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ON THE THEORY OF AMERICAN ADVERSARY CRIMINAL TRIAL*

GARY GOODPASTER**

I. INTRODUCTION

The adversary system is a foundational feature of our legal system. Many of the activities in our legal system are overtly adversarial, and virtually all of our public legal decisions are processed in an adversarial fashion. The adversary premise also underlies all of our law and our thinking about law. While the adversary system is important, there has been relatively little study of this adversary system premise.¹ This premise is a foundational axiom so embedded in our thought processes and actions that we build on it without questioning why we use this footing.

The use of an adversarial system to generate decisions about

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¹ The aim of this article is to articulate, elaborate and explore theories of American adversary criminal trial, ultimately making the best case for our system. Many people have mixed feelings about our adversary system, and yet are fascinated by it enough to try to figure out why criminal cases are tried in the rather peculiar way they are.

In researching this topic, it becomes apparent that there are very few discussions of the theory of adversariness. While a number of works discuss or critique the adversary system or some of its features, few investigate the theory of the adversary system. Indeed, most justifications proffered for the adversary system are simply rhetorical assertions about its supposed merits. There are few works, however, that attempt to provide explanations or analyses of how the adversary system achieves its claimed results.

The principal works that analyze the theory of the adversary system are: Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1960); Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83 (D. Luban ed. 1983); Donagan, *Justifying Legal Practice in the Adversary System*, in THE GOOD LAWYER 123 (D. Luban ed. 1983); Schwartz, *The Zeal of the Civil Advocate*, in THE GOOD LAWYER 150 (D. Luban ed. 1983); Damaska, *Structure of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975).

Most adversary system critiques assume that truth-finding is the purpose of the adversary system and challenge it from that point of view. The principle critiques are: J. FRANK, COURTS ON TRIAL (1950); M. FRANKEL, PARTISAN JUSTICE (1978); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

disputes is a large subject. This Article undertakes a more limited inquiry. Adversariness of itself has little concrete meaning. There is no generic type of adversary system; different societies use different versions. The ancient Greeks and Romans each had adversarial systems of public decision-making, but these systems were quite different from both the English adversary trial system and our own system.² Trial by physical battle is a type of adversarial system, as are formal debate, presidential elections, football games, and a host of similar events. What all of these events have in common is that they are contests that lead to decisions. They can be distinguished, however, by the manner in which the contest is structured. This Article addresses the question of why we structure our adversary criminal trial contest the way we do.

II. DETERMINATIVE CHARACTERISTICS OF ADVERSARY TRIAL SYSTEMS

There are several determinative features of adversary trial systems. These features include: the roles of the judge and other decision-makers (active or passive); the role of the parties or party representatives in controlling presentations; the manner in which "facts" are proven; the obligations of the parties to one another; and informational and decisional side constraints which directly or indirectly skew final decision-making.³ Adversary systems can be compared on the basis of these determinate features, some of which are intimately related, and on the ways the system fills and combines these variables.

In the United States, there are two separate adversary systems, a civil and a criminal system. Although these two systems have some identical features, they differ structurally in the ways in which they specify some of the variables described above. In general, the criminal adversary system operates under more numerous, and more stringent, side constraints than does the civil system. The obligations between the parties also differ in the criminal and civil systems. This Article focuses on the criminal system, leaving the civil system and underlying relationship between the two systems to a later time.

² See R. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* 167-96, 203-22 (1927); J. STRACHAN DAVIDSON, *2 PROBLEMS IN THE ROMAN CRIMINAL LAW* 112-34 (1912); A. GREENIDGE, *THE LEGAL PROCEDURES OF CICERO'S TIME* 471-504 (1901); A. HARRISON, *THE LAW OF ATHENS* 47-48, 156-67, 247-54 (1971); W. KUNKEL, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY* 66-74 (2d ed. 1973); D. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 242-47 (1978).

³ Cf. Damaska, *The Adversary System*, 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 24-29 (S. Kadish ed. 1983).

The American adversary criminal trial is a regulated storytelling contest between champions of competing, interpretive stories that are composed under significant restraints. The parties compose their stories for and present them to an impartial and passive audience which acts as a decision-maker, by assigning criminal liability on the basis of the stories.⁴

The major structural features of American adversary criminal trials are as follows.⁵ "Facts" are "proven" dialectically through a complex process of persuasion. This process takes the general form of a dramatic contest aimed at shaping two mutually inconsistent interpretations of common data. A decision-maker, paradigmatically a jury composed of non-legally trained lay persons,⁶ assesses the stories presented to it and assigns criminal liability. The parties, almost always acting through attorneys, control and manage the presentation of evidence—the materials from which "facts" are constructed. The parties and their attorneys are also attitudinally and ethically committed to winning the contest rather than to some other goal, such as discovery of truth or fairness to the opposing side.⁷

⁴ "Story telling" seems to be the most accurate description of the focus of the activities of each side in a criminal trial. See the enlightening study of W. BENNETT & M. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1985).

⁵ See *supra* note 1 for a list of sources.

⁶ If both the prosecution and defense waive the right to jury trial, a judge, sitting alone, may hear and decide a criminal case. *Singer v. United States*, 380 U.S. 24 (1965). A jury trial, however, is central to the American system of adversary criminal trial. *Duncan v. Louisiana*, 391 U.S. 145 (1968). This article discusses only the jury trial system.

⁷ If the truth is that his client committed the crime, the defense attorney's job is to keep the truth from coming out, or to keep the jury from recognizing it if it does. It is unethical to hold back any effort, to do the job with less than all one's "zeal". J. KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE? THE MAKING OF A CRIMINAL LAWYER* 30 (1983).

As a matter of constitutional law, the prosecution has a duty to disclose some evidence to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976). *Cf.* *United States v. Bagley*, 473 U.S. 667 (1985). The theory underlying this disclosure requirement is that the State's law enforcement interests are served when both the guilty are convicted and the innocent are acquitted. The state therefore has an obligation to ensure that trials are fair so that the innocent will not be convicted. As agents of the state, prosecutors' duties include the duty not to use perjured testimony knowingly, *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Napue v. Illinois*, 360 U.S. 264 (1959); to disclose on request evidence favorable to the accused, *Brady v. Maryland*, 373 U.S. 83 (1963); and, in some cases, to disclose evidence favorable to the accused even when there has been no request for this information, *United States v. Agurs*, 427 U.S. 97 (1976).

The defense has no reciprocal disclosure obligation. The above cited cases therefore, can be interpreted to suggest that the prosecution has an obligation to seek the truth, but the defense does not. These cases, however, impose only limited disclosure obligations and do little to affect the competitive ethos of prosecutors. Prosecutors do

The parties have significantly unequal mutual disclosure obligations. The prosecution must present its story first, thus permitting the defense an opportunity to assess the competing story and to adjust its own story accordingly. The prosecution does not have the power to force the defending party to testify and thereby provide the prosecution with material for its story. Additionally, the prosecution must satisfy an extraordinarily high burden of proof—beyond a reasonable doubt—in order to prevail. Complex evidentiary rules govern the material that may be incorporated into the parties' stories and the inferences the decision-maker should draw from the material. Complicated legal instructions are presented to the jury in order to focus and limit its decisional discretion.

III. THEORIES OF ADVERSARY CRIMINAL TRIAL

What explanations does our legal system offer to account for these features? The major explanations of adversary trial are that its purpose is truth-finding; that it leads to fair decisions; that it protects the people from oppression or potential oppression by government; that, as a stalemate system, it is conducive to bargaining; and that finally it is a process designed to produce publicly acceptable conclusions which project substantive legal norms, whether or not those conclusions are grounded in true facts.

A. TRUTH-FINDING THEORY

The most common view of the purpose of the adversary system is that in matters relating to human, as opposed to scientific, affairs it is the best truth-finding system we can devise. This view is based on claims that "[t]ruth is best discovered by powerful statements on both sides of a question."⁸ The simplest formulation of this view assumes that the principal issue of an adversary trial is to discover "what happened," that is, historical fact, and that a competitive contest over what happened is the best way to accomplish this goal.

This view is easy to debunk as an unequivocal explanation of an adversary criminal trial. Aside from trial lawyers and perhaps judges, both of whom have economic and ideological investments in

not try cases as investigations aimed at discovering what happened; rather they try to prove a theory of the case that they advance. In practice, prosecutors are as committed to winning as defense counsel. Prosecutors, like the system as a whole, assume that the battle will determine who has truth on their side.

⁸ *United States v. Cronin*, 466 U.S. 648, 655 (1984). This view is also shared by adversary system critics. *Cf., e.g.,* M. FRANKEL, *supra* note 1, at 6, 87; J. FRANK, *supra* note 1, at 80-102, 108-25.

the system,⁹ it is doubtful that many people think that an adversary contest is the best way to discover what actually happened. Neither scientists, engineers, historians nor scholars from any other discipline use bi-polar adversary trials to determine facts. Following the space shuttle explosion, for example, no one proposed that the investigating Presidential Commission adopt the procedures of adversary civil or criminal trials. Indeed, the suggestion that a commission investigating any disaster might wish to follow such procedures seems quite strange, and many people would react incredulously were such procedures adopted. In matters of importance, we want an active investigative body capable both of testing any credible hypotheses and of amassing evidence from any source relevant to them. In trials, party control of evidence acquisition and presentation limits the number of possible hypotheses presented and restricts the evidence which is available to assess these hypotheses.¹⁰ For this reason, trials are generally thought to be less reliable historical fact-finding procedures than more active investigative procedures.

