplicate.

The importance of assuring that the Continental judge is highly motivated to uncover the truth is further underscored by one possible consequence of depowering the lawyers. A super-active judge may have the effect of rendering the lawyers complacent or unmotivated by over-reliance on the judge. The highly regarded German scholar Hans Heinrich Jescheck has pointed to unprepared lawyers deferring too much to the judge as a weakness in the Continental approach:

The exceedingly small participation of the parties in the trial itself leads to unfortunate consequences. The prosecutor who had conducted the investigation often does not appear but is represented by any colleague who happens by chance to have the time free, and who is therefore much less familiar with the files. Experience shows that some defense attorneys occasionally appear without having adequately studied their own files. So accustomed are they to the taking of evidence by the judge,

492 See *supra*, part II.C.1.

that they rely completely upon him and often fail to direct the taking of proof in the manner most favorable to their client Not infrequently in my own experience as a judge, a decisive point of view has been missed by both the prosecutor and the defense attorney and therefore would never have been raised at the trial had the judge himself not pointed it out.⁴⁹³

A more serious objection to the Continental model is that it often fails to provide an objective and dispassionate evaluation of the evidence. A judge who, prior to trial, studies the case file developed by the police and prosecutor or by an investigating magistrate may tend to reach a conclusion at an early stage and remain impervious to contradictory evidence later developed at trial. Rene David noted that the French presiding judge

is supposed of course to be neutral, but in fact he is in many cases convinced beforehand of the guilt of the accused It is an exertion for him to keep a pretence of neutrality, although in many cases he may be inclined to leniency and eager to have his views followed by the members of the jury.⁴⁹⁴

Even defenders of the Continental model recognize the danger that the most conscientious presiding judge, in playing an active part in the proceedings, will not be able to avoid the appearance of partiality.⁴⁹⁵

Thus, the Continental system relies heavily upon the skill, motivation, discipline, and integrity of its professional judges. It depends on a fair and efficient judicial bureaucracy buttressed by high standards of selection, training, and performance, and pro-

493 Jescheck, *supra* note 28, at 249-50. Professor Langbein also pointed out the extremely passive role of the Continental lawyer during the taking of evidence, quoting an observer of German trials as follows: "In my own experience . . . I have never seen the legendary sleeping prosecutor, but I have seen a prosecutor reading a novel while the court conducted the proofs." John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 448 (1974).

494 RENE DAVID, *ENGLISH LAW AND FRENCH LAW* 68 (1980).

495 Kötz, *supra* note 248, at 486 (The European judge faces the difficult task of avoiding the appearance of partiality while playing an active part in the proceedings.); see also Brouwer, *supra* note 29, at 222 (The dominance of the Continental judge in the elicitation of evidence can make the judge appear less partial than he is.).

The late Professor Wolfgang Zeidler, former President of Germany's Constitutional Court, remarked that the "external image" of the active German judge "may occasionally remind the uninformed observer of a hunter pursuing his prey," and that from this arises a misunderstanding, widespread in common law countries and stemming from ignorance of the pretrial history of the case, that the court is hostile and eager to convict the accused who must prove his innocence. Zeidler, *supra* note 44, at 154.

tected from political and public pressures by a form of judicial tenure. In their comprehensive study of the American jury, Kalven and Zeisel remarked that apart from what we may conclude as to the behavior and performance of juries, "[w]hether the jury is a desirable institution depends in no small measure on what we think about the judge."⁴⁹⁶ Similarly, whether it is desirable to depower our trial lawyers depends to a great extent on the confidence we have in our judiciary.

(b) *Our System of Selection and Retention of Judges.*—Unfortunately, our country's distrust of concentrated judicial power rests on firmer foundations than simply different philosophies of authority and government. Fundamental distinctions between American and Continental trial judges regarding professionalism and independence, largely stemming from our diverse and highly political systems of selection and retention, support the argument that, absent changes in these systems, empowering our trial judges in the Continental mode in serious criminal cases would be unwise. Considerable evidence demonstrates that, generally, Continental trial judges are more uniformly professional and less subject to whatever biases may result from insecurity of employment.⁴⁹⁷ Unlike our state trial judges, who often are political appointees beholden either to the executive or to the electorate, Continental trial judges hold positions either as, or akin to, career civil servants.⁴⁹⁸ Generally, their initial appointments are merit based rather than politically based, and they are not subject to the political pressures of having to stand periodically for re-election.⁴⁹⁹ It has been suggested that this greater independence frees them to be more sensitive toward procedural fairness and the rights of the accused. The public generally regards them with considerable trust and respect.⁵⁰⁰ Langbein has described the fairness with which German judges approach witnesses and his general "high regard for the skill, thoroughness and humanity with which the German judges

496 HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 499 (2d ed. 1971).

497 See *supra* part II.C.1.b.

498 The German judge is not a "civil servant" in the strict sense, but does hold a fixed salary position along with other senior civil servants according to grade. See Zeidler, *supra* note 44, at 397.

499 See generally Damaska, *supra* note 35, at 501 n.47.

500 Jescheck, *supra* note 28, at 250-51 (The French judge has such an overwhelmingly powerful position and enjoys such high prestige and trust that people believe that the taking of proof is best safeguarded if left in his hands.).

examine witnesses."⁵⁰¹ English trial judges 'usually come from the top ranks of experienced barristers and are selected on the basis of experience and competence. They have a form of tenure until retirement and are not required to stand for popular re-election during their term of office.'⁵⁰²

Certainly, many of our state and federal trial judges are highly competent, professional, and unbiased. However, we would be less than honest if we did not recognize the uneven quality of our judiciary, and that many judges are deficient in these qualities. Trial lawyers, for example, are aware that certain judges are abysmally ignorant of the evidentiary rules or the principles of search and seizure. Court administrators know that a robbery case assigned to Judge X will be tried in five days, but the same case, if assigned to Judge Y, will last two weeks. Judge X will manage the trial efficiently, directing the lawyers to concentrate on the relevant issues. Judge Y will allow the trial to be interrupted with numerous motions that should have been decided before jury selection and fail to control lengthy, irrelevant witness examination and emotional and disruptive arguments between counsel. Even more dangerous are examples of judges clearly favoring either the prosecution or the defense. Yet we cannot expect a uniformly high quality judiciary when, as a general matter, our system provides neither for the appointment of trial judges based principally on the prospect of excellence on the bench, nor for their advancement primarily upon the merits of their judicial performance.

The dependence upon the electorate presents an even more formidable obstacle to investing our trial judges with the authority to deliberate and vote with lay jurors in a mixed-court system. One need only think of the many highly publicized and bitterly contested criminal trials, particularly in small communities, where the judge, facing the next retention election, would be in the unenviable position of being required not only to "put on the case," but to deliberate and vote on the verdict. Defense attorneys also might feel a bit uneasy before a fact-finder who is subject to such pressures.

Our trial judges recognize their vulnerability and point to the important aspects of our adversary system, such as the jury trial,

501 LANGBEIN, *supra* note 29, at 75.

502 See *supra* part II.C.1.b.

that shield them from public reaction to unpopular decisions. Judge James Carrigan remarked:

Preservation of jury trial is essential not just in the interest of litigants and lawyers, but in the interest of courts and judges as well. Having a jury in cases where a decision which is right but unpopular helps to buffer and diffuse community hostility which otherwise is directed solely at the court.⁵⁰³

Even those state appellate court judges subject only to non-partisan retention elections may encounter strong pressures in highly publicized controversial cases. Former California Supreme Court Justice Otto Kaus faced a retention election at a time when the Court had been subjected to considerable criticism for reversing numerous death penalty judgments and was asked to decide the validity of a popularly enacted "Victims' Rights" initiative. He later remarked, "I found it totally impossible to work on cases dealing with [the initiative] and not have in mind, to some extent, that my retention depended on that vote."⁵⁰⁴ In his view, ignoring the political consequences of such decisions is "like ignoring the alligator in your bathtub."⁵⁰⁵

In summary, structural and political aspects of our systems of judicial selection and retention present formidable obstacles to transferring authority over criminal trials from lawyers to judges. The ability and independence of trial judges are as significant as the system of justice in which they operate.

