AMERICA'S ADVERSARIAL AND JURY SYSTEMS: MORE LIKELY TO DO JUSTICE

BY GERALD WALPIN*

This Article aims to answer the following question: Are the American and British adversarial systems, which rely heavily on juries, or the German and Continental inquisitorial non-adversarial systems, which operate without juries, more likely to result in justice? The Article advocates for America's adversarial and jury systems because they are logically superior and, in my experience, they most often succeed in rendering justice.

I. ADVERSARIAL VS. INQUISITORIAL SYSTEM

Paraphrasing Winston Churchill's well known statement about democracy[1] provides a succinct description of these competing systems of justice: no one pretends that the adversarial system is perfect; indeed the adversarial system may be the worst form of judicial procedure except for all others that have been tried from time

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In the interest of full disclosure, I have what some might call a handicap that does not infect any of the other contributors on this subject: I am not and have never been a professor. Thus, I have not taken part in the academic research, analysis, and scholarship that the other contributors on this subject proudly include in their credentials. My sole credential—aside from being a graduate of Yale Law School, where this symposium was initially held—is over 45 years of litigation experience from various different vantage points. These experiences include law clerkships under two federal district judges, defense counsel and prosecutor in several Air Force court-martials, five years as an Assistant United States Attorney for the Southern District of New York, and, since then, an attorney in private practice, litigating both civil and criminal cases. While I was serving in France in the Air Force, I also had some personal experience with the French inquisitorial system of justice, where I was occasionally assigned as the official observer at French prosecutions of U.S. personnel charged with violating French criminal laws.

1. Winston Churchill, Speech in the House of Commons (Nov. 11, 1947), *in* THE OXFORD DICTIONARY OF QUOTATIONS 216 (5th ed., 1999) ("Democracy is the worst form of Government except all those other forms that have been tried from time to time.").

to time.

The only possible way to avoid defects in *any* system of justice would be to create a computer program that could digest all of the facts *and* determine the absolute truth between the divergent assertions of the litigating parties. No such computer exists. That means that any determination must rest on the human foibles of the fact-finder—such as a biased reaction to evidence or the issues of the case—as well as the fact finder's willingness to spend time considering all available evidence and to search for additional relevant facts. These human elements control the ultimate judgment regardless of whether the fact-finder is a lawyer for one of the parties, a juror, or a judge in either the inquisitorial or adversarial system.

No one with litigation experience would claim that every lawyer or each judge is identical in ability, energy, work ethic, or the extent of bias brought to any case. These realities, these differences between human beings, do not disappear because the human being becomes an inquisitorial judge. This is an axiom that must be applied to the specific question of this Article—whether the inquisitorial system or the adversarial system is more likely to result in justice being done.

Understanding the differences between the two systems is imperative. The adversarial litigation system relies heavily on advocacy by each party with a relatively passive judge acting as an umpire or evidentiary traffic warden.[2] Only in bench trials (trials where there is no jury) does the judge take on the role of fact-finder. Much, but not all, of the rest of the world has the inquisitorial system, in which the judge plays the pivotal role in adducing the facts and deciding every case.[3]

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2. Adversary system is defined as "[a] procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other in order to put fourth a case before an independent decision-maker." BLACK'S LAW DICTIONARY 54 (7th ed. 1999).

3. Inquisitorial system is defined as "[a] system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry. The system prevails in most of continental Europe, in Japan, and in Central and South America." BLACK'S LAW DICTIONARY 796 (7th ed. 1999). In Germany (which follows the inquisitorial system), the judge has the responsibility of examining the pleadings and appending documents, scheduling hearings, maintaining the court's official dossier, and deciding the case in a written judgment. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827-30 (1985). The judge serves as examiner-in-chief and will take the lead in interrogating witnesses. *Id.* at 828. Counsel assists with specific procedures, such as filing the complaint, and in guiding the court, such as by posing additional questions during the interrogation of witnesses or by advancing legal theories to the court. *Id.* at 828-29. In the German criminal system, a mixed panel of professional and lay judges will adjudicate the case. *See* Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to*