Other factors that render suspect the truth-finding capacities of adversary criminal trials include the fact that the parties are generally committed to prevailing rather than to discovering the truth. Thus, the parties inevitably shape the evidence and use their persuasion skills toward that end.¹¹ The lay jury, inexperienced in the ways of lawyers and in the assessment of witnesses, may easily be misled.¹² The rules of evidence, particularly the exclusionary rules,

⁹ See, e.g., Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. REV. 30; Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

¹⁰ This article does not suggest, however, either that adversary proceedings have no value in settling issues or that there are no respectable disciplines that use adversary proceedings. Philosophical and scholarly debate is often adversarial, and even investigating commissions may invite adversarial presentations. Such presentations are often used to illuminate, to overcome adversarial bias, to persuade and to help the commission decide between possible courses of action. There is a difference, however, between those adversary proceedings in which the decision-maker has the power and ability itself to uncover information and where many adversary viewpoints may be presented and those adversary proceedings that are controlled by parties who present only two opposing points of view. Only the latter types of proceeding are addressed in this article.

¹¹ "Partisan lawyers do not try to uncover the truth. On the contrary, lawyers trained and commissioned to seek justice, are engaged very often in helping to obstruct and divert the search for truth." M. FRANKEL, *supra* note 1, at 75. Furthermore, "[f]requently the partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it." J. FRANK, *supra* note 1, at 81.

¹² "Unable to cope with complicated information that is scrambled by cross examination, jurors are pushed into relying on their intuition or into making value judgments based on pretrial beliefs." Austin, *Why Jurors Don't Heed the Trial*, The Nat'l L.J., Aug. 12,

may keep relevant evidence from the jury.¹³ The unilateral discovery rule, which in many jurisdictions requires at least some pretrial disclosure of the prosecution's case¹⁴ without requiring a reciprocal disclosure from the defense, permits the defense to tailor and manipulate facts to its advantage.¹⁵ The privilege against self-incrimination prevents the state from requiring the defendant to testify and, thus, forecloses an important source of evidence for the prosecution.¹⁶ Finally, the prosecution's burden of proving guilt beyond a reasonable doubt is exceptionally difficult to meet. In practical effect, the prosecution's failure to meet that burden may result in a guilty party's acquittal.

1985, at 15, col. 3 (citing Vinson, *Psychological Anchors: Influencing the Jury*, 8 LITIGATION 20 (1982)).

Studies of juries in civil cases suggest additional problems.

One disturbing strategy jurors may employ when expert testimony is in direct conflict is to ignore all expert testimony and evaluate the case on other grounds. . . .

Another evaluative strategy jurors use to reason through conflicting expert testimony is to favor the side they judge to have the most credibility. . . .

Expert testimony that is not credible may have a detrimental "spillover" effect on other evidence, calling it into question. For example, if an expert testifies to a fact or expresses an opinion that seems mildly discordant or preposterous in relation to evidence already presented, jurors may doubt the earlier evidence, no matter how reliable it may be. . . .

There is a third and less extreme strategy jurors may adopt. Studies of the effects of conflicting expert testimony on the reliability of eyewitness testimony show that, while jurors considered the experts' advice, the net effect of the conflict is that one witness neutralizes the impact of the other. It is as if no expert testimony was presented.

Goodman, Greene & Loftus, *What Confuses Jurors in Complex Court Cases*, The L.A. Daily J., Nov. 21, 1985, at 16, col. 3.

Generally, juries are thought to be more lenient than judges on the issue of guilt. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 58 (1966). Those members of the school of Judge Frank would take this tendency as evidence of jury fact-finding incompetence. Cf. J. FRANK, *supra* note 1, at 108, 145. Others view disagreements between judges and juries as evidence that juries sometimes bend the law to comport with their sense of what is fair, just and equitable. V. HANS & N. VIDMAR, *JUDGING THE JURY* 163 (1986).

¹³ See Damaska, *Evidentiary Barriers*, *supra* note 1. "Under the adversary system, much logically relevant and cognitively valuable information never reaches the factfinder. . . ." Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1094 n.22 (1975).

¹⁴ Cf. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).

¹⁵ Cf. J. KUNEN, *supra* note 7. Scholars support the practitioners' view that the defense attorney's aim is not truth or fairness, but the most favorable outcome possible for his or her client. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 200 (1984). In pursuit of this aim, the defense attorney's whole effort may be to make the worse seem to be the better case. Trial attorney training manuals are replete with techniques and suggestions for how to accomplish this goal. See, e.g., W. BROCKETT & J. KFKER, *EFFECTIVE DIRECT AND CROSS-EXAMINATION* (1986). Cf. J. KUNEN, *supra* note 7, at 94-96, 214-15, 244.

¹⁶ Damaska, *Evidentiary Barriers*, *supra* note 1, at 528-29.

Advocacy ideology and its associated advocate's ethos are of particular importance in assessing the truth-finding capacity of criminal trials. In the adversary system, the adversary is interested in winning rather than in the discovery of truth. This ethos is best captured by the two principles articulated by Murray Schwartz: the principles of non-accountability and professionalism. The principle of non-accountability holds that "[w]hen acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."¹⁷ The principle of professionalism holds that "a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."¹⁸

As this ethos plays itself out in adversary criminal trials, the advocate tries to frame and shape the evidence and inferences in her favor whether or not such manipulation actually corresponds to what really happened or to the facts as the advocate knows them. It is difficult, however, to see how the truth (historical fact) can be uncovered where at least one party to the proceedings is actively seeking to hide the truth because it is damaging to her client. As an element of trial design in a truth-finding theory of trial, the advocacy ethos presupposes an "invisible hand" theory of competition.¹⁹ This theory is based on the premise that when two advocates vigorously oppose each other in an effort to do their best for their client, rather than with the aim of discovering truth, they inadvertently serve the systemic goal of truth-finding. The respective efforts of the opposing attorneys to maximize the interests of their side lead to the best systemic results even though neither attorney directly tries to achieve these ends.

In such a system, the truth might emerge if the mutual and misleading distortions of the two equally matched and similarly purposed adversaries annihilated each other, like a collision of particles in a cyclotron, leaving historical fact behind as a trace particle. This cherished belief is, however, just a hopeful supposition derived from advocacy ideology. There is no empirical evidence indicating that the contests of advocates deliver truth in this manner.

¹⁷ Schwartz, *supra* note 1, at 150.

¹⁸ *Id.*

¹⁹ The arguments suggested by Luban relative to the rights theory of the adversary system are effectively extrapolated at this point to the truth-finding purpose of the adversary system. Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 99 (D. Luban ed. 1983).

B. FAIR DECISION THEORY

The foregoing features of adversary criminal trials, which suggest that the criminal adversary system is structurally truth-dysfunctional, give rise to the "fair decision theory" of trial. The strictest form of this trial theory holds that trials are not a good way to discover the truth, because the truth of what actually happened is probably unknowable. In a criminal trial situation, nonetheless, there is a dispute between the state and an individual that needs to be resolved. The best we can do is arrange a criminal dispute resolution procedure that is at least fair to both the state and the individual.²⁰ The procedural elements of party control, party commitment to winning, and jury fact determination are viewed as conducive to fairness because they lead to a potentially equal contest before an unbiased decision-maker. In this scheme, the evidentiary rules are necessary to insure that the jury will not be unduly influenced by suspect evidence. Broader fairness considerations arguably account for the unilateral discovery rules and the privilege against self-incrimination, both of which are essential to offset the government's resource advantages and to insure that the government plays fairly by preventing coerced admissions or confessions.

Fair decision theory alone cannot account for the adversarial nature of the system, because it is possible to conceive of fair decision procedures which do not involve adversariness or at least the degree of adversariness found in our criminal trial system. The European inquisitorial or investigative system of criminal trial is one example of a system that is thought to be fair, but not adversarial.²¹

There is some evidence, however, that party control of adversarial proceedings gives affected participants a greater sense of fairness and perhaps a greater willingness to accept the outcome.²² Nonetheless, party control is but one feature of adversary criminal

²⁰ This appears to be the thrust of Fuller's argument. Fuller, *supra* note 1.

In the end, the justification for the adversary system lies in the fact that it is a means by which the capacities of the individual may be lifted to the point where he gains the power to view reality through eyes other than his own, where he is able to become as impartial, and as free from prejudice, as "the lot of humanity will admit." *Id.* at 47.

²¹ For a discussion of the inquisitorial system, see Damaska, *Evidentiary Barriers*, *supra* note 1, at 556-57. See generally J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977).

²² There is also empirical evidence, subject to varying interpretations, indicating that experimental subjects prefer adversary fact-finding procedures to other procedures and find them to be the most fair. J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 113-14 (1975). Cf. Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975) (critiquing Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972)).

trial, and a psychological explanation of party control does not explain other criminal trial features such as the privilege against self-incrimination, the right to jury trial, the evidentiary complications caused by a jury trial, or the burden of proof beyond a reasonable doubt. These features also cannot be explained by fairness considerations. Leaving aside coercion or other abuses external to trial, nothing seems inherently unfair about requiring a defendant to give testimony, requiring criminal cases to be tried before a judge or panel of judges, admitting some of the evidence that now is excluded, or using a different burden of proof.