(c) *Changing Views of Adversary and Nonadversary Systems.*—Currently within Continental systems there is growing recognition of certain benefits associated with the adversary process. For example, in 1970, Jescheck remarked that while he found a "Continental consensus"⁵⁰⁶ against such adversary aspects as the American-style jury, he saw "[m]uch greater interest . . . in readapting the German trial so that the parties adduce the proof through direct and cross-examination, with the judge, as in America, limited to posing only supplemental questions to guarantee the completeness, the clarity and the correctness of the

503 Jim R. Carrigan, *The American Jury—Vanishing or Only Shrinking?*, FLA. B. J., Jan. 1981, at 20, 26.

504 Bill Blum, *Toward a Radical Middle: Has a Great Court Become Mediocre?*, A.B.A. J., Jan. 1991, at 48, 52.

505 *Id.*

506 Jescheck, *supra* note 28, at 244.

results.⁵⁰⁷ However, Jescheck cautioned that “[i]n contrast to the law in the United States, German scholars almost unanimously feel that the duty to clarify the facts (and thus the judicial right to examine the files) must be preserved, because no court could otherwise accept the responsibility for the correctness of its decisions.”⁵⁰⁸ He concluded that “Germany should move toward an adversary process, because cross-examination appears to be the psychologically preferable method of extracting the truth, provided that the ultimate integrity of the fact-finding process is guarded by the check of a judge familiar with the contents of the file.”⁵⁰⁹ Professor Zeidler praised the common law trial as the best arena in which to develop such talents as imagination and creativity, noting that “its dynamic and competitive character is a powerful stimulus to individual effort.”⁵¹⁰

The Italians recently reconstructed their criminal process jettisoning their traditional, Continental-style trial procedure and adopting several significant aspects of the adversary system. The 1988 Italian Code of Criminal Procedure implanted “an accusatorial soul in a European body”⁵¹¹ by transferring to the parties the primary responsibility for producing the evidence, including direct and cross-examination of witnesses.⁵¹² Under the new procedure, the judge’s knowledge of the case is limited because she does not receive the entire dossier. Consequently, she must rely on opening statements and the lawyers’ presentation of evidence. The Code includes new evidentiary rules, framed on the hearsay principles, designed to encourage oral, in place of written, proof. However, the Code retains significant aspects of the nonadversary system such as the mixed court (as opposed to the American-style jury), the unitary trial procedure, in which guilt and punishment are decided in a single proceeding, and full discovery for the accused. Recognizing that their old procedures had become increasingly inefficient to the point of becoming dysfunctional and that the new trial procedures likely would worsen the situation, the Code drafters introduced western-style plea bargaining in less

507 *Id.* at 250.

508 *Id.*

509 *Id.*

510 Zeidler, *supra* note 46, at 159.

511 Amodio & Selvaggi, *supra* note 12, at 1212.

512 *Id.* at 1220.

serious cases and, for all cases, a form of summary trial having many plea bargain characteristics.⁵¹³

Some have attributed these reforms to the need "to cure the ailments of a 'de-lawyerized' system" and to reject "shortcomings [of] inquisitorial patterns framed on the judge's pivotal position"⁵¹⁴ Others believe the reforms were intended to cure a system of investigation and trial that had become inefficient and overburdened, largely due to increasing defendants' procedural rights and the complexity of pretrial and trial procedures without allowing plea bargaining or other alternatives to formal trials.⁵¹⁵ While the reforms are most likely the result of many different pressures, they provide evidence that some Europeans are beginning to regard the traditional nonadversary style judge as too powerful and are looking favorably upon aspects of the adversary system. In light of this skepticism regarding the powers of the Continental judge, we would be wise to hesitate investing our judges with similar powers in serious criminal cases, particularly when our trial judges face formidable hurdles in acquiring the competence, neutrality, and respect that those in such dominant positions should possess.

The verdict is not in on this somewhat adversary, somewhat nonadversary approach, and it remains to be seen whether, as has been suggested, these reforms will pave "a European road to the accusatorial system,"⁵¹⁶ or ultimately will be rejected as unworkable. The new system may require procedures unacceptable in other countries, or create unforeseen problems that may actually worsen matters. For example, because the new trial process will be more time consuming, the Code introduces procedures to reduce caseload pressures, such as plea bargaining, that are common to the American system, but generally disfavored on the Continent. Furthermore, the changes may have been a response to particular Italian problems such as an inefficient legal system burdened by overwhelming caseloads and threatened by organized crime.

513 *Id.* at 1219-20; see also Fassler, *supra* note 33, at 263-67; Jeffrey J. Miller, Note, *Plea Bargaining and Its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure*, 22 N.Y.U. J. INT'L L. & POL. 215 (1990).

514 Amodio & Selvaggi, *supra* note 12, at 1224; see also Fassler, *supra* note 33, at 246 (The Code represents the acknowledgement that justice is more likely to be achieved "through a dialectical process, rather than by the solitary research of an 'instructive' organ whose evidentiary acquisitions may become sources of prejudice at trial.").

515 Miller, *supra* note 513, at 221-23.

516 Amodio & Selvaggi, *supra* note 12, at 1224.

Only experience with the new structure will tell how workable a "fit" the Italians have constructed. However, the Italian experience demonstrates that it is politically possible for a country to move away from a traditional nonadversary approach and combine significant adversary elements into a more mixed system. This suggests that we may benefit by ceasing unquestioned worship of our adversary system and our knee-jerk dismissal of the nonadversary Continental approach. Instead, we should seriously consider the possibility that our traditional adversary system can adopt significant reforms by borrowing from distinctively different trial models.

(d) *Problems Encountered in Piecemeal Incorporation of Nonadversary Procedures.*—Nevertheless, we should not underestimate the difficulties we would encounter attempting to import individual aspects of Continental trials without fully understanding all the complexities of adversary and nonadversary systems and how they interrelate to form a particular balance. For example, limits on the power of Continental prosecutors should be viewed in light of the great advantage given them by the liberal rules of evidence and the unitary trial. Combining the issues of guilt and punishment allows liberal admission of evidence of defendant's character and background, including prior convictions,⁵¹⁷ and puts considerable pressure on him both to testify and to confess his guilt. If he remains silent, he forfeits his right to present evidence to mitigate punishment. If he speaks, but denies guilt, he may find it awkward, in the next breath, to assert mitigating circumstances. Defense counsel faces a similar dilemma in closing argument if he chooses both to assert defendant's innocence and to explain why defendant deserves a lenient sentence if found guilty.⁵¹⁸

The Continental trial strikes a different balance of forces than our own, but it aims at a balance nevertheless. Greater judicial authority and more favorable rules of evidence and procedure compensate for the prosecutor's reduced powers. We have our own

517 The German code provides that evidence of prior offenses be introduced only as far as necessary, but "in practice the defendant's rap sheet is usually read into the record at the very end of the trial before the closing arguments." Weigend, *supra* note 123, at 62.

518 For these reasons, German academics often urge a two-phase proceeding modeled after our system, but practitioners fear that it will lead to increased trial time. *Id.* at 64.

particular balance of trial forces, and any borrowing of nonadversary aspects should take into account the effect on that balance.

*C. Problematical "Half-Steps" to Activating Judges
in the English or Continental Mode*

1. English Summary and Comment Powers

Empowering our judges in the English or Continental manner raises other serious questions. Judicial authority could be significantly enhanced by giving judges both the power and the responsibility to sum up and comment on the evidence, similar to those currently possessed by English judges.⁵¹⁹ However, this would greatly increase the judge's work load as well as the length of trials. The judge's summing up often occupies a substantial portion of the English trial—one day in a trial lasting five or six days is not uncommon. The judge must pay close attention to the testimony, take copious notes, and occasionally ask the witness to pause or repeat testimony in order to assure an accurate and complete summation. Our lawyers may object to the judge's account of witness testimony, ask for the opportunity to respond, and challenge the fairness and completeness of the summation on appeal. Furthermore, defense attorneys may reasonably object that, unlike in England, where the prosecutor cannot answer the defense's closing argument and the judicial summation provides a balance, the judge's summing up in this country would merely add weight to the prosecutor's already powerful closing argument.

2. Continental-Style Authority to Examine Witnesses

Some have suggested that the judge should have greater control over the order of proof, including the authority to conduct the initial examination of witnesses.⁵²⁰ Professor Alschuler contends that the judge's examination ordinarily could be cursory and involve merely inviting the witness's narrative of the events such that "[a] more detailed probing of the witness's testimony would remain the task of the opposing attorneys, each of whom could

519 The Continental judge also sums up the case and comments on the evidence, but usually does so during deliberations. See Casper & Zeisel, *supra* note 3, at 150-51.

520 See Alschuler, *supra* note 6, at 1004; Hein Kotz, *The Reform of the Adversary Process*, 48 U. CHI. L. REV. 478, 483 (1981); Maechling, *supra* note 6, at 63; Pizzi, *supra* note 6, at 365.

cross-examine the witness in turn.⁵²¹ Professor Pizzi suggests that the judge conduct a more complete examination of witnesses, with counsel playing a backup role and filling in any gaps.⁵²²

The idea of a more judicially-controlled presentation of testimony in a more natural form is very appealing. Eliminating the opportunity for an initial, one-sided presentation of the facts, as well as the stilted manner of first presenting evidence in the form of direct and then cross-examination, would not be a great loss provided the opportunity for questioning by the lawyers was available at some point. However, absent incorporation of other Continental procedures—in particular, providing the judge with the complete case file and investing the judge with the power and responsibility to produce the proof, direct the trial, and arrive at a just result—I doubt that the suggested revisions would, as Professor Alschuler concluded, enhance “the efficiency and the coherency of the trial process.”⁵²³ I suspect just the opposite would result from such a half-step adoption of an aspect of Continental procedure.

