Notre Dame Law Review

Volume 47 | Issue 4 Article 6

4-1-1972

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I. Introduction

The popular concept of the law, reinforced by literature and T.V. shows, is that it is principally involved in litigation conducted by hard hitting or cleverly devious adversaries before ignorant juries and a judge who may be a model of justice, a jackass or corrupt. One side is right, the other is wrong. One side tries to establish truth, the other to obfuscate it. This view of the law is like the legendary ideal of war depicted in the face-to-face battles of the mighty fighters of the *Iliad*.

This popular view, though simplistic, is nevertheless accurate insofar as the adversary system creates what game-theorists speak of as a zero-sum situation.[1] An examination of the litigation process as a zero-sum game makes clear the disparity between the purported truth-seeking purpose of the adversary system, and its actual result.

II. Some Background on Game Theory and the Resolution of Conflicts

A zero-sum situation exists when there is a fixed amount of a desired good or value, so that any increase in one actor's position with respect to that value necessitates a decrease in the other actor's value position.[2] In the trial situation both the party-plaintiff and party-defendant seek identical goals, that is, judgment in their favor. The ultimate value for each party is not only generally fixed but unique; thus, the litigation process customarily culminates in an all-or-nothing, or zero-sum result.[3]

Although game theory is relatively new to the field of psychology, the zero-sum situation has long been used to effect the resolution of conflict. Thus, like trial by battle in earlier times, when a party could engage a champion for his cause to do the fighting for him, so now in courts the parties engage (retain) lawyers to do battle for them.

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The author wishes to acknowledge the assistance of Adriane G. Berg of the New York Bar in the preparation of this article.

1 *See* notes 2, 3 and accompanying text, *infra*.

2 *See, e.g.*, T. GURR, WHY MEN REBEL (1970). Game-theorists postulate zero-sum and variable-sum situations; Gurr describes these terms as follows:

> In fixed-sum [i.e. zero-sum] situations there is a fixed amount of a desired good or condition; any increase in one actor's position on that value necessarily entails a decrease in other actors' value positions. In variable-sum situations there may be either undistributed values (such as unused land, unoccupied elite positions) or the potential for increases in value stocks. *Id.* at 123-24.

3 *See, e.g.*, Deutsch, *Some Quantitative Constraints on Value Allocation in Society and Politics*, XI BEHAVIORAL SCIENCE 245-52 (July 1966).

The very anonymity and finality of a verdict may, of itself, settle the dispute.[4] The verdict leaves the contestants with a sense that they have had their day in court, a run for their money, and that at least it is not the opponent who has determined the victory or defeat.

Trials by battle and litigation are symbols that replace the blood feuds, vendettas and other forms of private war. As Cardozo said:

> [I]t [our present system of criminal law] is a survival of the time when punishment for crime was thought of as a substitute for private vengeance, with its sequel private war . . . We have put away the blood feud, the vendetta, the other forms of private war, but in the framing of our penal codes we have not forgotten the passions that had their outlet and release in pursuit and retribution.[5]

The bite of words replaces the cut of the weapon especially in highly verbal cultures and sub-cultures.

The reduction of physical retribution to verbal struggle in some primitive societies is well exemplified by the Eskimos. There, if a man took another's wife without his consent, the husband felt this to be a challenge to his manhood (as is the case with adultery in more "advanced" cultures). He could either assault the wrongdoer or challenge him to a song contest, which was a marathon in its nature. Each said everything nasty that he could think of about the other.

The decision on the "merits" was for the audience. Even the loser, however, felt that he had avenged himself. In other situations the Eskimos avoided combat in homicidal disputes by wrestling, buffeting and butting as well as by song contests.[6]

Sporting events have also been used as symbolic releases of hostility, during which participants could direct their hostility against opponents "within the rules of the game."[7] The Olympic games were, in Greek times, a way not only of unifying the city states but also, at least during the period of the games, avoiding battle between those states.[8]

The palio in Sienna, dating from the Middle Ages, is an exciting and vicious horse race in which each section of the town enters its own horse. Sometimes men and horses are killed in the course of the race (all within the rules of the ritual) but the rivalry induces plans and training of each section of the city for a year before the event.[9] Such deaths as occur are accidental and part of a ritualized channeling of intra-city hostilities.