For these reasons, it is clear that something more than simple fairness is the operative determinant of the structure of criminal trials. Plainly, the criminal defendant has a set of rights which may interfere with truth-finding and which go beyond immediate fairness considerations. A defendant's right against self-incrimination, the right to unilateral discovery from the prosecution, the right to a jury trial, and the burden of proof beyond a reasonable doubt, for example, are potentially significant barriers to truth-finding. These rights of the defendant are not matched by an equivalent set of prosecutorial rights. Indeed, from a fair contest point of view, an adversary criminal trial has an asymmetric shape, with one side having qualitatively and quantitatively different and considerably more rights than the other. Furthermore, the prosecution has fairness obligations which are not reciprocated.

To explain this skewed structure, a fair decision theorist might suggest that there is a kind of "rights offset" where the defendant is given a set of rights to offset the natural resource and public support advantages of the prosecutor.²³ Some of the defendant's unilateral rights thus might be construed as at least partially animated by fairness concerns, where fairness is understood broadly as a matter of equalizing advantages and disadvantages. This explanation makes some sense, but, it seems to be a strange way of handicapping to produce an equal contest. A defendant's criminal trial rights are obviously both more and less than a counterweight to governmental-prosecutorial advantages. They are more than a counterweight in that they amount to a potential systematic frustration of governmental power in all cases, whether or not a particular defendant needs the advantage conferred. They are less than a counterweight to governmental prosecutorial advantages in that in many, if not most, trials the "rights offset" does not in fact compensate for the government's power and resources. Giving a defendant exactly the same

²³ Schwartz, *supra* note 1, at 158.

resources as the government might, notwithstanding the general public relations advantage of the government, produce a more equal contest than the current structure.²⁴ Thus, a criminal defendant's unilateral trial rights do not fit well into either a truth-finding or fair contest theory of trial.

C. TRUTH-FINDING AND FAIR DECISION THEORIES JOINED

Truth-finding and fairness theories of criminal trial are sometimes joined, and this combination may account for adversary criminal trial structure. For example, in *Polk County v. Dodgson*,²⁵ the United States Supreme Court said that "[t]he system assumes that adversarial trial testing will advance the public interests in truth and fairness."²⁶ Other opinions suggest that truth and fairness are not separate interests to be pursued, but that they are intimately connected.²⁷ The connecting idea appears to be that a fair procedure represents a means of ensuring that the truth will be discovered. Furthermore, if the truth is discovered in trial and illegal methods were not used to obtain the truth, the trial could not have been unfair.

Thus, there are two reasons to join truth and fairness as twin purposes of adversary criminal trials. First, an unfair decisional procedure may lead to erroneous fact-finding. Second, there is a need to account for the truth dysfunctionality of trials. If criminal trials are not good truth-finding mechanisms, as many observers agree they are not, then we must offer some other value that trials are structured to protect in order to explain why we use the adversarial system. Because criminal trials principally err on the side of erroneous acquittals, the apparent conclusion is that this price is justified by our concern for fairness to the defendant.

D. THE RELATIONSHIP BETWEEN TRUTH-FINDING AND FAIR DECISION PROCEDURES

The ease of associating the idea of an adversary criminal trial as a truth-finding device with the idea of using such a trial as a fair decision procedure demonstrates the close relationship between the two concepts. By definition, an unfair decision procedure or pro-

²⁴ Schwartz, *supra* note 1, at 158.

²⁵ 454 U.S. 312 (1981).

²⁶ *Id.* at 318.

²⁷ *Cronic*, 466 U.S. at 655-56; *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Such statements prove nothing. These statements may, however, reflect a hope that if society states its ideals of truth and fairness in conjunction, it may be more likely to find these ideals together.

cess has a built-in bias. In this sense, because an unbiased decision procedure is likely to produce a different result than a biased procedure, the decisional result of an unfair procedure cannot be a "true" result. For this reason, we tend to connect fair procedures with correct or "true" results. The truth-finding and fair decision notions of the purpose of the adversary criminal trial system, therefore, seem fully compatible and mutually reinforcing.

This resolution, however, is not completely satisfactory. While a fair procedure may lead to a correct result in the sense that it is an unbiased result, there is no necessary correlation between an unbiased result and what actually happened. In other words, the idea of truth which is present in the notions of correct or "true" results is not necessarily the same idea of truth which is present in the notion of truth-finding. Truth-finding generally refers to the discovery of "what actually happened" and is thought of as the exact correspondence between what we presently assert and the actual reality of a past event. When "true" results are referred to as following from a fair decision procedure or contest, however, truth is, in effect, being defined by fairness; what is fairly decided is true, simply because it was fairly decided.

In our thinking about the adversary system we tend to confuse these two different concepts of truth. It is often wrongly assumed that a trial that is a fair contest is a trial that produces "true" results which correspond to the facts of "what actually happened." There is a similar problem with the idea of fairness in the concept of "fair decision procedure." Although ordinarily we do not use the terms "fair" or "unfair" in reference to scientific investigations, it does make sense to speak of such an investigation as a "fair" treatment of the problem or as "fair" to the underlying facts. In scientific investigations, all possible sources of error or bias must be found and corrected for. An erroneous or biased investigative method, which is, in effect, an "unfair" method is suspect in principle because it is not likely to disclose the true state of affairs.

A procedure can be fair or unfair, however, in ways that are unrelated to the discovery of the true state of affairs. A football game, for instance, which is a kind of decision procedure, is fair if it is played according to rules that are fairly enforced by the officials. If the rules of any game or proceeding are neutral as to result and are enforced without bias, the game or proceeding is fair whether or not the result reflects some other state of affairs, such as whether the better team actually won or whether the actual facts of some prior event in issue were truly disclosed.

A criminal trial is both an investigation and a contest. It is im-

portant to understand, however, that the factors that make the trial a fair contest, in the sense of using neutral rules which are neutrally applied, are not necessarily the same as the factors that make it a fair investigation, in the sense of using a process designed to elicit actual facts. A fair investigation could be an unfair contest or no contest at all; a fair contest could be an unfair investigation or no investigation at all. Similarly, a trial that produces "true" results and is a fair contest is not necessarily a trial that uncovers "truth" in the sense of "what actually happened." Finally, a trial that uncovers the "truth," in the sense of "what actually happened," is not necessarily a fair trial producing "true" results because it may not have been a fair contest.

Trial fairness appears to be an independent purpose of the structure of the adversary criminal trial, but the fairness of the procedures is not a guarantee of the truth-finding capacity of trials. As an independent purpose, trial fairness may actually interfere with truth-finding. Nonetheless, it is doubtful that our pursuit of fairness explains the adversary criminal trial structure, because, as previously noted, fairness does not require a particular set of procedures. Fairness notwithstanding, the question remains why our justice system uses the particular adversary criminal trial features that we use.

IV. AN ALTERNATIVE VIEW OF TRIAL TRUTH AND FAIRNESS

Perhaps the truth-finding and fair decision theories should be viewed as limited to the universe of law.²⁸ In this view, law is just one of a number of kinds of discourse about the world. As a discourse, the law has its own concepts, categories of thought, and ways of perceiving and processing information.²⁹ Legal discourse

²⁸ The view presented here is an elaboration of the notion that the adversary system is a system of proof rather than a system of discovery of what actually happened. There are occasional undeveloped references to this idea in the literature. "[I]t is not that tools for determining truth are imprecise, but that the truth may not be ascertainable by any means in the form we seek it. What we are trying to measure may be indefinable." Briscoe, ". . . *For the Devil Does not Know Man's Intentions* . . .", 44 AUST. L.J. 31 (1970).

Let no one pretend that our system of justice is a search for truth. It is nothing of the kind. It is a contest between two sides played according to certain rules, and if the truth happens to emerge as the result of the contest, then that is pure wind-fall. . . . It is not something with which the contestants are concerned. They are concerned only that the game should be played according to the rules. There are many rules and one of them is that some questions which might provide a shortcut to the truth are not allowed to be asked, and those that are asked are not allowed to be answered. The result is that verdicts are often reached haphazardly for the wrong reasons, in spite of the evidence, and may or may not coincide with the truth. The tragedy of our courts is that means have come to count more than ends, form more than content, appearance more than reality.

L. KENNEDY, *THE TRIAL OF STEPHEN WARD* 251 (1964).

²⁹ C. GEERTZ, *LOCAL KNOWLEDGE* 173-75 (1983).

may, in some respects, track the world in the same way that other kinds of discourse do, while in other respects it may not. Legal discourse is simply one of many approaches of dealing with the world. Just as the legal discourse describes a person differently than does ordinary language, for example, the law considers a corporation to be a person for some legal purposes, so too the law may also have both a different concept of truth and a different way of finding truth than do other systems of thought.

A trial is an accusatory proceeding. As such, trials have no abstract interest in what happened independent of the accusation. In other words, the issue in a trial is the truth of the accusation, and the accusation is true if it is proven to be true within the rules of proof and persuasion. In this manner, a trial produces truth, rather than finds it. This truth is a "legal" truth and is that which the system recognizes as true.