First, the procedure would require the judge to become familiar with the evidence available in the prosecutor’s case file prior to trial, unless the judge only asks witnesses open-ended questions, such as, “What do you know about this case?”⁵²⁴ Reviewing only a “limited pretrial ‘dossier’” containing lists of witnesses with summaries of their expected testimony, as Alschuler has suggested,⁵²⁵ would create further inefficiencies because the parties would be required to prepare these summaries. Questions would be raised concerning their accuracy and completeness, providing yet another ground for hearings and appeals. Furthermore, if the judge’s initial examination elicited no more than a simple cursory narrative, the tripartite examination would likely be more confusing and less efficient than existing procedures. A superficial examination inviting narrative responses most likely would be disjointed and incomplete and would require counsel to “fill in” later by going back over the same ground. As a result, presentation of witness testimony would likely become less efficient, more confusing, and provide

521 Alschuler, *supra* note 6, at 1004.

522 Pizzi, *supra* note 6, at 365.

523 Alschuler, *supra* note 6, at 1004.

524 Such general questions pose obvious problems in a system governed by hearsay and other complex exclusionary rules.

525 Alschuler, *supra* note 6, at 1004.

opportunities for unfair emphasis by repetition. Moreover, in our system, where witnesses are often interviewed, and at times "prepared," by the lawyers, judges will usually know less about the case than the lawyers, even if the judge reviews the complete case file. This judicial deficiency would undoubtedly show up in the judge's examination and provide a source of confusion and controversy. If we are to maintain a coherent and efficient system of proof, we must place the primary obligation for developing the evidence against the accused on either the judge or the prosecutor, and assure that the one responsible has full knowledge of the case.

Even with adequate judicial enlightenment, requiring our trial judges to conduct the initial examination of witnesses would pose other serious problems. First, even the knowledgeable judge who actively questions witnesses runs the risk of conveying to the jury, consciously or unconsciously, a judicial view of the witness' credibility or the state of the evidence. Judicial impartiality would be further endangered if the judge's examination were limited to questioning prosecution witnesses, because, in essence, the judge would be putting on the state's case against the defendant, which usually consists entirely of evidence pointing to defendant's guilt. This problem is less serious in Continental trials, where the judge calls and questions all witnesses, including those offered by the defense. A similar procedure could work here, absent constitutional or statutory impediments to requiring the defendant to deliver to the court the names and addresses of his witnesses before trial.⁵²⁶

Another problem with judicial examination of witnesses arises from our judges' traditional umpirage role. Aside from the duty of assuring the defendant of a fair adversary contest, our present system fails to obligate judges to actively pursue truth and justice in a criminal jury trial. As a result of their long-accepted position as passive referees, our judges might have some difficulty taking the initiative in conducting witness examination. More important, without a clearly defined purpose and responsibility, judges left to roam at large in the examination of witnesses may easily slip into the appearance of partiality, if not suffer an actual loss of objectiv-

⁵²⁶ The Supreme Court has permitted the prosecution to discover the names and addresses of alibi witnesses and statements of defense witnesses after they have testified on direct. See *United States v. Nobles*, 422 U.S. 225 (1975); *Williams v. Florida*, 399 U.S. 78 (1970). However, the Court has not yet passed on the constitutionality of a broad discovery requirement covering the names and statements of all witnesses the defense intends to call at the trial.

ity. It is not surprising that the common law tradition requires the judge to stay aloof from the contested trial battle to assure maintenance of apparent as well as actual impartiality. As Lord Green put it, the judge, in examining a witness, "descends into the arena and is liable to have his vision clouded by the dust of the conflict."⁵²⁷ In light of such problems, one may suggest defining for our trial judges a duty to pursue truth and justice, while at the same time reducing the intensity of the battle between attorneys in the trial arena, such that judges may descend from their lofty positions and participate in the search for truth without losing clear vision.

3. Judicial Obligation to Seek Truth and Justice

Full awareness of our criminal trial judges' limited duty to pursue truth would undoubtedly shock most Europeans and probably surprise many Americans as well. Not only do we free our trial judges from responsibility for presenting relevant evidence, we fail to impose upon them any clear and direct obligation to "do justice," in the sense of furthering the determination of truth and enhancing the verdict's integrity. While the Constitution and various rules of procedure require our judges to protect the defendant's rights in specified contexts, such as waiver of the right to jury trial⁵²⁸ and waiver of the right to counsel,⁵²⁹ neither the Supreme Court nor our legislatures have encouraged trial judges

527 *Yuill v. Yuill*, 1945 P. 15, 20 (Green, L.J.). One finds no lack of English condemnations of the over-active judge. Lord Denning quoted Lord Chancellor Bacon remarking that "an overspeaking judge is no well-tuned cymbal." *Jones v. National Coal Board*, 2 Q.B. 55, 64 (Eng. C.A. 1957). In more direct and absolute terms, Chief Baron Palles of Ireland warned, "The judge who opens his mouth closes his mind." Zeidler, *supra* note 44, at 395.

528 *See, e.g., Boykin v. Alabama*, 395 U.S. 238 (1968) (the court must assure an affirmative, on-the-record waiver of trial rights by a defendant entering a plea of guilty); *see also* FED. R. CRIM. P. 23(a) (waiver of the right to jury trial must be in writing with the approval of the court); FED. R. CRIM. P. 11(c) (the court, before accepting a plea of guilty, must "address the defendant personally in open court and inform him of, and determine that he understands" enumerated facts such as the nature of the charge, the range of possible penalties, and certain consequences of the plea).

529 *See, e.g., Holloway v. Arkansas*, 435 U.S. 475 (1978) (when counsel for multiple defendants makes a timely representation of the possibility of a conflict of interests, the Sixth Amendment requires the judge either to appoint separate counsel or to take adequate steps to ascertain whether the risk is too remote to warrant separate counsel); *see also* FED. R. CRIM. P. 44(a) (assuring the indigent's right to appointed counsel); FED. R. CRIM. P. 44(c) (obliging the court to take appropriate measures to protect the defendant's right to conflict-free counsel).

to intervene in the battle between the lawyers primarily to increase the likelihood that the jury will reach an accurate result. On the contrary, our courts more often caution trial judges against intrusion than against detachment in the fact-finding contest, demonstrating that, as a rule, our courts value the appearance of judicial impartiality over active judicial inquiry.

Even United States District Court Judge William Schwarzer,⁵³⁰ an advocate of judicial intervention to protect the accused from incompetent counsel, warned that judges cannot be expected to take over the questioning of witnesses or make objections for the defense.⁵³¹ He expressed what most likely represents the general judicial view that the judge's obligation to remain impartial takes precedence over any significant judicial search for truth: "While it has been said that the judge may have a duty to elicit those facts necessary to the clear presentation of the issues, which may in extraordinary cases include calling and examining witnesses and adducing evidence, his primary duty is to remain, as well as to appear, impartial,"⁵³² and "[t]he judge's role in the adversary process does not include playing back-up counsel for any party."⁵³³ The Supreme Court has encouraged judicial intervention in the trial primarily in the context of upholding the rights of the criminal defendant, and, even then, for the purpose of righting the balance of the adversary process, rather than independently seeking justice.⁵³⁴ Under this view, the trial judge's primary goal is to assure that the adversary process is functioning, and as long as the rules of the contest are not violated and the adversaries are engaged in a fair fight, the determination of truth and justice is secondary.

By and large, our rules of judicial conduct take the same approach by remaining silent on the matter of "doing justice" apart from avoiding partiality and conflict of interest. The principal statute governing the conduct of federal judges covers only the

530 Judge Schwarzer is currently director of the Federal Judicial Center.

531 William Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 663 (1980).

532 *Id.*

533 *Id.* at 669.

534 Thus, the Court has sought to protect the accused from incompetent counsel by admonishing trial courts "that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

requirement of disqualification for reasons such as bias, knowledge of disputed facts, and personal or financial conflicts.⁵³⁵ The American Bar Association's 1990 Code of Judicial Conduct,⁵³⁶ which serves as a model for many state rules of judicial conduct,⁵³⁷ is only a bit broader. The Code provides that "[a]n independent and honorable judiciary is indispensable to justice in our society"⁵³⁸ and requires that judges observe "high standards of conduct . . . so that the integrity and independence of the judiciary will be preserved."⁵³⁹ The Code also demands that judges act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,"⁵⁴⁰ and requires that judges maintain competence in the law⁵⁴¹ and avoid bias, prejudice,⁵⁴² and conflict of interest.⁵⁴³ However, the Code encourages judges to remain passive and remote in the search for truth by its silence concerning the judge's duty to "do justice" by intervening in the battle, when necessary, to elicit overlooked facts, curbing contentious counsel, or in other ways correcting adversary excesses that undermine the jury's ability to determine the truth.

On the other hand, the American Bar Association's Standards Regarding Special Functions of the Trial Judge⁵⁴⁴ take a more balanced, but arguably more schizophrenic, view of the judge's duties. The Standards provide that the judge "has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice" and that "[t]he adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative . . . matters which may significantly promote a just determination of the trial."⁵⁴⁵ The Advisory Committee's commentary, while main-

535 28 U.S.C. § 455 (1988).

536 In matters relevant to the present inquiry, the 1990 Model Code largely mirrored the previous Code adopted by the ABA's House of Delegates in 1972 and modified in later years.

537 See, e.g., CALIFORNIA CODE OF JUDICIAL CONDUCT (adopted 1974 and effective January 1, 1975).

538 CODE OF JUDICIAL CONDUCT Canon 1(A) (1989).

539 *Id.*

540 *Id.* at Canon 2(A).

541 *Id.* at Canon 3(B)(2).

542 *Id.* at Canon 3(B)(5).

543 *Id.* at Canon 2(B).

544 The Standards were first approved by the ABA's House of Delegates in 1972, and were approved with modifications in 1978.