It is the channeling of hostility in socially less dangerous rituals than blood feuds and duels, not fixing responsibility or finding guilt, that has been the

4 *See* Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1962). Defamation suits, Wyzanski suggests, are in effect substitutes for brawls. The very anonymity and finality of a verdict may, of itself, settle the dispute. The verdict leaves the contestants with a sense that they have had their day in court, a run for their money, and that at least it is not the opponent who has determined the victory or defeat.

5 B. CARDOZO, WHAT MEDICINE CAN DO FOR LAW (1930).

6 E. HOEBEL, THE LAW OF PRIMITIVE MAN (1954).

7 *Id.*

8 *Id.*

9 *Id.*

essence of those various practices. Perhaps our own adversary system is the most highly developed method through which conflict is resolved within a zero-sum game structure.[10] What is often overlooked, however, is that the win-lose result cannot be squared with jurisprudential notions of justice.

Justice by its very definition belongs, *a priori*, on one side or another, or so we tend to believe; but it may be independent of the final result. We have, furthermore, construed statutory and constitutional mandates to require "fairness" in the battle process of our adversary system. In a fair game, the opponents are both assumed to be entitled to win if they can. The win-lose adversary situation, thus, creates the following dilemma:

> Justice is on one side only. But one must fight for one's *own* side. Moreover, one must fight as hard as one can, using all the tricks of the trade, as long as the rules are obeyed. But what if justice is on the other side?[11]

And one may add, what if justice is on neither side? What if neither is at fault?

III. Lawyers and Their Training

Given the zero-sum situation, the lawyer enters the courtroom with his energies channelled toward the goal of "winning his case." Thus, while the adversary system may be a form of dialogue that winnows the evidence and clarifies it, the system, unfortunately, leads to the psychological drive for victory and the drive for victory is, in essence, a power drive. This, in turn, tempts the seeker of victory to use weapons of power that have little relevance to the purpose of a judicial system to administer equal justice. Distortion (if not misrepresentation) and the manipulation of bias defeat the possibility of finding truth or reality.[12] Thus, the adversary system is often used not as a means to equal justice, but as a technique for victory.[13]

At times the adversaries become *ad hominum* and disrespectful. The opponent and his witnesses, frequently his counsel, and sometimes the judge, may be treated as enemies, insulted and humiliated.[14] Disrespect is a form of hostility and hostility hampers the search for truth and justice alike. It has been well said by the American College of Trial Lawyers that: "Basic to an efficient and fair

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10 *See, e.g.*, A. RAPOPORT, FIGHTS, GAMES AND DEBATES, 262-63 (1961).

11 *Id.* at 263-64.

12 P. ZIMBARDO, THE PSYCHOLOGY OF POLICE CONFESSIONS (1966).

13 *See* Kramer, *The Psychology of a Jury Trial*, 16 PRAC. LAW. 61 (1970):

> There are times when you will, for the purposes of creating atmosphere, want to put a witness on the stand who knows very little about liability. For example, a man is crossing the street and is hit by an automobile and killed. The problem of liability might be great, for example, since he was crossing between intersections.
>
> In this type of case, it might be a good idea to call as your first witnesses the widow and the children—even though they know nothing about the accident. From a psychological point of view you are now setting the stage and creating the atmosphere because the jury may be saying to themselves "what a lovely widow—poor soul —left alone with these fine children!" *Id.* at 66.

14 *See* Burger, *Remarks on Trial Advocation*, 7 WASHBURN L. REV. 15 (1968). The

functioning of our adversary system of justice is that at all times there be an atmosphere manifesting mutual respect by all participants."[15]

There are a number of reasons why the adversary system so often becomes an arena of hostility. First, perhaps those people who choose advocacy have personalities that require the satisfaction of victory. A renowned litigator observes that there are many to whom the need to win amounts to the biological need for survival.[16] "There are some to whom defeat is a rejection carrying all the unconscious mutilating implications of castration."[17] It is perhaps the very personality of the litigating attorney that reinforces the win-lose adversary process, because to him "[c]ompromise implies surrender . . . [and it is] unconsciously equated with loss of security but sometimes articulated on the conscious level, as loss of face."[18]

Second, the victory-aimed advocate is supported by the traditions of the bar and the general culture and the values of our civilization. For example, The American Bar Association maintains that:

> Advocacy is not for the timid, the meek, or the retiring. *Our system of justice is inherently contentious in nature,* albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer have the urge for vigorous contest. Nor can a lawyer be halfhearted in the application of his energies to a case.[19] [Emphasis added.]