Neither the "fact-searching" system nor the "fact-presenting-leading-to-fact-finding" system has any fixed plan or procedure that must be followed. The reality is that, whether that task of searching for and presenting facts is delegated to an inquisitorial judge or adversarial lawyers, the facts made available for consideration will depend on the ability, initiative, bias, determination, thoroughness, energy, aggressiveness, interest, knowledge, and motivation of the specific human being acting as inquisitorial judge or as adversarial lawyer in that specific case. That person, whether judge or lawyer, can do a great job, a passing job, or a poor job. The attributes of the specific person in that role, which determines how that person performs his duty, can result in benefit to one of the litigating parties and detriment to the other.

So, one might ask, does that mean that, insofar as a search for justice is concerned, the two systems are six of one and half dozen of the other?

My answer is a decisive no. In the adversarial system, the lawyer for a party has the duty to act zealously and faithfully *for* his client. Zealous, faithful advocacy means the obligation to search out all favorable evidence, to seek, neutralize or destroy all unfavorable evidence, and to press the most favorable interpretation of the law for his client.[4] That is simply *not* the obligation of an inquisitorial judge.[5] Even assuming a hard working, totally unbiased inquisitorial judge, his loyalty is to society. Therefore, he must take into account balancing perfect justice against time and budgetary constraints, *i.e.*, looking at his growing docket of cases that can only be decided if he does not spend too much time on any one case, in light of the limited budget provided by the state.

Granted, in the adversarial system, the judge may limit the time given to any specific case, and each party (limited to his own financial resources) must elect which of many investigatory paths to follow. But, the crucial difference lies in that the party and his attorney, knowing the case and motivated solely by what is in the client's best interests, make the strategic decision of what evidence to

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American Law Reform: Similar Problems, Better Solutions?, 18 B.C. INT'L & COMP. L. REV. 317, 321 (1995).

4. *Cf.* MODEL RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibilities (2002) (the preamble states: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

5. *See* Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 192 (2002).

seek and present, given limited time and resources.

Weighing the benefits of an adversarial system against those of with an inquisitorial system requires analysis of the arguments made in favor of the latter. In the end, I believe the arguments made for the inquisitorial system are without merit and conclude that those who favor substituting the inquisitorial system for our adversarial system are driven by an iconoclastic, grass-is-greener elsewhere philosophy.[6]

Proponents of the inquisitorial system argue that when lawyers interview and prepare witnesses in the adversarial system, they are suborning perjury.[7] Conversely, they argue that this does not occur in the inquisitorial system because lawyers are generally not allowed to interview witnesses before the judge has done so.[8] Instead, the judge acts as the examiner-in-chief, with counsel relegated to a limited role in questioning a witness.[9] Supposedly, the purpose of this is to keep the witness "pristine and pure."[10] But does anyone genuinely believe that, because the lawyer may not talk to a witness, other persons less ethically bound will not talk to the witness and, perhaps more directly, accomplish the perjury? In addition, why should anyone suggest that a poor and un-refreshed recollection wears the halo of purity and trust that furthers the fact-finding process?

What our system provides is a more likely avoidance of inadvertently erroneous testimony. We all know that Alzheimer's disease is not the only reason for failed recollection. We all have been through totally innocuous situations of being certain of something only to recognize our error when faced with a document, picture, or even just a reasoned review that causes a sudden recall of the correct

6. In this regard, it is noteworthy that America's system of justice is under attack by some as not sufficiently adversarial. Critics of our system have objected to our grand jury procedure as lacking adversarial participation and suggested that the witness's attorney be permitted to participate. *See, e.g.*, Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 560, 601-02 (2002).

7. *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833-34 (1985). Langbein does not use the word perjury, but, in his critique of adversarial control of fact-gathering, he describes how skillful coaching of a witness undermines the witness's ability or desire to testify as to "the whole truth." *See id.* at 833 (quoting Jerome Frank, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1038 (1975)).