545 SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1(a) *in* 1 AM. BAR ASSOC.

taining that the adversary process is the preferred procedure, notes that "the adversary process should not be regarded as sacred" and urges judicial action "to give a jury the opportunity to decide a case free from irrelevant issues and appeals to passion and prejudice."⁵⁴⁶ The Commentary lists ways in which the judge should intervene to achieve a just result, including questioning a witness to elicit relevant and important facts when the case is not being presented intelligibly or when counsel's cross-examination "appears to be misleading to the jury."⁵⁴⁷ However, while encouraging judicial activity, the Standards warn against judicial intervention which intrudes upon the traditional adversary process: "[t]he only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose."⁵⁴⁸ The Commentary warns that "[t]he judge should be aware that there may be a greater risk of prejudice from overintervention than from underintervention . . . [and that] [w]hile the judge should not hesitate to exercise authority when necessary, the judge should avoid trying the case for the lawyers."⁵⁴⁹ The result is a mixed message, implying that judges should err on the side of passivity.

One might suggest the "modest approach" of explicitly placing on judges the duty to further accurate fact-finding by seeking and presenting information the advocates failed to develop, but stop short of investing our judges with Continental-style powers such as the authority to call and first question witnesses or otherwise direct the course of the trial. However, giving judges the duty to seek truth without allowing them full knowledge of the facts and significant authority to question witnesses or otherwise participate in the presentation of the evidence would put judges in the untenable position of not possessing the power necessary to meet their obligations. Suggesting that Germany move toward an adversary presentation of evidence, the respected German scholar Hans-Heinrich Jescheck stated a qualification: "provided that the ultimate integrity of the fact-finding process is guarded by the check of a judge familiar with the contents of the file."⁵⁵⁰ Jescheck rec-

STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986).

546 *Id.* at Standard 6-1.1(a) cmt. (footnote omitted).

547 *Id.*

548 *Id.* at Standard 6-1.1(a).

549 *Id.* at Standard 6-1.1(a) cmt. (footnote omitted).

550 Jescheck, *supra* note 28, at 250.

ognized that the judge must have full knowledge of the facts in order to intervene effectively in the search for truth and justice. Imposing an affirmative duty on judges to pursue the truth in order to increase the likelihood of the jury reaching an accurate result is a viable approach only if we reject the proposition that the judge must remain a passive observer, ignorant of the facts until the moment the parties reveal them and unable to significantly participate in the quest for truth.

4. Incompatibility of Our Adversary Structure with "Half-Step" Approaches to Judicial Empowerment in the Continental Mode

I have sought to demonstrate that it would be both unfair and unworkable to give a judge, who has no knowledge of the prosecutor's case, responsibility for initial witness examination or to impose on her the responsibility actively to pursue a just result. Also, judicial questioning that produces a "cursory narrative," followed by a three-part witness examination, may produce confusion and delay. In summary, the judge's primary examination of witnesses would be unworkable and unfair to both the prosecution and the defendant⁵⁵¹ absent fundamental Continental procedures. These procedures include providing the judge with the complete case file and investing the judge with the primary power and responsibility to produce the proof, direct the trial, and arrive at an accurate and just result.

Judge Frankel accurately characterized our adversary system when he said that it does not allow much room for effective or just intervention by the trial judge:

The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. He risks at a minimum the supplying of more confusion than guidance by his sporadic intrusions Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming

⁵⁵¹ Of course, such judicial questioning of witnesses would face formidable hurdles of appellate review, and, given our adversary structure, it is not surprising that our appellate courts tend to discourage trial judges from engaging in any significant or extensive questioning of witnesses. *See, supra* part III.A.1.

light may lead or mislead him at odd times.⁵⁵²

5. Large-Scale Adoption of Fundamental Aspects of Continental Trials: Shifting Toward the Nonadversary Trial in Serious Criminal Cases

Because partial or piecemeal incorporation of nonadversary aspects pose so many difficult problems, one may ask, why not go boldly forward toward a full-scale nonadversary model? Educate judges on the facts and give them the authority, responsibility, and direction to conduct the trial and to seek justice. Frankel himself left open this possibility. While he believed that, within our adversary framework, "the trial judge probably serves best as a relatively passive moderator"⁵⁵³ and that, as a participant, the judge "is likely to impair the adversary process as frequently as he improves it,"⁵⁵⁴ his principal objection to the active judge appears to rest on the position of the American judge as an uninformed and undirected umpire whose intrusions are often "blind and blundering."⁵⁵⁵ He questioned "whether the virginally ignorant judge is always to be preferred to one with an investigative file," and left open the possibility of replacing our party examination of witnesses with "safeguarded interrogation by an informed judicial officer."⁵⁵⁶

On the positive side, our judges might be given such powers and responsibilities without equaling them to Continental judges, who, along with lay members of the court, decide factual questions and arrive at the verdict. One might find less merit in the criticism of pretrial judicial review of the "dossier" in this country,

552 Frankel, *supra* note 109, at 1042. The bleak outlook for trial reforms based on the Continental model has lead some to focus on features of Continental systems outside the criminal trial context. In his recent comparative work focusing on the French criminal justice system, Professor Richard Frase argues that small or incremental transplants are possible, but most suggestions he provides—as, for example, narrowing the scope of the criminal law, limiting prosecutorial discretion and plea bargaining, and reducing sentences—do not entail modifications of the trial process. Frase, *supra* note 32, at 550. He contends that aspects of Continental trails such as open discovery, judicial control over presentation of proof, relaxed evidence and procedure rules, or the mixed court "deserve lower priority . . . because they are not likely to suggest feasible American reforms." *Id.* at 666.

553 *Id.* at 1043.

554 *Id.* at 1045.

555 *Id.* at 1042

556 *Id.* at 1053.

where the judge is not part of the fact-finding body. Also, we need not combine questions of guilt and punishment into a unitary trial in order to invest judges with the knowledge and authority to examine witnesses. Finally, Italy is an example of a possible European trend toward more creative combinations of adversary and nonadversary procedures.

However, in light of our constitutionalized rules of criminal procedure, lawyers' and judges' inertia, and our "national character" which distrusts centralized authority, the quick answer, as I have suggested, is that major changes like these would not be possible in this country, at least in serious criminal cases. Furthermore, even if such changes were possible, we should have reservations about importing the major components of the Continental system because of our judicial selection and retention system. An incorporated system that would place great powers in the hands of trial judges, combined with our selection and retention system, which often fails to assure a uniformly competent, motivated, and impartial judiciary, would be a weak system indeed. Finally, as Professor Gross has noted, the German and other successful nonadversary systems depend on core elements that are "considerably trickier than a micro-chip: an efficient judicial bureaucracy, with high standards for training and performance . . . [and] the integrity and the competence of German prosecutors, the creatures of another state bureaucracy."⁵⁵⁷ Even if our judges and prosecutors had the security of civil service, a danger exists that, in this country, such bureaucracies might become complacent, inflexible, inefficient, unresponsive, biased, and entrenched. To become skeptical about the wholesale importation of the Continental system, one need only contemplate the prospect of a judge employed by our Internal Revenue or Postal Service directing the trial of a serious criminal case. Structure alone does not guarantee fairness and efficiency. Before the recent changes, the Italian nonadversary process was considered particularly inefficient, and Professor Mauro Cappellitti remarked, "[T]he Italian legal system is like the German, except that it doesn't work."⁵⁵⁸

557 Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 749-50 (1987).

558 *Id.* at 750 (citations omitted); see also Miller, *supra* note 513, at 222-23 (citing characterizations of the Italian criminal justice system as increasingly dysfunctional, incoherent, and inefficient).

Professor Merryman cites the 1987 vote to repeal laws protecting Italian judges from civil liability for negligence in office as reflecting "popular dissatisfaction with the Italian

D. Possibilities and Proposals

How, then, might we improve our polar-extreme adversary criminal trial in light of the legal and practical barriers to reform as well as the dangers in giving our judges Continental-style powers? First, while maintaining the adversary model, we should begin enhancing the quality and independence of our judiciary, while taking measured steps to shift authority from lawyers to judges. Without abandoning the fundamental nature of our adversary system, we would strike a better balance if we gave the other participants, primarily the judge and the accused, a greater role in the trial process. Also, within the basic framework of our adversary structures, we should shift the focus of the trial from the lawyers to the accused and to the discovery of truth. We can encourage this shift if we relax our rules that exclude reliable evidence, encourage more active participation by the accused both pretrial and at trial, and require full and open discovery from the prosecution. Finally, in jurisdictions where we find the promise of an independent and competent judiciary, we could become more ambitious and, at least in minor criminal cases, we could experiment with a Continental-style trial procedure adapted to our own needs.

1. Measured Steps Toward De-powering the Lawyers While Increasing the Quality, Independence, and Authority of the Judiciary

We could begin the long-term and difficult project of upgrading the quality, motivation, and independence of our judiciary, particularly our state trial judges, by methods such as merit committee review of judicial appointments, judicial education programs, and judicial retention and advancement systems that are merit-based rather than political. Judge Frankel has questioned "whether a substantial career of adversary jousting is clearly the best training for the role of detached judging"⁵⁵⁹ and has suggested experimentation with Continental judicial selection and retention structures. He noted that "it would be enlightening if we could begin to staff some of our courts, in some states or parts of

judicial bureaucracy," but cautions that "[w]e do not know how much of the Italian problem is specific to Italian culture and how much is a more general hazard of a career judiciary." Merryman, *supra* note 106, at 1874-75.