V. CRIMINAL TRIALS AND THE MANUFACTURING OF FACT

In criminal trials, the verdict is a combination of a judgment about historical "fact" and a decision about culpability for what is thought to have happened. While the two are deeply related, generally we separate them conceptually. In a homicide trial, for example, the questions of historical fact are those regarding the circumstances of the victim's death: how did he die?; from what did he die?; how was the defendant physically involved in the victim's death? The culpability question, however, addresses the degree of the defendant's responsibility for the victim's death and is a mixed fact and value question of intentionality.

In reaching a verdict in a criminal trial, the trier of fact must draw inferences from historical fact in order to settle the question of intentionality. The process is more complicated than this statement suggests, however, because in most trials historical fact itself is in dispute. Additionally, the kind of historical fact with which the law is concerned may not even exist in any meaningful way independent of the method of proof.

In the conceptual universe of law, fact and law are radically separated. Trial decisions are considered to involve two distinctly different operations: determination of facts and application of law to the facts. This conception of the relationship between law and fact posits that the major issue in trials is the determination of what actually happened. The criminal adversary jury trial does not, however, appear to be a particularly good way to determine historical fact. The failure of the adversary system as a method of finding historical

fact has led to strong criticisms of the system and proposals for how it could be changed to improve its fact-finding methodology.

Further consideration reveals that the critique of trials as truth-finding devices is fundamentally mistaken because there is no radical separation of fact and law. "[L]egal facts are made not born, are socially constructed. . . by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of law school education. . . ." ³⁰ Facts are "close edited diagrams of reality." ³¹

The rendering of fact so that lawyers can plead it, judges can hear it and juries settle it is just that: a rendering. As in any trade, science, cult or art, law, which is a bit of all of these, molds the world into a world in which its descriptions make sense. . . . At base, it is not what happened, but what happens, that law sees; and if law differs, from this place to that, this time to that, this people to that, what it sees does as well. ³²

In other words, the law manufactures facts from the raw data of reality so that it can perform its operations on them. Facts do not announce themselves as facts. The data from which factual conclusions are drawn is ambiguous and subject to varying interpretations. Furthermore, the same data can constitute a different fact under a different theory of what the data means. For example, assume that a man has a rifle with a small worn spot in its firing chamber. What are the facts?

- (1) The rifle was not manufactured properly and, as a result, the metal in the chamber had a low spot that wore unevenly as the weapon was used;
- (2) While cleaning the weapon one day, the man found a small nick. He took a piece of bronze wool and rubbed out the nick, perhaps a little too enthusiastically. Rubbing out the nick produced the worn mark;
- (3) At a gun show, the man bought a small part that he could put in the operating mechanism so that the rifle could fire automatically. He has fired the weapon automatically but has since removed the part because it is illegal to possess an automatic weapon. The worn spot is the place where the part struck the chamber when the gun was fired automatically.

The mark is on the rifle, but its meaning lies in its explanation. Different explanations interpret the mark differently. The mark as data becomes a fact only when it finds a place in a theory or explana-

³⁰ *Id.* at 173.

³¹ *Id.*

³² *Id.*

tion. In this sense, "facts are theory laden,"³³ and facts in law are laden with legal theory. The business of trials and trial lawyers is to manufacture such facts. Theories fabricate facts, and they construct facts from data. Facts are thus elements in a net of signification in which the whole explains the parts and the parts explain the whole. In the rifle example, suppose the man was arrested and the rifle was found in his possession. The worn spot was discovered in a routine forensic examination. Assume that:

- (1) The man is an employed family man without a police record;
- (2) The man is unemployed, attempted to assault the officer when he was arrested, was found with another weapon in his possession and also possessed mercenary and terrorist literature. In each case, suppose the man is prosecuted for the federal firearms offense of altering a rifle to fire automatically. In which case is he most likely to be convicted?

Although in either case, he may or may not have deliberately altered the weapon, the theory that he did alter it fits best with the second assumed case. It fits better in that case because the man seems to be the kind of person who might commit this crime. Further, a jury is more likely to believe that someone who reads terrorist literature would want an automatic weapon. In the second assumed case, the theory of deliberate alteration fits the data, the cast of characters and ordinary beliefs.³⁴

When there is uncertainty about what happened, the uncertainty must be settled through meaningful constructions of the data or evidence presented. The data, in turn, is generated by theories or stories proposed to explain all of the data, including the credibil-

³³ See N. HANSON, *PATTERNS OF DISCOVERY* (1958); N. GOODMAN, *WAYS OF WORLDMAKING* 91-97 (1978). Legal thinkers have almost arrived at the same insight. "You cannot decide which facts matter unless you have already selected, at least tentatively, applicable decisional standards. But most of the time you cannot understand these legal standards without relating them to the factual situation of the case." Damaska, *Presentation of Evidence*, *supra* note 13, at 1087 n.7. What this statement misses, however, is the fact that legal theories or decisional standards may determine not only which facts matter, but also *what counts as fact*.

³⁴ [A] version [of the world] is taken to be true when it offends no unyielding beliefs and none of its own precepts. Among beliefs unyielding at a given time may be long-lived reflections of laws of logic, short-lived reflections of recent observations, and other convictions and prejudices ingrained with varying degrees of firmness. Among precepts, for example, may be choices among alternative frames of reference, weightings and derivational bases. But the line between beliefs and precepts is neither sharp nor stable. Beliefs are framed in concepts informed by precepts. . . .

Truth, far from being a solemn and severe master, is a docile and obedient servant. . . . [The scientist] seeks system, simplicity, scope; and when satisfied on these scores he tailors truth to fit. He as much decrees as discovers the laws he sets forth, as much designs as discerns the patterns he delineates.

N. GOODMAN, *WAYS OF WORLDMAKING*, *supra* note 32, at 18 (citations omitted).

ity of those who presented it. In effect, we create facts by embedding data in socially acceptable explanations.³⁵ A decision about what the "facts" are is an implicit acceptance of the theory or story which gives the data credible meaning by connecting it into a unified whole.

A trial is, therefore, a contest over the meaning of evidence, and the "evidence" is data that the trial attorneys have already shaped into some frame of reference. That frame of reference is a theory of the case or a story that makes sense in some world view embedded in the law. The trier of fact uses all of the trial data, including the respective attorneys' shaping and reading of the evidence, to draw its own inferences and to generate its own reading of the evidence. When the trier of fact is a lay jury, it may import readings different from those considered permissible by legally trained persons.

"Truth," in the context of an adversary trial, is thus, the inferences of ultimate historical fact and liability that the fact-finder draws from the "evidence" that the adversaries help to fashion. How closely such "truth" comports with the "real truth," whatever that might be, is indeterminable.

Jury verdicts are a composite of influenced "fact" determinations and associated value judgments. These determinations and judgments are mediated by the jurors' own conceptions of how the world and people operate and are filtered through the mental templates that the law imposes on the interpretation of conduct. In this sense, there is no truth regarding criminal liability *independent* of the truth determined at trial, and trials are more truth-producing than truth-finding events. In other words, trials produce what we are willing to accept as truth.³⁶

Obviously, this interpretation of an adversary criminal trial as a way to discover truth is very different from the simple notion that trials are an ideal procedure to discover what actually happened. This rendition of the truth-finding theory, which depends on the redefinition of the meaning of truth, is actually a disguised version of the theory that the purpose of trials is to reach a decision acceptable under prevailing social and cultural norms and beliefs. If society

³⁵ This also explains why trials are framed as competitions between stories.

³⁶ "In many of these [criminal trials], objective truth is more ambiguous, if it exists at all. Such truth exists only as it emerges from the fact-determining process, and accuracy in this context really means relative equality of results as between defendants similarly situated and relative congruence between the formal verdict and our understanding of society's less formally expressed evaluation of such conduct."

Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT: THE COURTS 108, 113 (Task Force on the Admin. of Justice 1967).

accepts its system of criminal trial proof, which assumedly it does because society thinks it is the right, fair and just way to make these decisions, then society also of necessity accepts as correct the results of that system.

Assuming the foregoing is what the legal system really means by truth in the context of the adversary criminal trial, problems remain. There often may be gaps between what the legal system concludes is the truth and what someone with an ordinary world view would conclude actually happened. Because serious consequences flow from criminal adjudication, questions arise as to why society tolerates these gaps and exactly what benefits, if any, the adversarial system provides.

VI. THE RIGHTS THEORY OF ADVERSARY CRIMINAL TRIAL

Any attempt to determine why society tolerates a system that it knows is in some sense defective as a truth-finding device leads to a third view of the purpose of adversary criminal trial, namely, the rights theory. Under one version of this position, termed the standard rights view, a defendant's trial rights are seen as designed in part to make it difficult for the government to bring and win *any* prosecution.³⁷ Under this view, either truth-finding or fair decision, or both, are accepted as central purposes of adversary criminal trials. Trials, however, are also structured to accomplish an additional political purpose: to ensure that the power of prosecution is not used as a general power of persecution. Thus, defendants' trial rights protect all citizens from the possible abuse of the government's power and resources.³⁸

The criminal law is one of the government's greatest weapons. Obviously, it can be used to control populations by harsh means. Compared to the average citizen, the government has overwhelming resources and tremendous credibility advantages. Furthermore, judges are government officials, and, in the long run, they are not likely to oppose the government. Even if judges develop a culture of independence from the government, all professional judging would still tend toward bureaucratic justice. Judging seems inherently to tend toward rigorous administration of calculable rules, a dehumanized justice little concerned with individual differences.³⁹ A defendant's trial rights, therefore, intervene to handicap the gov-

³⁷ Luban, *supra* note 1, at 91-92.