I primarily cite Professor Langbein for the position taken by critics of the adversarial system, because he is the most vociferous.

8. *See id.* at 827, 834.

9. *See id.* at 828.

10. John H. Langbein, Panel on Truth, the Jury, and the Adversarial System, Federalist Society 2002 Symposium on Law and Truth 13 (March 2, 2002) [hereinafter Panel] (transcript on file with Harv. J. L. & Pub. Pol.).

facts. A lawyer can and should challenge a witness's recollection. This is not inducing perjury, but eliciting the truth. I grant that a gray area exists between witness preparation and suborning perjury. I will also concede the probability that some lawyers actively participate in getting witnesses to testify falsely. But there is no reason to believe that a greater amount of incorrect testimony is given in the United States than in inquisitorial procedure countries. The word perjury exists in the German language[11] because, as in all countries, perjury exists. That is due to human nature, not to either institutions in a specific country or a specific legal system.

Another argument set forth for the inquisitorial system is that it is more efficient to focus quickly on the weakness in one side's case, thereby leading to quick determinations.[12] This efficiency is said to be in contrast to the adversarial system in which lawyers with a losing case waste time by proceeding forward. Such a criticism of lawyers in the adversarial system could only be made by someone who has not had much experience serving as a lawyer. No adversarial attorney truly trying to help his client would fail to evaluate the facts and law realistically and objectively (indeed even harshly as a devil's advocate) and to report his determinations as quickly as possible to the client. The adversarial lawyer has an advantage here over the inquisitorial judge, because the lawyer has access to the facts of his client's case, including as to what witnesses will testify, in contrast to the inquisitorial judge who has to reach his superficial conclusions, if he does, on a light body of evidence.

In addition, our adversarial system provides a procedure for focusing on one or more issues that would determine the dispute between the parties—a motion for summary judgment.[13] In our adversarial system, this expeditious procedure does not rest on a judge's quick reaction to what he has heard, but on a procedure that guarantees both parties the right to delve into all relevant facts until no relevant, disputed fact remains. Moreover, what proponents of the non-adversarial system find beneficial in the judge's ability to decide the case before him quickly may well be merely a rush to judgment without having heard all available evidence. In my experience, even when a judge expresses skepticism (or worse) about a litigator's case

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11. The German word for perjury is "Meineid." COLLINS ENGLISH-GERMAN DICTIONARY 859 (2d ed. 1993).

12. *See* Langbein, *supra* note 7, at 830.

13. *See* FED. R. CIV. P. 56.

after having only heard an overview of the case, a good lawyer is often able to change that judge's opinion by eliciting additional facts and authorities. The adversarial system requires that opportunity; the inquisitorial system frustrates it.

Another arrow fired at our adversarial system is that a party with financial resources can hire a better attorney than the other, poorer party is stuck with an incompetent lawyer.[14] The reply is many fold. First, high-priced lawyers today are making a significant contribution of pro bono services.[15] Personally, I cannot recall a time in private practice when I have not had at least one pro bono matter. For example, while I bill my paying clients at a substantial hourly rate, I am currently representing a blue-collar family in a claim of denial of free speech rights.

Second, being a high-priced lawyer does not necessarily ensure that the lawyer will do a superior job. A much-in-demand, high-priced lawyer may accept more clients than can be adequately represented with full zealousness, resulting in inadequate representation.

Moreover, the same variations in attorney quality exist in all countries. Why else are certain attorneys in France and Germany able to charge more than others in their country?

In reality, parties in both systems rely on the luck of the draw to some extent. The odds of success in court are admittedly better for one with wealth than for one without. But in the non-adversarial procedure countries, the luck of the draw rests most importantly on the ability, knowledge, energy, and bias of the judge, which is totally outside the party's control.[16] A party who does not approve of his lawyer can replace him—a party cannot replace the judge chosen *for* the parties.