559 FRANKEL, *supra* note 30, at 41.

states, with career magistrates of the European model.⁵⁶⁰ However, Judge Frankel's aim is "for the qualities of detachment and calm reflection that we suppose ourselves to desire on the bench,"⁵⁶¹ and I do not suggest a shift toward the Continental-style judicial system for this purpose. The worn out warrior often makes a good umpire. Rather, in my view, the greater competency and independence of judges that may flow from different selection and retention structures are essential ingredients of a system that divests judges of their umpirage and makes them active participants in the search for truth.

However, even with our present judicial structures, we could activate our judiciary without investing them with the powers of Continental judges.⁵⁶² Our trials would not lose their basic adversary character if our judges conducted jury voir dire, controlled abuses by counsel, and participated to a greater, but still limited, extent in the presentation of evidence, including the questioning of witnesses. Judges now possess much of the authority necessary for this greater activity,⁵⁶³ but exercise it unevenly. Some will read a novel on the bench, while others will occasionally ask questions of witnesses. Also, we could prompt judges to become more active in "case management" areas. For example, a judge could encourage stipulations, clarify and narrow the issues prior to trial, and avoid the disruption and delay of trial occasioned by overly contentious counsel.

Substantial time could be saved by simply shifting responsibility for jury voir dire from lawyers to judges. While 75% of federal judges currently do not permit oral participation of counsel in the examination of prospective jurors, most states either give lawyers

560 *Id.* at 42.

561 *Id.* at 41.

562 Over the years, greater judicial control over the trial process has been urged by many studies and commissions. *See, e.g.*, C.E. GEHLKE, MISSOURI CRIME SURVEY COMMITTEE 363 (1926); NATIONAL COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PROSECUTION 123, 180 (1931) (increase judge's control over the conduct of the trial).

Greater judicial management and control also has been viewed as a solution to the problem of overall delay in the processing of criminal cases: "court delay can be reduced only by judges who are willing to insist that attorneys meet reasonable deadlines for the conclusion of pretrial activities and by trial-setting and continuance practices that create an expectation of an early and relatively firm commencement of trial for those cases not settled." NATIONAL CENTER FOR STATE COURTS, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 84 (1978).

563 *See, e.g.*, AMERICAN BAR ASS'N, A.B.A. STANDARDS FOR CRIMINAL JUSTICE 6-2.2 to 6-2.4, 6-3.1, 6-3.5 (1980).

the primary responsibility for voir dire or allow them to share the task with judges.⁵⁶⁴ Not surprisingly, studies find that judicially-conducted voir dire is quicker. Most federal judges who responded to a Federal Judicial Center survey estimated that a typical voir dire lasted 1 hour or less,⁵⁶⁵ whereas a study of attorney-conducted voir dire in New York found that the average voir dire lasted 12.7 hours (40% of total trial time).⁵⁶⁶ The selection process is also expeditious in other adversary systems in which the main questioning of jurors is assigned to judges. For example, in New South Wales the average time spent selecting a jury is 30 minutes.⁵⁶⁷

The recent California experience in judicial voir dire illustrates the extent to which judicial intervention that leaves the adversary character of the trial intact could expedite the criminal trial. For years, California gave lawyers in criminal cases the right to personally question prospective jurors⁵⁶⁸ and to ask all questions relevant to peremptory challenges as well as to challenges for cause.⁵⁶⁹ In capital cases, the court had to allow counsel to conduct the voir dire of prospective jurors individually and in sequestration.⁵⁷⁰ It was not unheard-of for jury selection to take longer than the presentation of the evidence. In one Oakland capital murder case, jury selection lasted over eleven months, while the trial itself was conducted in less than two months.⁵⁷¹

564 See V. HALE STARR AND MARK McCORMICK, *JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS* 39-40 (1985).

565 GORDON BERMANT, *CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES* 13 (1977).

566 Marcia Chambers, *Who Should Pick Jurors, Attorneys or the Judge*, N.Y. TIMES, June 13, 1983, § B, at 4. Other studies have recorded instances where jury selection has taken "as much as twice the length of time to try the case on the merits." See William B. Enright, *Don't Create an Adversarial Area*, 70 A.B.A. J. 14 (Nov. 1984); Howell Heflin, *Let Lawyers Ask the Questions*, 70 A.B.A. J. 14 (Nov. 1984); see also Cheryl Frank, *Voire Dire Struggle*, 71 A.B.A. J. 28 (Sept. 1985).

567 Philip R. Weens, Comment, *A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California*, 10 SYDNEY L. REV. 330, 343 (1984). Weens tells of an American trial lawyer asking an English barrister when the trial begins under the English system. The barrister responded, "When the jury is accepted by counsel and sworn to try the issues." "Hell," the American lawyer replied, "in the United States the trial is over by that time." *Id.* at 340 (citations omitted).

568 Prior to 1988, CAL. PENAL CODE § 1078(a) (West 1985) provided that the trial court "shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel." In 1988, this section was repealed, but similar language was inserted in CAL. CIV. PROC. CODE § 223 (West Supp. 1991).

569 See *People v. Williams*, 29 Cal. 3d 392, 407 (1981).

570 See *Hovey v. Superior Court*, 28 Cal. 3d 1 (1980).

571 *People v. McDonald, Robinson, & Evin* (Alameda County Superior Court, 1991)

In 1990, a voter initiative gave the court the responsibility for conducting the examination of prospective jurors, limited the examination to questions "in aid of the exercise of challenges for cause," and eliminated the sequestration procedure by providing that when practicable, the examination shall occur "in the presence of the other jurors in all criminal cases, including death penalty cases."⁵⁷² The effect was dramatic. Jury selection in ordinary felony cases, which previously took several days, now is completed in a matter of hours. Jury selection in capital cases which lasted months when managed by attorneys, takes only days when controlled by the judge. A capital murder case against two defendants in Marin County illustrates the significance of court-managed voir dire.⁵⁷³ The defendants were tried separately. The first case, using the old procedure, required two months to select the jury. In the second trial, conducted before the same judge but under the new procedures, the judge selected the jury in two days.⁵⁷⁴

Restricting, or better yet eliminating, peremptory challenges would further expedite trials⁵⁷⁵ and reduce lawyer influence over the jury selection process, particularly in light of the increased length and complexity of jury selection since *Batson v. Kentucky*⁵⁷⁶ and its progeny.⁵⁷⁷ We stand virtually alone in the world in our extensive use of peremptory challenges. Peremptory challenges to the lay members of the mixed court are unknown on the Continent, and England abandoned them in 1988.⁵⁷⁸ Prosecutors would argue, however, that since many jurisdictions require unanimous verdicts, prosecutors must be able to exclude those jurors who would not vote to convict regardless of the evidence.⁵⁷⁹

(case available from author).

⁵⁷² Crime Victims Justice Reform Act, § 7, CAL. CIV. PROC. CODE § 223 (West Supp. 1991). The California Supreme Court found that other aspects of the initiative violated the California Constitution, but has not ruled on the legality of its jury selection provisions. See *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

⁵⁷³ *People v. Segura & Diaz* (Marin County Superior Court, # 11240, 1990-91) (case available from author).

⁵⁷⁴ Discussion with the prosecutor and the defense lawyer in the first case.

⁵⁷⁵ Reducing the number of jurors would speed the selection process, but would likely have little effect on overall trial time. A recent study of civil jury trials in selected California cities found that both trial time and deliberation time are independent of jury size. JURY COMPARISON, *supra* note 292, at 86-88.

⁵⁷⁶ 476 U.S. 79 (1986).

⁵⁷⁷ See *supra* notes 241-45 and accompanying text.

⁵⁷⁸ See *supra* notes 234-37 and accompanying text.

⁵⁷⁹ Following California's 1990 restrictions on attorney-conducted voir dire, many prosecutors complained of an increase in hung juries and acquittals. The prosecutors felt

Such a reform might well require some relaxation of the traditional unanimity requirement⁵⁸⁰, but we could compromise. Following the English, for example, we might allow a ten-to-two verdict after the jury deliberates for a specified period without reaching unanimity.⁵⁸¹ Fortunately, the Supreme Court has allowed the states some flexibility in jury unanimity, permitting ten-to-two, and, possibly nine-to-three, verdicts in serious criminal cases.⁵⁸² Thus, states now have an opportunity to experiment with reducing or eliminating peremptory challenges.

2. Focusing the Trial on the Discovery of Truth

As noted previously, the excesses of our adversary system include a diminished respect for the discovery of truth. This is demonstrated by our formal, complex, and restrictive rules of evidence and procedure, which shift the focus of the trial away from the

this could be attributed to their inability to probe juror attitudes and backgrounds to discover the "unreasonable" person who would not convict regardless of the evidence of guilt. One San Francisco prosecutor cited the inability to discover "artichokes," referring to jurors whose votes cannot be explained. Another felt that judges do not have the same stake as lawyers in finding out as much as possible about prospective jurors. *Prosecutors Complain About Judges' Voir Dire*, THE RECORDER, Dec. 13, 1990, at 1. Also, the judge has less knowledge of the facts and appreciation of the issues. As the Fifth Circuit noted, it "is the parties, rather than the court, who have a full grasp of the nuances . . . of the case." *United States v. Ible*, 630 F.2d 389, 395 (5th Cir. 1980).

Of course, without peremptory challenges, even the "clearly apparent artichoke" could not be removed except for cause, and challenges for cause cannot reach those who promise to follow the law, but are irrational or have a "hidden agenda." Defense attorneys would complain of the inability to remove pro-prosecution "artichokes," but as a general matter, may benefit from the elimination of peremptory challenges because very often a hung jury results in either a dismissal or a more favorable plea bargain.