Finally, and perhaps the most important factor that makes it difficult to remedy abuses of the adversary system is the training of lawyers. Our law schools tend to emphasize litigation and its win-lose characteristic. While it is true that the court (and a court trial) looms constantly in the background as arbiter of law and fact in the case of every business deal, testamentary act, tort and criminal offense, there are also win-win situations and problem-solving situations that account for the greater part of legal practice today and which are underemphasized by our legal training.

Furthermore, most cases are not tried, but settled, and compromise is rarely motivated by a win-win or variable-sum approach, but by the fear of ending up on the wrong end of a win-lose result. In other words the spirit of zero-sum dominates the outcome. We can expect no less in a culture that emphasizes win-lose in its training of lawyers and uses the fixing of fault liability by its legal processes as a principal way to release hostility.

Lawyers will understand the distinction being made if they will consider

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Chief Justice indicts litigators for the discourteous and often disrespectful conduct exhibited at trials. He maintains that:

> Anyone who has spent even a part of his years in the courtroom knows that good manners, courtesy and etiquette are more than a matter of form. They are the lubricating element which helps prevent a trial from deteriorating into a brawl. *Id.* at 17-18.

15 AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS 5 (1970).

16 Gair, *The Psychology of Litigation,* 20 N.Y. BAR BULL. 44 (1962).

17 *Id.* at 45.

18 *Id.* at 46.

19 THE AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION (approved draft 1971), at 174.

the difference between an ordinary bankruptcy which closes down a business and a proceeding under Chapter X (formerly known as Section 77B) of the Bankruptcy Act which attempts to re-create a solvent business.[20]

The educational emphasis on the win-lose result is wholly inconsistent with the experience of most practicing attorneys. It would be well to realize that litigation is only a small (though important) part of law today. Most lawyers are engaged in providing technical skill to clients in business matters, advising them what they can and what they cannot do in the jungle of imprecise and often conflicting laws and how to accomplish what they want effectively.

A great area is the management and planning of estates, *inter vivos* and testamentary. Still another is obtaining favorable rulings from government agencies. There is much less romance in negotiating a contract than in cross-examining a perjurious witness. But a practicing lawyer may well suspect that a tax ruling he obtains or a corporate merger in which he participates (such as the creation of the United States Steel Corporation or the Bank of America) may have greater national consequences than a decision by the Supreme Court which may not affect the conduct of lower echelons of the civil service or police.[21]

In the issuance of stock or corporate bonds and in the sale and lease of real estate or merchandise in which lawyers become involved, it is ordinarily to the advantage of neither party to win a victory over the other. The agreement must appear to be of advantage, in other words a variable-sum game, a win-win situation to all the parties involved. Perhaps the most evident example of this is in corporate mergers where each corporation and its stockholders must perceive winning situations.

What the attorney requires when he participates in business deals is not just a knowledge of law but a capacity to solve problems in cooperation with his opposite number and to help his client solve such problems. This is more a matter of social science and the application of skills in intergroup relations than it is of law. Such skills are rarely learned in law schools or shown on the screen. They do not gratify the taste for the dramatic or for retribution.

This variable-sum or win-win situation is clearly necessary when the attorney must deal with a government official or bureau to get a favorable ruling. Advocacy may be needed but to take an adversary role and introduce aggression or hostility into the process would be self-defeating.

Although in its long history labor relations has been on a win-lose basis, this is often not effective today. It does not facilitate collective bargaining. When the position of labor is so extreme that an employer is forced out of business (as in the case of the New York newspaper strike of 1967 which closed several papers) or the posture of management humiliates the employees so that they become hostile to their employer, the results are damaging to both sides.[22]

20 11 U.S.C. §§ 501-676 (Supp. 1970).