Those in favor of the non-adversarial system argue that a career judiciary, separate from practicing lawyers, ensures high quality, hard working judges.[17] Of course, *if* a separate career track was the *sine*

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14. *See, e.g.*, Panel, *supra* note 10, at 14 (Langbein speaking).

15. *See, e.g.*, Elisabeth Preis, *Pro Bono A Small Gain*, THE AMERICAN LAWYER, July, 2002, at 119 (estimating that pro bono hours increased by 17.9 percent in 2001 in the American Lawyer's annual survey of the top 100 law firms).

16. Even proponents of the non-adversarial system concede this defect in their position:

> Because German procedure places upon the judge the responsibility for fact-gathering, the danger arises that the job will not be done well. . . . After all, who among us has not been treated shabbily by some lazy bureaucrat in a government department? And who would want to have that ugly character in charge of one's lawsuit?

Langbein, *supra* note 7, at 848.

17. *See* Langbein, *supra* note 7, at 849-51.

qua non of quality judges, the adversarial system could adopt that separation while retaining adversarial procedure. Nevertheless, there is much to be commended in our system in which a lawyer becomes a judge after years of experience, thereby having a first-hand knowledge of good and bad of judges. The suggestion that a judge has a greater incentive to excel because promotion to higher courts comes from the judges' ranks is naive. I know of few American trial court judges who do not yearn for promotion to a higher court. Yet, every practitioner knows that the vast differences in the quality, responsibility, efficiency, work ethic, and personalities among judges results from the judge being a unique individual. Although appointment to a higher court in this country is supposed to take into account the quality of judging already shown, the reality is that here, as in non-adversarial countries, promotions do not always go to the best judge.[18]

Inquisitorial system proponents also tout its reduced costs due to the many expedited procedures leading to an earlier final determination.[19] Such a position is unassailable *if* you believe that cost *as determined by the state* (and not by each party) should be determinative. If the cost of a court proceeding was our sole concern, we could eradicate any cost by returning to medieval trial by combat, for example. A system of justice should value justice, not money. One example of the German inquisitorial system's emphasis on cost is its procedure of not making verbatim transcripts of witnesses' testimony. Instead, the judge writes a synopsis of the testimony.[20] The procedure is problematic in two ways. First, we all know from experience that there can be, and usually is, a difference between what a person actually said and what a listener summarized him as saying. For example, in my youth, we had a game called Telephone, where people would sit in a circle and one person would whisper a statement to the next person and this would be repeated until it goes around the circle back to the original message giver. Invariably, the returned message did not resemble the message when first given. This phenomenon is equally possible in a judge trying to summarize a witness's testimony after it is given. For that reason, it has been stated that "[t]he recording of testimony is in a very real sense a circumstantial

18. Judge Robert Bork's failed nomination to the Supreme Court provides a particularly salient example of this proposition.

19. *See* Langbein, *supra* note 7, at 829.

20. *See id.* at 828-29.

guaranty of trustworthiness."[21]

Second, any litigator who has tried cases knows the importance of the exact words spoken by a witness. Such words are invaluable in cross-examining that witness. Also, because it is unknown what future witnesses will say, summaries may not capture the words or testimony that will be most relevant in analyzing future witnesses' testimony. A good litigator providing a persuasive summation will use the witnesses' specific words, not just a summary of their testimony.

Another assertion is that the inquisitorial system makes better use of experts than the adversarial system. In Germany, for example, only one expert is chosen per field, and the court selects this expert.[22] The theory behind this limitation of a single expert chosen by the judge appears to be a rather simplistic view that only one truth in science exists, and, therefore, only one expert is necessary at trial. The reality, however, may be to the contrary. I have found that recognized experts can sincerely hold divergent views on a given set of facts. For example, the judge's decision to pick the expert who will espouse the majority view could have precluded expert testimony that the world was round prior to Christopher Columbus or that it was possible for ship captains to determine location based on longitude before John Harrison. Obviously, hearing divergent expert opinions can only further the search for truth.