580 Alschuler has noted that other devices might also make the elimination of peremptory challenges more palatable. He has suggested expanding the grounds on which a party can challenge for cause, or authorizing the judge "to select on a discretionary basis those jurors who appeared best qualified to decide the case impartially." Alschuler, *supra* note 242, at 207. However, I find these alternatives less workable and more open to abuse because they would merely shift to the judge, who knows less about the case than the attorneys, the power to pick or to strike jurors based on broad and ill-defined standards.

581 See *supra* note 247 and accompanying text. Notably, on the Continent, non-unanimous verdicts are the standard, and the prosecutor can appeal an acquittal. See *supra* part II.B.2.

582 See *Johnson v. Louisiana*, 406 U.S. 356 (1972) (affirming conviction based on nine-to-three verdict violates neither the Due Process nor the Equal Protection Clauses of the Fourteenth Amendment); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion) (upholding ten-to-two verdict against the argument that the Sixth Amendment requires jury unanimity); but see *Burch v. Louisiana*, 441 U.S. 130 (1979) (the verdict of a six-member jury must be unanimous).

accused and the relevant facts.⁵⁸³ Our general disregard of the effect of such rules on the integrity of verdicts often surprises Continental observers.⁵⁸⁴ The Supreme Court uses, for example, the exclusionary rule to deter police misconduct though it prevents the jury from hearing highly probative evidence and has no necessary relationship to the extent of the official lawlessness.⁵⁸⁵ Even more detrimental to truth discovery are our "game rules," which operate to divorce the accused from the trial process, and allow the contestants to hide their cards until played. It is difficult to imagine a procedure more ill-suited to discovery of past events than one that discourages the most important witness from participating in the process and allows each party to hide its evidence from the other, surprising the opponent at trial.

Focusing the trial more on the accused and the discovery of truth should have a high priority and could be accomplished without abandoning the fundamental nature of our adversary system. Depowering lawyers would tend to shift the focus of trial toward the accused and the discovery of truth. Further changes in our rules of evidence and procedure would encourage disclosure of the accused's knowledge of the case (both early in the investigation and at trial) and would require the prosecution to open its files to the defense.

First, we might modify *Miranda* and associated rules that encourage pretrial silence and adopt procedures that encourage suspects to speak early in the investigation. These procedures might include a warning that, while the accused has a right to remain silent and a right to a lawyer during questioning, a refusal to make a statement can be disclosed to the jury at trial.⁵⁸⁶ Fur-

583 See *supra* part II.C.5.

584 See *supra* part II.C.3.

585 The merits of the exclusionary rule have been debated extensively and will not be considered here.

586 Presently, *Miranda* prohibits the prosecution's use, in its case-in-chief, of the fact that the defendant remained silent or claimed the privilege in the face of police questioning. *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). Prohibition of the use of silence to impeach a defendant's testimony rests on the due process principle that this use would be unfair in light of the implicit assurance of the *Miranda* warning that exercise of the silence right will cause no harm. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Thus, *Miranda's* requirements would have to be modified before the prosecution could use the defendant's silence following *Miranda* warnings and questioning in its case-in-chief. The Court might allow the prosecution to use silence to impeach the defendant's testimony, provided *Miranda* advice was followed by a "no safe harbor" warning indicating that the defendant's failure to speak could be made known to the jury if inconsistent with his trial testimony. The disclosure would be used to judge the weight to be given to

thermore, we might abandon that aspect of the hearsay rule which prohibits the accused from using his prior consistent statements except in limited circumstances.⁵⁸⁷ As a result of these changes, whatever occurs during police questioning—whether the accused confesses, denies guilt, or remains silent—may be disclosed to the trier of fact. England takes a similar approach. The trier of fact is told that the accused remained silent, even if the accused's silence followed warnings of the right to silence. Consequently, the jury is fully aware of the defendant's refusal to answer questions when warned and interrogated by police. Barristers are well aware that, though the jury is instructed not to draw an inference of guilt from such silence, nothing can prevent the jury from actually drawing these inferences.⁵⁸⁸ The defendant's exculpatory statement to the police likewise usually comes before the jury, though in England, consistent as well as inconsistent statements technically are not admissible for the truth of the matters asserted.⁵⁸⁹ With rare exception, the prosecution places in evidence the defendant's reaction to police questioning, including exculpatory statements, and when the prosecution does not, the accused may do so.⁵⁹⁰

Second, we should encourage the defendant to testify at trial by abandoning *Griffin* and other rules that discourage the accused from taking the stand.⁵⁹¹ One of the first rules to eliminate

the testimony.

587 See FED. R. EVID. 801(d)(1)(B); *United States v. Carter*, 910 F.2d 1524 (7th Cir. 1990) (defendant's prior exculpatory statement not admissible under state of mind exception of 803(3) because it referred to a past, rather than to a then-existing, state of mind); *United States v. Rodriguez-Pando*, 841 F.2d 1014 (10th Cir. 1988) (tape recording of defendant's statement to police the day following his arrest, in which defendant claimed that he had been coerced to act as he did, was inadmissible because it was a statement of memory of past events and beliefs); *United States v. Nelson*, 735 F.2d 1070 (8th Cir. 1984) (defendant's prior exculpatory statement was not admissible as a consistent statement under 801(d)(1)(B) because it was not relevant to rehabilitate).

588 See Van Kessel, *supra* note 5, at 10-15.

589 See *Regina v. Pearce* 69 Crim. App. 365 (1979). However, mixed statements—those in part inculpatory and in part exculpatory—are as a whole admissible for the truth of the facts asserted. *Regina v. Sharp* 1 W.L.R. 7 (1988); See ARCHBOLD, *supra* note 127, § 15-57(I)(2)(iii).

590 Glanville Williams, *The "Right of Silence" and the Mental Element*, 1988 CRIM. L. REV. 97, 99. The exception is noted in paragraph three of *Pearce*, which refers to "a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to its being made part of the prosecution evidence." *Pearce*, 69 Crim. App. at 366; see ARCHBOLD, *supra* note 127, § 15-57.

591 The Supreme Court has hinted that the rules established by *Griffin*, or at least some of their aspects, are not themselves rights protected by the Constitution, but, like *Miranda* warnings, are prophylactic rules or procedural safeguards associated with the privilege against self-incrimination. In *United States v. Robinson*, 485 U.S. 25 (1988), the

should be the rule allowing impeachment by prior convictions. Such impeachment acts as a powerful deterrent to testimony while, at the same time, demands the impossible of the jury—that they consider the conviction only as it bears on the defendant's credibility. Whatever the proper rules governing the admission of evidence of the defendant's prior convictions or other bad acts, they should not turn on whether the defendant chooses to testify.

We could also alter our character evidence rules to provide additional encouragement to testify. First, we might allow the defendant to offer evidence in support of his credibility as a witness even though credibility has not been attacked. Currently, most jurisdictions follow the Federal Rules of Evidence in allowing evidence of truthful character "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."⁵⁹² Second, we might restrict the defendant's character evidence to prove his conduct, as well as the defendant's character evidence to prove the victim's conduct, to cases in which the defendant takes the stand. Under federal law, though choosing not to testify, the accused may offer evidence of his good character and evidence of the victim's bad character in order to prove conduct on a particular occasion. Yet, the prosecution may offer character evidence for conduct only in rebuttal.⁵⁹³

By removing the threat of prior conviction impeachment and by giving the accused many advantages in testifying—avoiding adverse comment on silence and allowing him to introduce character evidence going to credibility and conduct—our rules would encourage the defendant to take the stand. Even with these changes, the accused would not have the same incentives to testify at trial as the Continental defendant who faces a unitary trial on both guilt and punishment, in which the judge calls the accused as the first witness, asks for responses throughout the process, and calls upon the accused to make a final, narrative statement. Neverthe-

Court referred to "[t]he broad dicta in *Griffin* to the effect that the Fifth Amendment 'forbids . . . comment by the prosecution on the accused's silence' . . ." *Id.* at 33. In his dissent, Justice Marshall referred to *Griffin's* "general prophylactic rule." *Id.* at 41 (Marshall, J., dissenting).

592 FED. R. EVID. 608(a). California has eliminated this restriction on character evidence in support of the credibility of all witnesses. See CAL. CONST. art. I, § 28(d); *People v. Harris*, 767 P.2d 619, 640-41 (Cal. 1989). Since my proposal is designed to encourage the defendant to testify, it extends only to the defendant as a witness.

593 FED. R. EVID. 404(a)(1)-(2).

less, reforms proposed would greatly encourage the accused to provide evidence and actively participate in his defense.

However, greater emphasis on discovery of truth should not be a one-way street, allowing the prosecution to learn the details of the defense while secretly holding its cards until trial. Once prosecutors can expect, in nearly every case, to have the benefit of the accused's story early in the investigation, fairness demands that the accused have early access to the prosecution's evidence. This requires some means to protect the prosecution from the danger of witness intimidation or elimination following open discovery. While our constitutional and statutory rules of evidence stand as formidable barriers to the use of witness statements in place of live testimony,⁵⁹⁴ provisions might be made for waiver of these rights in exchange for full, Continental-style discovery of the prosecution's evidence.⁵⁹⁵ Our discovery rules might provide that by asking for the names and statements of prosecution witnesses, the defendant waives all confrontation and hearsay objections to the use of those statements as substantive evidence if any of those witnesses either testifies inconsistently or becomes unavailable at the time of trial.⁵⁹⁶ Allowing use for the truth as well as for impeachment of all inconsistent statements of witnesses is already allowed in many jurisdictions.⁵⁹⁷ In others, it would require only a waiver of unconstitutional rules of evidence. Allowing the use of the statements of unavailable witnesses would often require a waiver of both constitutional and statutory restrictions.