³⁸ *Id.*

³⁹ M. WEBER, *LAW IN ECONOMY AND SOCIETY* 976 (M. Rheinstein ed. 1954).

ernment's use of criminal prosecution and its ability to influence outcomes.

The adversary criminal trial can be understood as a check on a significant risk of persecution or an otherwise too enthusiastic prosecution policy. The rights position also implies a concern with the risk of erroneous conviction. Because adversary trials are neither an accurate nor dependable way of determining facts, there is a great risk of error in trial verdicts. Both parties in court run that risk: trials may produce erroneous convictions or erroneous acquittals. In a symmetrical adversary system, and given the relative ease of prosecuting and the relative difficulty of defending against prosecutions, the risk of erroneous convictions seems greater than that of erroneous acquittals. Because of the serious consequences of criminal convictions, it is better to risk erroneous acquittals than erroneous convictions.⁴⁰ Criminal trials, therefore, should be structurally skewed to favor acquittals.

Making prosecution more difficult is one way to redistribute the risk of error arising from criminal trial decisions. There may be other ways as well. Equalizing prosecutorial and defense resources, for instance, might do as much to reduce the risk of wrongful convictions as all of the defendant's unilateral trial rights. Consideration of such alternatives leads to the implicit question of why the risk of trial error should be redistributed through a system of trial rights, rather than through some other means. The rights theorist would simply respond that a system of trial rights was the only available means to check governmental power when the adversary criminal trial system was developed.⁴¹

The rights theory provides a credible account of the truth dysfunctionality of criminal trials. The rights theory also provides a more satisfactory account of the asymmetric structure of trials as contests than does the fair decision theory. The standard rights view also has the merit of partially accounting for the peculiar ethos of criminal trial attorneys: to win, rather than to discover truth.

For the criminal defense attorney, the discovery and revelation of the truth to the jury is just one means to the end of winning a case. The truth does not matter very much unless it allows the client to go free. In the standard rights view of criminal trials, the criminal defense attorney and his competitive ethos are necessary to make it more difficult for the government to bring and win prosecutions.

⁴⁰ Schwartz, *supra* note 1, at 158.

⁴¹ It is undeniably true that some of a criminal defendant's trial rights were functionally developed for this reason. Cf. H. GREEN, *VERDICT ACCORDING TO CONSCIENCE 1200-1800* (1985); J. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1600-1800* (1985).

The defense attorney is permitted to play unfairly in the sense that he or she has no duty to discover the truth, except to avoid assisting in the commission of known perjury or the use of false evidence. Furthermore, the defense attorney may present any plausible defense, even if it is false. By contrast, the prosecutor is required to play fairly in the sense that he or she cannot hide the truth if it is known to be favorable to the defendant. The necessity to confront plausible, but false, defenses obviously makes it more difficult for the prosecutor to obtain a conviction.

There is also an expanded version of this rights view which sees a criminal trial as a forum for enforcing a regime of individual constitutional rights designed to limit criminal law enforcement powers generally.⁴² To the list of a defendant's unilateral trial rights, this view would add fourth amendment rights against search and seizure,⁴³ the *Miranda* expansions of the fifth amendment privilege against self-incrimination,⁴⁴ and the sixth amendment right to counsel decisions enforced by the exclusionary rule.⁴⁵ Law enforcement violations of any of these rights call for the exclusion of probative evidence from the criminal trial. Under this view, the strong version of the rights thesis, trial design incorporates not only fundamental political and policy decisions to handicap the government in criminal prosecutions, but also a decision to vindicate constitutional rights by providing a forum to discover and remedy their violation.⁴⁶

This strong version of the rights thesis outlines the basic logic of the position, but at an even greater cost to the truth-finding and fair contest functions of trials. The strong rights theorist may argue that while the enforcement of rights may limit the ways in which

⁴² M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 3-4 (1975).

⁴³ *E.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Katz v. United States*, 389 U.S. 347 (1967); *Spinelli v. United States*, 393 U.S. 410 (1969).

⁴⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁵ *E.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977); *United States v. Henry*, 447 U.S. 264 (1980).

⁴⁶ See M. FREEDMAN, *supra* note 42, at 3-4. This view has not gone uncriticized:

Such widespread adoption of conventional rules [i.e., the various exclusionary rules] as essentials of due process seriously distorts factual hearing and weakens the protection of primary personal right that criminal law should provide. Invasion of the victim's primary right goes unprosecuted as a consequence of police invasion of the criminal's civil right, which likewise goes unprosecuted. We have set fire to the house of criminal law in our attempt to roast the police pig. Defenders of the practice of suppressing evidence argue that criminal process provides an appropriate forum for correction of its own abuses and, therefore, suppression of evidence is both permissible and desirable. The abuses, however, are not those of courts but of government agents—investigators and police—and our corrective efforts should be directed against them, not against reliability of criminal hearing.

M. FLEMING, *OF CRIMES AND RIGHTS* 155 (1978).

truth is pursued, there are right and wrong ways to pursue truth. If the government would adhere to the correct ways, rights would pose no problem to truth-seeking. Similarly, the rights theorist would say that although trials are asymmetrical contests, they are not really unfair to the government, for rights are appropriate checks on government activity. While this gloss makes the strong rights view consistent with a belief in criminal trials as truth-finding or fair decision events, it cannot justify the "win" ethos of criminal trial attorneys, which, unless it adopts the standard version of the right theory, regards rights as means and not ends in themselves.

Under the strong rights view, the "win" ethos of defense attorneys is arguably essential to the vindication of defendants', and by implication other persons', constitutional rights. It would, however, be a mistake to consider defense attorneys as rights knights or paladins. Defense attorneys often seek to enforce rights not for the sake of preserving the constitutional regime, but to inhibit the discovery of truth for the purpose of winning. Motions to suppress relevant evidence have no other motivation. For the criminal defense attorney, the enforcement of constitutional rights is only a means to the end of winning or getting the best possible disposition. If a constitutional right doesn't contribute to those ends, it will be waived. Although the "win" ethos doesn't necessarily secure constitutional rights in individual cases, it may, however, secure them better than other alternatives.⁴⁷

In the rights view, then, trial design incorporates a fundamental political decision to circumscribe the power of the government to punish or harass people through criminal proceedings. It also incorporates a policy decision, arising from the weakness of the adversary trial as an accurate truth-finding device, to favor acquittals over convictions. A necessary result of these kinds of checks on governmental power, however, is a deterioration of the criminal trial as a

⁴⁷ This is an empirical question on which there have been no studies. It is, however, certainly a belief among public defenders and some criminal defense attorneys. Indeed, a few years ago, when public defenders' stock was particularly low, some of them wore T-shirts emblazoned with the slogan "Liberty's Defenders." Kunen expresses the same view in stating: "*Of course it's terrible for guilty people to go free. That's the price we pay for not having cops crawling in and out of our houses.*" J. KUNEN, *supra* note 7, at 166 (emphasis added in original).

Anyone who does a significant amount of criminal defense work, except perhaps those who are utterly cynical or are simply in it for the money, must at some point confront the moral and psychological problems associated with representing persons whom the public despises and who may have committed terrible crimes. The justification that such representation helps advance larger systemic goals, such as the furtherance of liberty, may ameliorate the internal conflicts, ease the moral labor and permit the attorney to continue in his or her work.

successful truth-finding procedure or as a neutral, unbiased contest. A defendant's trial rights operate as strong constraints on the criminal trial as an investigative search for truth or as a fair decision procedure.⁴⁸

The rights theory is essentially a testing theory.⁴⁹ Testing theories of criminal trial are attractive because they provide an explanation of the asymmetric character of criminal trials and the heavy burdens placed upon the prosecutor. What a testing theory cannot explain in its own terms, however, is the level of difficulty set by the test. Presumably, the rights theorist would say that the level of difficulty was set through experience. The accumulation of centuries of Anglo-American experience with government prosecutions led both to the common law of trial structure and to the criminal trial rights established in the Bill of Rights of the United States Constitution. Expansive case law interpretations of these rights simply reflect more contemporaneous experience.

VII. THE BARGAINING INCENTIVE THEORY

The bargaining incentive theory⁵⁰ is a pragmatic offshoot of the rights theory. It takes the structure of an adversary criminal trial and a defendant's unilateral trial rights as historical givens which

⁴⁸ For a very helpful discussion of the idea of side constraints, see R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-35 (1974).

⁴⁹ Some theorists based the rights theory on "dignity" interests. See generally M. FREEDMAN, *supra* note 42. The basic idea of this approach is that the particular schedule of rights that we possess derives from the resolve to treat all humans in certain civilized ways in order to acknowledge their humanity and accord them the dignity associated with being human. This seems to me to be an elevated way of saying that we have rights in order to protect people from the abuses of governmental power. Casting the discussion in terms of dignity interests, however, does not seem to advance it in any useful way, and thus this Article uses a more direct approach.