Interestingly, the German criminal justice system has adopted many attributes of our adversarial system. For example, Germany abolished the investigatory judge position in 1975.[23] Now, magistrates play a similar pre-trial role to that of judges in the United States. Prosecutors, the epitome of an adversary to a potential defendant, can summon and interview suspects, witnesses, and expert witnesses.[24] This sounds very much like recognition, at least in Germany, that some of the benefits of the adversarial system outweigh those of a

21. United States v. Cramer, 447 F.2d 210, 222 (2d Cir. 1971) (Oakes, J. dissenting). *See also* In re Grand Jury Subpoena, 72 F.3d 271, 274 n.1 (2d Cir. 1995) (noting that the Advisory Committee cited to Judge Oakes's dissenting opinion in *Cramer* when writing Fed. R. Civ. P. 6(e)(1), governing recording of all grand jury proceedings).

22. *See* Langbein, *supra* note 7, at 839-41. The judge usually selects an expert based on his qualifications and prior court experience, but without much consideration to divergent views within the field of his expertise. *See id.* at 837-39.

23. *See* Frase & Weigend, *supra* note 3, at 325.

24. *See id.* at 326. Also, defense counsel can conduct an independent investigation before trial, but, unlike the prosecutor, has no right of compulsion. This is hardly an equal opportunity. *See id.* at 341.

pure inquisitorial system. Indeed, the authors of the German code of criminal procedure were sufficiently impressed by the American system of subjecting witnesses to cross examination that they introduced the use of pre-trial party examination and cross-examination if both parties agree.[25]

In sum, the adversarial system allows a sharp clash of proofs presented by adversaries during a fixed procedure of presenting evidence, and the adversaries have an opportunity to question each other's evidence. The result is that the neutral decision-maker has the information necessary to resolve the dispute in a manner that is acceptable to the parties and society; thus, justice is rendered.

II. JURY SYSTEM

The United States Constitution was written with full knowledge of the criminal prosecution of John Peter Zenger for seditious libel, a case in which the jury, although essentially directed by the judge to return a verdict of guilty, refused to do so.[26] Given that example, it is no surprise that the Constitution specifically incorporated the right to a jury trial as a check on the power of government.

Are juries perfect? Obviously not. We all can rattle off noteworthy jury verdicts that appear contrary to the evidence, likely based on bias or prejudice. But, in my experience, most litigators with any significant experience with jury trials recognize that jurors generally take their responsibilities seriously and overwhelmingly make determinations consistent with justice.

That jurors generally take their responsibility to heart is exemplified by a case that I prosecuted many years ago when I was in the United States Attorney's Office.[27] It was a complex stock fraud prosecution against 33 defendants, represented by some of the best-known lawyers of that day, including, for example, Edward Bennett Williams, Boris Kostelanetz, and Milton Gould. While some of the defendants pled guilty during the trial, a number of them continued through what became nearly a yearlong jury trial. There were many counts in the indictment, including several mail fraud counts that required the proof of a mailing. Obviously, whether the jury found a

25. *See id.* at 357.

26. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654-55 & n.48 (1973); William R. Glendon, *Legal Lore: The Trial of John Peter Zenger*, 68 N.Y. St. B. J. 48-52 (Dec. 1996).

27. *See* United States v. Dardi, 330 F.2d 316 (2d Cir. 1964).

defendant guilty of six counts or five counts was of little interest either to me as the prosecutor or to the defense counsel. Therefore no one, during the trial or in summation, focused on a fact that I recognized—the proof of mailing in two of the counts was weak. The jury deliberated for four days. We were all impressed by the thoroughness of their deliberations, which was evident by the questions that they posed during deliberations. They demonstrated a well organized and sophisticated understanding of the case. When the jury returned the verdict, it found each of the defendants guilty on all but two counts. Amazingly, the two counts in which the jury found the defendants not guilty were those two specific counts in which the proof of mailing was weak. Based on the amount of time the jury deliberated and the accuracy of their decision, it seems evident that the jury had taken seriously the requirement that it find that proof support each of the required elements of each charge. That careful performance of duty is the way, I suggest, most juries perform.