21 Other examples are the negotiation of labor contracts between national unions and large industries; participating in the establishment of rules of federal and state agencies; incorporating non-profit organizations such as the Ford Foundation; participating in the drafting of legislation and appearing before congressional and legislative committees; organizing and participating in the construction of real estate developments such as Lincoln Center and Rockefeller Center; negotiations and the preparation of SEC statements.

22 *See generally* R. LIKERT, THE HUMAN ORGANIZATION: ITS MANAGEMENT AND VALUE (1967). R. LIKERT, NEW PATTERNS OF MANAGEMENT (1961).

"Aggression breeds aggression" as we all know by experience. Gordon Allport went on to develop this idea by saying: "One comes to *expect* aggression to be a way of solving all problems. . . . Thus aggression is pretty much of a habit, the more you express it the more you have of it."[23] The aggressive attitudes in which lawyers are schooled and which clients so generally expect of their attorneys not only diminish their effectiveness to bring about constructive results in corporate and commercial situations, but also tend to defeat the attempts of the courts to administer equal justice. We all know examples of how hostile aggression (anger) has led us and others to folly, made it impossible to test claimed facts against our normal perception of reality and curdled the sympathy of those who might have been allies.

IV. Witnesses

To seek truth and determine the merits of a controversy is a good goal for the law. But we must beware of deluding ourselves that we can find truth through the judicial process, except perhaps accidentally. For to the extent that legal judgments depend upon testimony which is the perceptions of witnesses, they are based on shadows, and the perceptions of judges and jurors are founded on the shadows of those shadows.[24] For each man's reality, each man's truth, is different from that of others. In a sense it is hypothetical but, unlike scientific hypotheses, it cannot be empirically tested and the test cannot be replicated, certainly not in litigation.

What we perceive in any situation is largely determined by our expectations and those in turn evolve from our previous experience.[25] It is our experience that gives significance to what we see and hear, and this is true not only with respect to happenings as to which we testify or as to which we hear others testify but also in regard to the meanings we attach to the verbal symbols we hear either in the course of the happening or the trial, or in the very use of the words we employ. Though there may be a common understanding of those verbal symbols, their truth, their reality and their meanings must differ from person to person, even from time to time, as experience expands.[26] I have shown this in greater detail in *Law and Psychology in Conflict*.[27]

The win-lose situation affects not only the conduct of attorneys, but the

23 H. CANTRIL, TENSIONS THAT CAUSE WARS 52 (1950), *citing* G. ALLPORT, THE ROLE OF EXPECTANCY.

24 Lund, *The Psychology of Belief*, 20 J. ABNOR. AND SOC. PSYCHOL. 174 (1925). The problem of truth seeking is further compounded by the jurors' response to the lawyers, parties and witnesses. Each form of jury trial as each procedure in debate assumes that both sides are given equal opportunity to persuade. However, in an excellent study Lund has shown that order of presentation of the evidence affects the jury verdict. He has found that "[w]hile the lawyer of the plaintiff is reviewing his case . . . the belief of the jurors is already in the process of formation, and they are not to be dissuaded from their position by an equal amount of evidence or persuasive pull. . . ." *Id.* at 176.

25 F. KILPATRICK, EXPLORATIONS IN TRANSACTIONAL PSYCHOLOGY 36-41 (1961); *see also* note 27 *infra*.

26 Triandis, *Categories of Thought of Managers, Clerks and Workers About Jobs and People in Industry*, 43 J. OF APPLIED PSYCH. 338-44 (1959).

27 J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 54-55 (1969).

testimony of witnesses as well. The "taking of sides" necessitated by our system constitutes an additional factor in the distortion of live testimony.