On the other hand, one could argue that a dignity interests rights theory is not a testing theory. Under a testing theory, rights insure a structural test of the government's case and for that reason provide a protection against possible abuse. A dignity theorist, however, might argue that we have rights as ends in themselves, rather than as a means to some other end such as protection from the government. In effect, this view equates the possession of certain kinds of rights with being human. Consequently, whether or not the rights serve as a check on government, one would still be entitled to them. Cf. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). Rights would, nonetheless, remain side constraints on the search for truth.

⁵⁰ The following includes extrapolations from the author's experience as a public defender and from M. FRANKEL, *supra* note 1, at 89-93. What is apparently a predominant practice and what Frankel deplores as a demonstration of the unworkability of our current system of adversary criminal trial, has been developed into a positive theory justifying the structure of the criminal adversary trial system. This new theory is developed not because the theory articulated is correct, but, rather, because it focuses on important systemic features that other theories do not even discuss. It is also an idea worth developing just to see where it will lead.

form the foundation of a system of criminal case resolution that is much greater than the trial. In this view, the balance of structural forces in adversary criminal trials are in equipoise. In general, this means that, for either side, going to trial is a great risk. Juries, the skills of trial lawyers, and the exercise of a defendant's trial rights make trial results unpredictable. The prosecution has resource and public relations advantages over the defense, but the defense, however, has advantages of prior knowledge of the prosecution's case, the suggestibility of the lay jury and the defense attorney's commitment to winning rather than to finding the truth.

It is very difficult to say how these relative advantages will influence the outcome of any particular trial. Indeed, the unpredictability of trials is so great that it affects the decision of each party to go to trial. In general, the prosecution will seek to try only those cases it believes it can win. The defense will try only those cases in which it has nothing to lose by going to trial.

Under the bargaining theory, criminal trials are considered an exceptional method of disposing of criminal cases, a kind of extreme zero-sum contest resorted to only when a case cannot be satisfactorily bargained. Criminal trials are structured so that each side, prosecution and defense, has both bargaining power and a strong rational incentive not to go to trial. The uncertainty of result is so high and the risk of loss is so great, that the parties are strongly influenced to compromise their positions and reach a negotiated settlement.

The bargaining theory represents a system-functional view of adversary trial which looks at the adversary system not in terms of intellectual justifications, but in terms of its practical effects. It takes as its effective purpose the functions of the criminal adversary system. The bargaining theorist readily admits that the features of the criminal adversary system were not consciously designed to create a balance of power aimed at discouraging trial. This theorist would assert, however, that it is a genetic fallacy to conclude that a thing, event, process, or institution is no more than its origin. In this theorist's mind, the adversary criminal trial system is a currently adapted system, and the features of the system that were originally intended to serve a certain purpose now effectively serve another goal. The structure of adversary criminal trial poses no problems for the bargaining theorist because he is not concerned with issues of truth finding, trial fairness and side constraints.

There is a certain attractiveness in the bargaining theory that causes a problem to disappear as a result of a refusal to see it, because it helps to place adversary criminal trials in perspective. For

example, one might consider the truth dysfunctionality of criminal trials a monumental problem if all criminal cases were tried. But the fact that criminal disposition through trial is but a small percentage of all criminal dispositions may mean that this problem is not very serious.⁵¹ This presumes, of course, that the truth dysfunctionality of criminal trials does not have a serious impact on non-trial adjudicated criminal dispositions, a matter much in doubt.⁵² Even the bargaining theorist would admit that there are criminal trials and that trials keystone the bargaining system. Trials must in some way radiate their effects through the system and therefore impact it.

A. THE NORM THEORY

A different view of the purpose of criminal trial originates in the perception that criminal trials are structured to be truth dysfunctional and that trials play a social role greater than simple decision-making in individual cases. Norm production or the norm theory,⁵³

⁵¹ Most criminal cases are resolved by guilty pleas. Cf. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975); Zeisel, *The Disposition of Felony Arrests*, 1981 AM. B. FOUND. RES. J. 407.

⁵² One can argue, for example, that the exclusionary rule has a significant effect on plea bargaining. If a prosecutor believes she will lose a defense motion to suppress important evidence, she may be unwilling to go to trial and may instead settle for a guilty plea to some lesser charge which the defendant is willing to accept. There has been some empirical work on this question, but the results have been questioned.

⁵³ As with other "theories" discussed in this article, there is no definitive statement of "norm theory" in the literature. This article traces the basic claim of the theory, which is that the purpose of social rituals is to constitute community, to the great French sociologist, Emile Durkheim. EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (S. Solovay & J. Mueller trans. 8th ed. 1938). Thurman Arnold appears to be the first legal scholar to have applied this idea to trials by treating them as a form of social ritual:

The judicial trial thus becomes a series of object lessons and examples. It is a way in which society is trained in right ways of thought and action, not by compulsion, but by parables which it interprets and follows voluntarily. . . . For most persons, the criminal trial overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the State as an enforcer of law, and at the same time the dignity of the individual when he is an avowed opponent of the State, a dissenter, a radical, or even a criminal. . . .

The criminal trial is a consequence of security, because only when men are secure are contradictory social values tolerated. It appears as an incident to the enforcement of law and the efficient investigation of issues of fact. One of its greatest difficulties is its necessity to appear as an efficient means of enforcement and working order, and at the same time bring into sharp relief various deep-seated popular moral ideals. Generally the ideal of law enforcement and efficient investigation are in direct conflict with accepted social behavior. In such cases the mental conflict between what the group thinks it ought to do, and what it actually does, must be reconciled by the conviction of some offenders and the acquittal or the failure to prosecute others.

T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 129-31 (D. Harbinger ed. 1962).

Nesson, in his fine article entitled *The Evidence or the Event: On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1359 (1983), uses the norm theory to explain certain rules of evidence. Nesson seems implicitly to advance the norm theory as a gen-

like the rights theory, is a testing theory of criminal trial. While the rights theory, at least in its standard version, envisions criminal trial structure as a set of institutionalized protections for individuals, the norm theory views the structure as a system designed to produce norms that the public will readily accept.

The norm theory claims that the purpose of an adversary trial is to produce "acceptable conclusions and thus to project substantive legal rules."⁵⁴ It begins with the premise that a major goal of the legal system is to articulate behavioral norms and to affirm moral values and law abiding attitudes.⁵⁵ The norm theory sees criminal trials, which generate public judgments about conduct, as events that project a public message or norm through a verdict. That message is a norm if the public accepts it as such, and the public will accept it if it believes that the condemnation of conduct embodied in the verdict is a judgment about what actually happened.⁵⁶

According to this theory, it is not necessary that trial results reflect what actually happened, but only that the public believes that they do. Trials must, therefore, be structured so that the public will accept their results as credible. In other words, criminal trials must have a structure which is generally perceived as a strong test of the prosecution's case. In overcoming such substantial disadvantages as a high burden of proof, the privilege against self-incrimination, lack of discovery and the exclusion of probative evidence, the prosecution passes a difficult test and more convincingly proves that the defendant actually did commit a crime.

The adversary ethos fits well into the norm theory. The structural purpose of the defense counsel is to insure a rigorous testing of the prosecution's case. Defense counsel's role, therefore, is "to design and present the most plausible defenses, even though they may be false."⁵⁷ Such extreme testing of the prosecution's case, in effect a kind of norm production quality control, insures that the public will accept a jury's finding of guilt. Under the norm theory, the truth dysfunctionality of trials is not a great problem. Indeed,

eral explanation of adversary criminal trial structure. Where Arnold emphasizes the symbolic character of trials as dramatizations of moral ideals, Nesson simply asserts that trial verdicts generate norms.

Nesson's statement is the most recent and simplest statement of the norm theory. His discussion therefore, is used as a statement of the basic premises of the theory. I have not, however, forgotten Durkheim and Arnold, for they have valuable insights addressed later in the Article.

⁵⁴ Nesson, *supra* note 53, at 1390.

⁵⁵ *Id.* at 1360.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1376.

the theory postulates a decisional system which produces fewer positive results—convictions—than are warranted, and more negative results—acquittals—than are warranted. This result is acceptable because a trial system that errs on the side of certainty in its convictions is more acceptable to the public than one that runs the risk of convicting innocent people.

The norm theory explains some of the structural features of adversary criminal trial such as jury trial, proof beyond a reasonable doubt, evidentiary rules restricting unreliable evidence, and the criminal defense attorney's ethos. Under the notion that trials are designed to be difficult tests, this theory may also account for unilateral discovery from the prosecution, exclusionary rules of evidence, and, perhaps, even jury passivity. On the other hand, the testing portion of the norm theory may prove too much. It is always possible to argue that the existence of some constraint on proof is meant to make proof more difficult and therefore is a test of the strength of a proponent's case. A testing rationale cannot, however, define how difficult the test should be. Virtually any set of constraints will frame a test, and, theoretically, one could add constraint on constraint with the only results being increasingly more difficult tests. Assuming criminal trials are arranged to make it difficult for the prosecution to convict, what accounts for the degree of difficulty imposed by the particular criminal trial structure we have?