During this debate at this Symposium, Professor Langbein derogated the jury system by asserting that "the jury consists of people who have nothing better to do."[28] He attempted to buttress this conclusion by asserting, in a conclusory manner, that "if you do have something better to do, you'll be excused from jury service . . . or else you'll make a hardship argument and you'll be off."[29] He cynically defined hardship as "consist[ing] of having something useful to do, like raising your kids or teaching school or healing people or whatever."[30] Continuing his analysis of jury composition, he opined that the voir dire "is a process by which we make absolutely certain that anybody competent is eliminated from the panel."[31]

Professor Langbein had the benefit, at the debate, of being able to make such oral assertions without having to provide any factual basis, such as a footnote citation, for those assertions. In fact, no such factual basis exists. My personal experience, as exemplified by the nearly yearlong stock fraud trial discussed above, is to the contrary. Indeed, using the federal and state courts in New York as an example, a conflicting schedule may well obtain a short adjournment of the date of jury service on one or two occasions, but exemption or excusal from service is prohibited.[32] Lawyers, judges, corporate

28. Panel, *supra* note 10, at 3.
29. *Id.*
30. *Id.*
31. *Id.* at 4.
32. *See* N.Y. JUDICIARY LAW § 517(c) (McKinney 2002).

executives, and other presumably highly competent individuals regularly appear for jury duty and sit on juries.

Professor Langbein's personal derogation of the large number of responsible public-minded citizens who serve on juries hit a new low, but he received his comeuppance during the subsequent remarks of Professor Sherry Diamond at the Symposium. She asked the audience "how many people have ever served on a jury in this audience?"[33] In response, a substantial show of hands raised. Professor Langbein interrupted to ask those who raised their hands: "How many of you could have got off if you wanted to but were there for a busman's holiday in order to figure out what this darn thing really was?"[34] No hands were raised, but a lady in the audience yelled out: "I serve because of my civic duty!"[35] Applause followed from the audience. This answer truly explains the motive of most jurors.

I have read that another objection to the jury system is the supposed "mysterious opacity of [jury] verdicts."[36] I suggest that this is a benefit in that jurors are insulated from outside influences and thereby able to do justice based upon an overall view of what is fair and right. To return to John Peter Zenger, he would not have been acquitted, in what was clearly the first heroic act of a jury in this country, if we insisted upon answers to each factual issue on which the ultimate judgment was based. On the other hand, those who raise this criticism of the jury system ignore that, where the judge, with or without the concurrence of both parties' counsel, believes that a jury should respond to specific questions on which the jury's ultimate verdict is based, the judge may direct the jury to return special verdicts.[37] This exemplifies the fluidity of the adversarial system's ability to re-engineer parts of the procedure as needed in each case to do justice.

III. CONCLUSION

As imperfect as our system of justice is, this country is blessed with a system of justice that, to an incredible degree, provides just that—

33. Panel, *supra* note 10, at 16.

34. *Id.* at 17.

35. *Id.* The transcript unfortunately quotes the comments as: "[unintelligible phrase] many of us." However, the "civic duty" remark is noted at the beginning of my presentation. *Id.* at 51. I specifically recall the comment of the woman who responded spontaneously to Professor Langbein's unexpected question because she happens to be my wife.

36. Langbein, *supra* note 7, at 831.

37. *See* FED. R. CIV. P. 49.

justice.

ROUNDTABLE:

THE LAWYER'S RESPONSIBILITY TO THE TRUTH

PANELISTS:

ALBERT ALSCHULER
SUSAN KONIAK
JOHN O. MCGINNIS
WILLIAM OTIS