The waiver approach is an integral part of our criminal process, from plea bargaining through sentencing, and has been used to support admission of prior grand jury testimony of prosecution witnesses.⁵⁹⁸ Furthermore, some jurisdictions already use an anal-

594 See *supra* part III.A.1.

595 I owe the discovery-waiver suggestion to my colleague Professor Schlesinger.

596 A claim of lack of recollection might be treated either as inconsistent testimony or as demonstrating unavailability, depending on the circumstances. See, e.g., FED. R. EVID. 804(a)(3) (defining unavailability to include testimony as to lack of memory); *People v. Green*, 479 P.2d 998 (Cal. 1971) (prior statements found inconsistent with witness's claim of loss of memory at trial).

Alternatively, when the witness agrees to take the stand and to testify, but asserts memory loss, the Supreme Court has found no confrontation clause or hearsay rule violation. The Court stated that a witness is "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions." *United States v. Owens*, 484 U.S. 554, 561 (1988).

597 See, e.g., CAL. EVID. CODE § 1235 (West 1966).

598 See *United States v. Carlson*, 547 F.2d 1346, 1358-60 (8th Cir. 1976) (By intimidating a prospective prosecution witness not to testify, the defendant waived his Sixth

ogous approach in the discovery context whereby the defendant becomes vulnerable to prosecution discovery only if the defendant first requests discovery. For example, federal discovery rules permit the defendant to request disclosure from the government of documents, tangible objects, or reports of examinations and tests. After compliance by the government and on the government's request, the defendant must permit the government to inspect and copy the same category of articles in the possession or control of the defendant that the defendant intends to introduce into evidence in chief at the trial.⁵⁹⁹ The result is similar to a waiver rule providing that, by seeking discovery from the prosecution, defendant waives all objections to discovery of similar matters by the prosecution. Yet with my waiver proposal the consequences would be more serious—admission into evidence rather than only disclosure—and many questions would remain, such as whether the prosecutor's consent should be required as in the case of jury trial waiver and whether the waiver should be limited to those statements given in a specified context.

To guard against the wholesale admission of questionable statements, some minimal requirements could be imposed, such as limiting coverage of waiver to those statements made to law enforcement authorities in circumstances that assure (1) that the statements were actually made by the witness and (2) that the witness perceived the gravity of the situation and the duty to tell the truth. Thus, the waiver might include only recorded statements given to a judicial officer or government attorney and made under oath subject to penalty of perjury—a category of prior statements similar to those inconsistent statements which Congress thought reliable enough to characterize as nonhearsay and admit as substantive evidence under section 801(d)(1) of the Federal Rules of Evidence.⁶⁰⁰

Amendment right of confrontation such that the court properly admitted the witness's prior grand jury testimony.)

599 FED. R. CRIM. P. 16(b)(1)(A)-(B).

600 Rule 801 covers only a narrow group of inconsistent statements—those that are “given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,” but does include witness testimony before the grand jury where there is no opportunity for cross-examination. However, the Rule requires that the declarant testify at the trial and be “subject to cross-examination concerning the statement.” FED. R. EVID. 801(d)(1). Under the proposed waiver rule, the witness's prior statements could be used as substantive evidence if the witness either sought to disavow them or became unavailable.

With defendants providing their side of the case both early in the investigation and at the time of trial, and with some evidentiary changes to protect against witness intimidation, no significant barriers would stand in the way of full and open discovery of the prosecution's evidence. With these changes, trials would be more open to all relevant evidence, less affected by legal strategies and surprises, and more focused on achieving a correct and just result.

3. Ambitious Experiments with the Continental Model in Misdemeanor Cases Before Federal Magistrates

Our adversary criminal trial system has become excessively complex, burdensome, and contentious. Its problems are so acute that, despite seemingly insurmountable barriers to ambitious experiments with fundamental nonadversary elements, we should find ways to experiment with Continental-style approaches in less serious cases and in contexts involving judicial structures that pose fewer dangers than ordinary state trials. For example, we might experiment with a mixed tribunal, including nonadversary Continental trial procedure in minor, nonjury criminal cases. This would require waiver of a defendant's Fifth and Sixth Amendment rights, but the defendant could be given a choice between a traditional bench trial or a mixed bench of one professional and two lay judges. In the mixed trial, the defendant would agree to an "inquiry" by the presiding judge according to the usual Continental procedure in which the judge, armed with full knowledge of the prosecutor's case file and inspired by a clear duty to arrive at an accurate and just result, calls and questions the defendant and other witnesses according to relaxed rules of evidence. The mixed court would decide the questions of guilt and sentence in a single proceeding.

At least some defendants may be willing to have their cases tried pursuant to a procedure guaranteeing the right to full discovery, the right to present their side of the case in a narrative manner without taking the oath, and, most importantly, the opportunity for a neutral judicial inquiry as opposed to a partisan contest dominated by an aggressive prosecutor. Furthermore, since the less formal and less adversary process would be short, its attraction could be enhanced by making it available at an earlier time than a formal adversary trial. Even in states such as California that give the defendant the right to a full jury trial—twelve persons and unanimous verdict—in all criminal cases including

misdemeanors,⁶⁰¹ many defendants might opt for a nonadversary trial because of its speed, informality, and other advantages. Under California's present system, defendants in misdemeanor cases who request a jury trial, but who are both unable to post bond and are ineligible for release on promise to appear, face either pleading guilty to the prosecutor's plea bargain offer or spending up to thirty days in jail awaiting trial. These defendants are often astonished to learn from their lawyers that, by pleading guilty, they would be released within a few days or sometimes immediately, but if they insist that they are not guilty and demand a jury trial, they must spend a month in custody and possibly longer if convicted. To such defendants, an early opportunity to obtain full discovery and present their side of the case in a Continental-style proceeding might be very appealing.

Problems regarding judicial quality and independence would remain, but could be largely overcome by using federal magistrates, who are not faced with the prospect of standing for election, and who, since 1979, have been selected on the basis of merit rather than politics. According to the merit selection procedures of the 1979 Magistrates Act, a majority of the judges of each United States district court appoint full-time federal magistrates for eight year terms⁶⁰² based on standards and procedures established by the Judicial Conference of the United States. Those procedures provide for public notice of all vacancies and the establishment of "merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions."⁶⁰³ The Act also upgrades the qualifications of magistrates by requiring bar membership and five years of legal experience.⁶⁰⁴

601 See CAL. CONST. art. I, § 16; *People v. Superior Court*, 434 P.2d 623 (Cal. 1967).

602 28 U.S.C. § 631(a), (b), (e) (1988). Part time magistrates are appointed for four year terms. *Id.* § 631(e).

603 *Id.* § 631(b)(5).

604 See Christopher E. Smith, *Who are the U.S. Magistrates?* 71 JUDICATURE 143, 146 (1987).

The Judicial Conference also sought to increase the diversity of federal magistrates. Judicial Conference regulations instructed committee members to make an affirmative effort to identify and give due consideration to all qualified candidates including women and members of minority groups. ADMINISTRATIVE OFFICE OF THE COURTS, THE SELECTION AND APPOINTMENT OF UNITED STATES MAGISTRATES 6 (1981). Since 1979, the number of magistrates from these groups has increased both in absolute and percentage terms. See Smith, *supra*, at 150 tbls. 7, 8.

While district court judges strongly influence the selection of magistrates through their appointment of the selection panel members, their guidance of the selection process, and their ultimate power to choose among recommended candidates, a recent study found that the new procedures have largely removed the appointment of federal magistrates from the domain of partisan party politics.⁶⁰⁵ The selection of magistrates by the very judges they will assist has another advantage. Because federal magistrates today may undertake virtually any task within the province of district court judges, except presiding over felony trials and sentencing,⁶⁰⁶ judges regard them as essential resources in the management of heavy and expanding caseloads and, thus, emphasize competence rather than patronage in their appointment.⁶⁰⁷ Not surprisingly, at the time of appointment, magistrates average about fifteen years of legal experience after graduation from law school.⁶⁰⁸

Magistrates are protected from removal during their terms except for "incompetency, misconduct, neglect of duty, or physical or mental disability."⁶⁰⁹ Although they are not as secure as federal judges, who have lifetime appointments, magistrates who perform within the bounds of competency are usually reappointed.⁶¹⁰ Consequently, they provide a source of talented, ex-

605 See Christopher E. Smith, *Merit Selection Committees and the Politics of Appointing United States Magistrates*, 12 JUST. SYS. J. 210, 229-30 (1987). The political nature of the selection process relates to the power struggles and value conflicts between judges, rather than to partisan affiliation and executive branch influence. *Id.* at 214-15. Even at the judicial level, the study found "surprisingly little evidence of political party affiliations affecting the selection of magistrates" and revealed "numerous examples of judges appointing magistrates from the opposite political party or not knowing the partisan inclinations of the selected appointee." *Id.* at 228.