Since the norm theory turns on public acceptance of trial results, it must claim that the level of prosecutorial difficulty is an empirical matter. What is critical is that the trial is structured so that the public will accept the verdict. Public acceptance, however, is not a stringent condition for trial structure; this suggests that under the norm theory there may be a range of structural prosecutorial handicaps that would satisfy this condition. In other words, unless it also resorts to historical explanations of the kind invoked by rights theory, norm theory cannot explain the unique set of prosecutorial handicaps that form the structure of an American adversary criminal trial.

There are also some features of the adversary criminal trial structure which arguably would decrease public confidence in trial results. The norm theory requires that the public believe that trial results reflect what actually happened so that the public will accept the norm projected by the verdict. If, for instance, the public knows that probative evidence was excluded from a criminal trial that resulted in an acquittal, is it really likely to accept whatever norm that

acquittal implies?⁵⁸

Finally, and perhaps most importantly, how does the public attend and receive lessons at the school of trials? How does the verdict imply a norm? How is that norm promulgated to the public? And, what does public acceptance mean? Certainly a verdict is a judgment about perceived conduct, and, in that sense, it is a norm. Verdicts, however, are general; they are judgments about the sum total of what was presented to the jury. Verdicts thus appear to lack the specificity we expect of norms that govern conduct, and they may be such general condemnations or exonerations that they are vacuous. In any event, except perhaps in the most news-generating cases, few members of the public are aware of criminal case verdicts. Of those few who are aware of a particular verdict, even fewer have sufficient knowledge of the evidentiary details of the trial to draw meaningful conclusions about what the jury verdict means as a norm.

While the idea of public acceptance of verdicts as norms has a certain rhetorical appeal, it seems rather empty. It is difficult to imagine what public non-acceptance of criminal trial verdicts would be like. Evidently, public acceptance must mean something more than a lack of an outcry; it must be something on the order of an integration into the public's stock of rules used to regulate and assess behavior. This is, however, a highly questionable empirical claim, and the theory posits neither a mechanism for this integration nor empirical proof that verdicts have this effect.

VIII. A UNIFIED VISION OF ADVERSARY CRIMINAL TRIALS

Each of the theories of adversary criminal trial that I have discussed thus far seems to capture some aspect of the system, although no single theory presents a complete picture. What is correct about the truth-finding theory is that we are interested in insuring that criminal trials produce true or just results under our prevailing ideas of truth and justice. The emphasis in the fair decision theory on the need for a decision generated in accordance with procedures which are thought to be both fair and unlikely to lead to biased results is also correct. The rights theory is correct in its claim that possible trial error is skewed in the direction of erroneous acquittals. Both the bargaining theory and the norm theory put all of this in perspective. The norm theory gives the adversary criminal trial a broader social role than a simple adjudication of criminal liabilities. That broader role contemplates not only decisions in indi-

⁵⁸ Nesson is aware of this problem. Nesson, *supra* note 53, at 1367 n.31.

vidual cases, but also the generation and promulgation of norms reflective of contemporary community standards.

To reconcile the differences between the various theories, one could simply assert that the adversary criminal trial system has multiple purposes and that each theory selects a single purpose as central to the system. In this view, each univocal theory errs in undervaluing the systemic purposes that the other theories posit. To correct for this theoretic myopia, one could assert that the system has all of the purposes posited by these theories: truth finding, fair decision, protection from possible governmental abuse and norm generation. These purposes, however, co-exist in an unstable tension.

On further reflection, it is apparent that the theories elaborated are in some manner variants of one another. When the truth-finding theory is construed as a truth-producing theory, it reveals itself as the fair decision theory in disguise. The rights theory is a form of the fair decision theory that structurally incorporates a risk analysis. The fair decision theory, the rights theory and the truth production theory all appear to be versions of norm theory. The norm theory, like the rights theory, is a testing theory, and it can be construed as incorporating the systemic purposes posited by the other theories as conditions for the community's acceptance of verdicts as norms.

These observations suggest that all of the theories have a common origin. As the most overarching of all the theories, the norm theory seems to hold the greatest promise of revealing that origin. The norm theory, however, is underdeveloped, and it does not account for any particular schedule of defendant's rights or explain how verdicts are translated into operative norms. Further development of the norm theory may remedy these defects and provide a compelling, and unified vision of the adversary criminal trial system.

The norm theory finds its source in the work of the great French sociologist, Emile Durkheim. Durkheim's thesis, articulated specifically in regard to community punishments, is that the function of certain community actions, such as punishments, is to define the community.⁵⁹ A community defines certain acts as criminal in order to indicate what is outside the bounds of acceptable community behavior. The community by its actions thus defines itself and informs any prospective community member what is expected of him or her.⁶⁰ Durkheim noted, for example, that some punishments could not have any of the effects that we normally associate with

⁵⁹ E. DURKHEIM, *supra* note 53.

⁶⁰ *Id.*

punishment, such as revenge, deterrence or rehabilitation. Some societies, for example, punish animals that have not committed a wrong; others punish inanimate beings.⁶¹ Such punishments are ritual punishments whose only function is to create the community and establish or express social solidarity.

Durkheim also explored how social rituals operate to maintain social ideals. According to Durkheim, the great ideals of civilization were born in select periods of cultural innovation or crisis when human interactions reached an intense pitch and gave birth to new ideas. But, societies cannot maintain that intensity and instead fall back to their normal level:

This illusion [that some ideal expresses a reality] can never last because the exaltation cannot maintain itself at such a pitch; it is too exhausting. Once the critical moment has passed, the social life relaxes, intellectual and emotional intercourse is subdued, and individuals fall back to their ordinary level. All that was said, done and thought during this period of fecund upheaval survives only as a memory, a memory no doubt as glorious as the reality it recalls, but with which it is no longer at one. It exists as an idea or rather as a composition of ideas. Between what is felt and perceived and what is thought of in the form of ideals there is now a clear distinction. Nevertheless these ideals could not survive if they were not periodically revived. This revivification is the function of religious or secular feasts or ceremonies, all public addresses in churches or schools, plays and exhibitions in a word, whatever draws men together into an intellectual and moral communion. These moments are, as it were, minor versions of the great creative movement.⁶²

Durkheim's insights focus on the building and community maintenance aspects of social rituals. His views suggest that the commonly accepted purposes of many social actions, such as some forms of punishment or anything that is deemed a form of ritual, are not the sole or main functions of those actions. Rather, the main functions are found in the solidarity effects of the ritual. Generalizing, all community rituals provide occasions for reaffirming or defining community values and thus for creating or maintaining a community of individuals through the promotion, acceptance, adoption and maintenance of shared values and ideals.

This suggests that we can most effectively develop norm theory as it relates to adversary criminal trials by taking seriously the idea that criminal trials are social rituals. As social rituals, criminal trials have at least two solidarity functions. First, a criminal trial defines

⁶¹ E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 85-86 (1964).

⁶² Durkheim, *On the Process of Change in Social Values*, in *THEORIES OF SOCIETY* 1305, 1309 (T. Parsons ed. 1961).

the community by deciding a defendant's guilt or innocence: those who are found guilty are implicitly cast from the community, at least for a period of time. This process defines the community by determining membership in accordance with standards applied by the jury acting as a representative of the community.

Second, criminal trial as social ritual, in addition to defining the present community, defines the community through time. An adversary criminal trial is a democratic rite connecting modern people to the founders and the ideals of human freedom that they articulated. The rights that shape and structure the criminal trial invest it with a special type of ceremony and confirm in it a distinctly American complex of conceptions and ideals about the relationship between government and the people. In effect, certain American ideals, beliefs and understandings of the way the world should and does operate interact and resonate harmonically with trial form to confirm both our way of operating criminal trials and our identity as Americans.

To develop these ideas, it is necessary to examine the American adversary criminal trial system to see how it comprises a ritual and how it confirms or generates values and maintains ideals. Of the theories of adversary criminal trial considered, only the norm theory emphasizes the central role of the jury in trial structure. In the truth finding theory, the jury is a liability; in the fair decision theory, the jury is a putative protection from judicial bias; in the rights theory, the jury represents one of a number of defendants' trial rights. The jury is central to the norm theory, however, because only a body taken from a cross sectional representative group of the community can meaningfully project community norms. In this view, the criminal trial jury is the principal force in shaping and maintaining the structure of the criminal trial, because the jury represents the community, both symbolically and actually, and brings community consciousness, community values and culture into the trial system. The jury is also a focal point of trial as a communal ritual. Thus, the best way to explore and develop the norm theory and to answer the criticisms raised earlier is to examine criminal trials from the point of view of the jury.

IX. A JURY'S VIEW OF CRIMINAL TRIAL

The ancient Greek word for trial is *agon*, a word that better than any modern words captures within its multiple meanings the unique, complex and rich character of criminal jury trials as human events. *Agon* means a gathering or assembly, a contest or struggle, a

dramatic conflict between chief characters in a play.⁶³ For the trial jury, as well as for other trial participants, a criminal trial is all of these: drama, spectacle, performance, competition, community meeting and decisional forum.

These features of trials, which I call "agonic resonances", are greatly underplayed in explanations of adversary criminal trial. Everyone knows they exist, but these features do not fit easily with standard purposive explanations and are generally ignored as simply coincidental similarities between criminal trial and certain other human activities.⁶⁴ On the other hand, one could contend that these features are culturally fundamental to the American criminal trial system and help to explain its particular forms.