The polarized nature of the litigation situation elicits in the witness a feeling of commitment to the party for which he testifies, and conversely a feeling of hostility against the opposing party. Rapoport maintains that the taking of sides operates to effect the active exclusion of certain perceptions from consciousness if they do not support the allied party.[28] Rapoport supports his hypothesis with an analogy to the principles of sense perception. It is elementary to the psychology of sense perception that we accept some stimuli while excluding others; we further accept the linking of certain groups of stimuli and exclude the linking of others.[29]

We thus establish a set pattern through which we translate external tangible objects into sensual data which we then organize or "perceive." Experiments have shown that this perception pattern, once developed, remains stable, and thus offers great resistance to change.[30]

This principle is demonstrated in the ambiguous picture shown by Rapoport. Observers usually see either a young woman, elegantly dressed, with the back of her head turned away, or an old, surly looking woman in profile. Once the observer perceives either of these subjects it is unlikely that he will recognize the alternative picture. It is possible, but extremely difficult, to perceive both images at once.[31] This is so because one or the other subject is suppressed; researchers have demonstrated the great lengths to which the suppression of images may go.[32]

In fairness, lawyers should not be condemned for using the testimony of witnesses with all their human weaknesses of perception, recall and bias. Except where there are documents or "real" evidence, this is all we have to search for the merits. It is a pragmatic procedure. Nevertheless, lawyers, and especially those who teach law, are to be criticized for reluctance to utilize such empirical evidence of the psychology of litigation that is available to reform procedure and to develop a forensic psychology (in collaboration with trained psychologists) through experimental research. This would require conceptualizing witnesses as imperfect observers trying to fill roles in which too much is expected of them, not as instruments in a zero-sum game, in a power struggle for victory.

V. Conclusion

It does not follow that we must abandon our attempts through litigation to determine the merits of controversies. To attempt to determine the merits of a conflict is sound political policy. So long as the preponderance of public opinion accepts the determination by courts of legal controversies, the stability of society is forwarded. Crimes cannot be ignored or injury by one person of another passed over because we now have no system to reach truth. If we did

28 A. Rapoport, Fights, Games and Debates 258 (1961).
29 *Id.* at 252.
30 *Id.* at 254; *see also* L. Festinger, A Theory of Cognitive Dissonance (1957).
31 *See* note 29 *supra,* at 252-53.
32 *Id.* at 254.

not have courts to try people accused of civil or criminal offenses we would return to self-help and vendettas, to lynch law and vengeance.

We must fashion our institutions as we do our lives—on approximations, on hypotheses, on pragmatic judgments. Consequently, matters that can be determined by other institutions without dependence on testimony of perception, such as motor vehicle accident cases, should be removed from the courtroom and treated as any common insurable risk is treated. For there rarely if ever is a single cause of a motor vehicle accident and in any event the cause may be faultless. Even for moral and social reasons, a person injured in a motor vehicle accident should be compensated without requiring the costly and uncertain tribulation of proving on the basis of doubtful perceptions and often untruth that someone else was at fault. To be compensated for an injury should not be a zero-sum game in a civilized society, certainly not in a society in which all people whether drivers, passengers or pedestrians risk injury or death. But it is difficult for lawyers and laymen to accept this because it is easier to deny awareness of the untruth of our perceptions than to divorce ourselves from fault-finding and punitiveness.

What we need badly on a vast scale is empirical evidence of the realities of the trial process; that is, on how many shadows of shadows of truth, on how many truth-distilling techniques, we assume that we reach the merits. Then on such evidence we can ask: how can we improve our techniques?

We must not delude ourselves into seeing the legal trial as a method by which to find truth. It should be apparent that we require research as to which methods are better to produce more accurate testimony as well as testimony that gives greater accurate coverage of a happening. "Most succinctly, the task is to reconceptualize the problems of the legal system through empirical, systematic research and not by appeals to authority, historical precedent or 'logic.' Psychologists can help lawyers studying the operations of their own institutions to broaden perspectives, realize new modes of inquiry and develop fresh insights in order to understand more fully the legal process and those factors most salient in determining the course of its evolution. These collaborative efforts should be made shortly and smartly."[33] Meanwhile, we struggle on a pragmatic, an "as if" presumption that we are finding truth on which to base a fair judgment.

Finally, it appears certain that to train lawyers to be fighters, when their work and the world require far more of them—that they be problem-solvers and mediators—is anachronistic. Positing law as a zero-sum game is not only unrealistic today, it also reduces the chance to attain equal justice on the merits.

33 Tapp, *Psychology and the Law: The Dilemma,* 2 PSYCH. TODAY 21 (Feb. 1969).