606 See 28 U.S.C. §§ 631-39 (1988); Smith, *supra* note 604, at 211.

607 See Smith, *supra* note 604, at 228 ("[M]agistrates are too valuable in the resource-scarce judiciary to permit primary emphasis on partisan political considerations.").

608 Smith, *supra* note 604, at 148-49.

609 28 U.S.C. § 631(i) (1988). Removal requires a majority vote of the district court judges after a hearing based on specified charges. *Id.*

610 Previously, their positions were less secure because a single judge could block reappointment. Currently, however, magistrates are reappointed by a majority vote of the judges of the district court. 28 U.S.C. § 631(f) (1988).

While federal judges who are political appointees are still very much in control of the selection process despite the merit selection procedures, the merit process opens up magistrate selection and removes it from direct control by either of the other two branches as well as from control by popular election. In fact, appointment of magistrates by district judges was considered essential to the constitutionality of magistrates undertaking judicial tasks as adjuncts to independent Article III judges. See Smith, *supra* note 604, at 148.

perienced, and relatively independent judicial officers in whom one might confidently place the authority of Continental judges, at least as an experiment in minor criminal cases.⁶¹¹

IV. CONCLUSION

Many serious problems in our system of justice, as well as our inability to solve them, stem from our worship of the adversary model and our excessive reliance on principles and mechanisms that we mistakenly believe are essential characteristics of this model. At the same time, we regard with smug detachment the less-adversary adjudication systems of other countries, which we dismiss as "inquisitory." In this rapidly shrinking world, we are long overdue in looking outward to other adjudication systems and opening ourselves to the possibility that other countries may have developed criminal trial procedures in many respects superior to ours.

Foremost among our adversary excesses is the extensive authority given to lawyers and the corresponding failure to give judges a stronger hand in the trial process. Also, our system gives too little weight to the fundamental goal of reliable fact-finding. Under the guise of protecting "other values," mistakenly described as essential to an adversary system of justice, we have erected substantial evidentiary and procedural barriers to efficient and reliable adjudication. We condone trial by surprise through our restrictive discovery rules. Finally, we rely too much upon the traditional, lay jury system and refuse to consider alternatives, partly because lawyer dominance over the trial process calls for a weak and uninformed fact-finder.

One result has been the dramatically increased length and complexity of the criminal jury trial. A corresponding increase has occurred in plea bargaining and other alternatives to the formal jury trial. It has been a slow process, but we are now weighted down by a formal criminal trial albatross that we can afford to offer to only a small portion of defendants. We also suffer a reduction in the quality of criminal trials; very often, our jury trial system fails to fulfill its principal objectives of determining facts and providing justice to the accused, the accuser, and the public.

611 Cf. Christopher E. Smith, *Former U.S. Magistrates as District Judges: The Possibilities and Consequences of Promotion Within the Federal Judiciary*, 73 JUDICATURE 268 (1990) (suggesting that greater consideration be given to the "broad pool of experienced" federal magistrates for appointments to district courts).

More rapid change possibly could have prevented this situation. Professor Langbein has pointed out that

[i]f the developments that have rendered jury trial[s] impractical had happened in a concentrated and visible fashion, Americans might have had occasion to give proper consideration to devising alternatives capable of preserving some of the jury policies. What actually occurred over the last century was a gradual and somewhat stealthy growth of bench trial and plea bargaining. Only because this departure from our supposed constitutional principles is now so familiar to us do we fail to appreciate how astounding the phenomenon really is (and how bizarre it appears to foreigners who encounter it afresh).⁶¹²

Yet the American trial does serve one purpose—it is terrific entertainment. Its dynamic, combative style is perfect for the visual media of television and the movies. It is also sexy. Where else but *L.A. Law* can one rely on seeing lawyers in either the courtroom or the bedroom each week? What would we do without its progeny—those numerous permutations beamed at the American home nearly every evening? Worse yet, what would we think of a nonadversary “inquiry” by a neutral judge where “[t]he tactical skills of a Perry Mason would fall on barren ground”?⁶¹³ Professor Zeidler recognized the superior entertainment value of the adversary trial: “[i]t is not by accident that crime novels and police stories all over the world feature court-room scenes in which common law procedural rules are applied.”⁶¹⁴ However, he pointed out that “the tedious and bureaucratic style [of the Continental trial] might, from time to time, have a mitigating and humanizing effect upon those whose fate and existence are at stake.”⁶¹⁵ Faced with such fine entertainment, we may lose sight not only of the purpose of the trial, but of those it affects.⁶¹⁶

I am far from optimistic that we are either willing or able to significantly reduce the excesses of our criminal trial. Many obstacles stand in the way of reform, including a constitutionalized code of criminal procedure, professional inertia on the part of

612 LANGBEIN, *supra* note 23, at 218-19.

613 Zeidler, *supra* note 46, at 156.

614 *Id.*

615 *Id.*

616 Ironically, many actual criminal trials are so lengthy that they lose entertainment value. One cable TV service has been taping criminal trials nationwide, but has shied away from California trials because their length makes them “too boring.” See Nancy Rutter, *Lex Populi: Daytime Television has Discovered the Law*, CAL. LAW., May 1991, at 22.

lawyers and judges, and our national character which resists attempts to centralize governmental authority in order to further efficient litigation. In light of these obstacles, wholesale adoption of major elements of the nonadversary system in serious criminal cases at this time appears virtually impossible. Furthermore, the dependence of nonadversary systems on the competence, efficiency and independence of judges and our diverse and highly political systems of judicial selection and retention argue against empowering our judges in the Continental mode in serious criminal cases. Finally, while some contend that our trial system could be improved by adopting features of Continental trials and "blending them with the best of our own traditions and procedures,"⁶¹⁷ piecemeal adoption of major nonadversary elements promises little. Many elements would collide with constitutional barriers while others would not make a workable fit or would create imbalances which would require further changes. In many respects, our adversary trial procedure is simply incompatible with partial approaches to judicial empowerment. For example, our umpire-like judges, who lack knowledge of the investigation, are ill-suited to conduct the initial or primary examination of witnesses.

Nevertheless, by failing to take steps to correct the adversary excesses in our criminal trial, we risk witnessing its further decline and eventual eclipse. Because our criminal justice system does not face significant competition, we can continue producing our criminal justice "trabbi,"⁶¹⁸ until the public becomes fed up with its inefficiency and social damage. Remaining locked behind our constitutional and psychological barriers with our eyes closed to foreign alternatives, we may witness the eventual extinction of our formal jury trial dinosaur, except in a few judicial tar pits and, of course, on television.

We can improve our polar-extreme, adversary criminal trial without abandoning its essential adversary character. First, while seeking ways to enhance the quality and independence of our judiciary, we should take measured steps toward increasing their authority in areas such as jury selection, controlling abuses by counsel, and case management. Judges might be encouraged to exercise greater authority in questioning witnesses, with the goal of furthering the efficient and reliable presentation of evidence.

617 See Alschuler, *supra* note 6, at 1003; Pizzi, *supra* note 6, at 366.

618 The polluting, inefficient car produced by the industries of former East Germany.

Following the English example of reducing or eliminating peremptory challenges while allowing non-unanimous verdicts, would further reduce trial time and allow for more jury trials. Next, we should shift the focus of the trial from the battle between the lawyers to the discovery of truth by (1) modifying our complex rules of evidence to allowing admission of more reliable and relevant evidence, (2) encouraging the defendant to contribute to the investigation and the presentation of the facts, and (3) requiring the prosecutor to give full and open discovery of the fruits of the official investigation. Moderating the extreme contentiousness of our lawyers and their desire to win at any cost is also a desirable goal, but is not likely to be accomplished merely by tinkering with ethical rules governing lawyer conduct. Rather, structural aspects of our adversary system should be changed because they most contribute to the problem by encouraging and enabling lawyers to frustrate truth-determining objectives in the pursuit of victory.

While movement toward the Continental trial, or even the mixed but more adversary Italian trial, would face formidable obstacles, we might attempt ambitious experiments in contexts such as misdemeanor trials before federal magistrates. At these trials, both the defendant's exposure to imprisonment and jury trial requirements are limited, and merit selection and retention systems promise a competent and independent trial bench. In such cases, defendants might be persuaded to accept Continental-style procedures if administered efficiently, informally, and fairly by competent and respected magistrates. A successful experiment of this nature would be a large step toward breaking down the psychological barriers we have erected against nonadversary procedures, and a possible first step toward removal of our constitutional barriers to such procedures.

Along the way to reform, we will have to reduce our expectations. We assume that we can have it all. We want our criminal trial process to do everything and to satisfy everyone. We ask it to police the police by means of exclusionary rules of evidence, provide an arena for a lively, entertaining contest, and arrive at an accurate and a just result. However, like the profligate who seeks to satisfy all desires and ends with little substance, we often come up short-handed and disappointed in our criminal trial.

Everyone recognizes that independent values, such as freedom and human dignity, occasionally must outweigh the efficient procedure necessary for reliable truth-finding. Nevertheless, compared to most other civilized countries, we have considerably underval-

ued the principal objective of the criminal trial. By reducing adversary excesses in our trials—including technical rules of evidence, contentious lawyering, and passive judging—we can speed up the trial process, make it available to more defendants, and focus it more sharply on the central character of the trial—the accused—and on the most important issue—guilt or innocence.