Legally trained individuals quickly grow accustomed to the formal shape of adversary trials and forget how strange, yet familiar, trial proceedings appear to lay persons. The proceedings are particularly strange to jury members who become deeply involved in them, first as involuntary participants, then as spectators of a special kind, and finally as decision-makers. Consider, for example, the *mise en scene*, or stage production, values in adversary criminal trial. The trial takes place in a special arena, which generally is undecorated, clean, and often furnished in rich wood panelling and severe furniture. This setting conveys the austere dignified effect of a sacred precinct, a kind of civic temple reserved for the rites of a civic religion. Indeed, the focal arrangements of furniture and seating in many trial courtrooms are reminiscent of those in churches, with the bench and jurybox replacing the altar and choirbox, and the spectator benches replacing the pews. The proceedings have strong elements of formalized ritual. They open in great formality and continue in a highly formal and structured manner. A robed and honored official, the judge, usually assisted by a bailiff, begins the event and supervises its course through several distinct stages. A court reporter meticulously records every word, thus giving them a virtually sacral character.

The principal actors, the judge, the lawyers and the court officials, have formally set roles and set places on the stage. In interacting with one another, these role players use special language and stock phrases. They also move in accordance with a set of formal rules, respecting one another's space and moving from one territory

⁶³ N. WEBSTER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (P. Gove ed. 1981).

⁶⁴ Arnold is one exception. T. ARNOLD, *supra* note 53. Arnold views a criminal trial as an event filled with drama and symbolism, and he brings these features of criminal trial forward in his discussion.

to another with notice given to and permission received from the judge. The jurors, for the most part, are passive participants at these proceedings; initially, they are cast as a small audience. The jury is given little direct information about the formalities of the proceedings, the structure of the trial or the limits of their role. What they do learn of these matters, they learn indirectly through the process by means of the imbedded cues of ritual, authority, space, position, place, tone and the directions and modelling of the principal actors. From time to time, the judge, in formal and unfamiliar language, instructs the jurors on how to treat various matters they see and hear. All of these impressions and overt directions teach the jurors that they are witnesses to, and ultimately judges of, a very special event.

These ritualistic aspects of an adversary jury trial are important. Ritual stems from and creates identifiable feelings and attitudes, and it imprints solemnity, propriety, regularity and formal rightness on events, occasions and proceedings. Participation in ritual is also a way of acknowledging, or accepting, membership in the community that uses the ritual. Depending on its forms, ritual may also invoke and symbolically enact some community value or ideal. Engaging in ritual both expresses and creates community; it is a way of participating, sharing, binding and confirming.

The ritual features of an adversary jury trial are entwined with its dramaturgical and contest features. In addition to being a ritual event, a criminal trial is a kind of drama or morality play, as well as a competition. Within the framework set by trial formalities, etiquette and evidentiary rules, the jurors watch a show, produced and directed by the lawyers, who are also the principal actors. The show is staged as a competition between two parties regarding the correct version of past events and the accused's responsibility for them. The lawyers remain on stage throughout the trial, playing their parts and directing the gradual and detailed unfolding of stories of past events by serially bringing forward other actors to advance the stories.

The drama presented is unusual and has elements both of the rehearsed and the extemporaneous, as though it were simultaneously a scripted play and a spontaneous happening. The characters are real and are both directed and unrehearsed. The trial action takes place in the present, but it is about the past. As a play, the trial has as its plot the contest between two different stories, the difference generally turning on different alleged factual versions of underlying events. What turns the factual versions into different stories is the way the elements are linked to frame a moral. This

moral is broadly conceived by the prosecution as a norm violation and by the defense as either not a norm violation, as an excused or justified violation, or as a lesser violation than what was alleged.

Whatever specific plot surfaces in a particular trial, all trial plots have as their unstated subtext the opposition between the government and an individual. In this subtext, the government has two possible roles: the role of legitimate law enforcer and the role of oppressor of freedoms. The defendant is also cast in the ambivalent roles of a criminal, a deviant, or a potentially oppressed individual. At the conclusion of the trial, both stories, as well as the implicit subtext, are proffered in formal equipoise to the jury for judgment as to who has won the contest, accuser or accused. The jury is formally free to accept or reject either story or to compose its own story from the materials of the factual versions presented. The jury does not have to report which story it chose, but it must agree unanimously on its judgment. In effect, the jury concludes the plot of the play by either condemning the defendant or rejecting the accusation, thereby giving the drama a moral. The jury therefore expresses a communal moral judgment on the inseparable sum total of the drama it has witnessed. In reaching its judgment, the jury also reads the subtext of the drama and implicitly decides which roles the principal players occupied.

The manner in which the jury reaches its judgment, however, is as important as the judgment itself. Consider, for example, that trial juries in ancient Greece rendered a communal judgment by individual voting, without discussion or deliberation, following the trial proceedings.⁶⁵ This "communal" judgment is similar to what we see in athletic competitions, for example, where individual judges rate performances. Such judgments are communal in the sense that they represent the sum of individual and mutually uninfluenced reactions of community members.

Our criminal juries, however, come to judgment after deliberation under circumstances in which the jurors must reach a supermajority consensus of views, either unanimity or near unanimity, in order to render an acceptable verdict. In this situation, unlike that of simple, undeliberated voting, the jurors' act of judging is an effort to reach a common understanding about the meaning, in terms of possible criminal liability, of what they have seen and heard. The

⁶⁵ D. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 251-52 (1978). Athenian jurors may not have deliberated, but they certainly represented the community in another sense. Their size was large in comparison to modern juries; in the fourth century, B.C., juries of 500 were common. There is also evidence of cases being tried by as many as 6,000 jurors. *Id.* at 36, 40.

communal judgment of our juries is not the sum of individual views, but a negotiated settlement of views.

Each juror comes to this deliberative meeting with a completely personal and unique set of impressions, attitudes and interpretations of what he or she has seen and heard. Each juror is an unique individual with education, training and life experiences which differ from those of the other jurors. The potential for disparity of viewpoints is virtually guaranteed by the present interpretation of the constitutional representative jury requirement and its proscription on excluding members of cognizable groups from the venire.⁶⁶ Furthermore, criminal trial rules prohibit the jurors from discussing the case with anyone, including fellow jurors, prior to the time the case is sent to the jury for deliberations.⁶⁷ Thus, at the start of jury deliberations there are likely to be many different views of the meaning of the events which the jurors have witnessed. In order to come to a common agreement, the jurors will have to engage in a cooperative process of interpretation and come to a common understanding by negotiating a common definition of the situation that was presented to them. To accomplish this task, the jurors must at least implicitly accept a common set of criteria of evaluation and then make similar assessments.

This necessary process in jury deliberations is also an omnipresent feature of American society, both as a matter of American political ideology and fact. American society is highly heterogeneous and is composed of people from many different races, cultures and ethnic groups, who hold many different philosophies of life. In order for this polyglot polity to function, the frictional differences between people, which may be quite serious, must somehow be worked through in all matters requiring accord for common action. One ideal American model for such decision-making is a direct democracy in which group decisions about what to do in uncertain situations are made following a discussion permitting the development of a true consensus.

Consensual decisions in heterogeneous societies or groups presuppose mutual adjustments of views. In regard to juries, this adjustment means that jury decisions may not embody the norms of any affiliation groups to which the members of the jury belong but, instead, will reflect either norms common or generic to all of those groups or compromise norms that are acceptable to everyone. It is

⁶⁶ *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979).

⁶⁷ See, e.g., CAL. PEN. CODE 1122, 1128. Cf. California Criminal Jury Instructions (CALJIC) 17.40 (1979).

in this sense that the criminal trial jury can be said to express a communal judgment: it either applies existing generic norms or makes new generic norms and applies them. The jury is, therefore, expressive of the larger community in generic norm application and constitutive of community in generic norm creation.

The criminal trial jury is an example of a cultural paradigm of community decision-making. Because this kind of decision-making is at the core of American beliefs about democracy and ideological commitments to democracy, jury decisions are culturally validated. Since a conviction is a community judgment mediated by the jury about a factually and attributionally uncertain situation, it defines the community's moral assessment of that situation. That definition sets a norm or standard for future similar situations. In other words, convictions implicitly produce referential norms.

In celebrated or controversial cases, jury verdicts may directly broadcast norms either to the community at large, to smaller communities or interest groups concerned with the substance of the trial, or both. Cases such as the recent insider trading cases⁶⁸ generate enormous publicity, which effectively carries normative messages of these cases well beyond the inner circle of criminal law professionals. Indeed, such criminal trials often become a focus for public consciousness on both the specific normative issues raised by the trial and on criminal justice and law enforcement matters in general.⁶⁹ In most criminal cases, however, a conviction is not a norm which is broadcast at large to the community, because the community does not know enough about it to draw any conclusion regarding its normative meaning. The trial participants, however, can draw such conclusions. In an ongoing system of criminal trials, it is the repeat players in the system, the lawyers and the judges, who are able to draw the normative lessons that jury convictions imply. They develop a feel for what juries are likely to do in many of the innumerable situations designated for criminal justice system resolution and also develop some skill in translating old normative lessons to new situations. The adversary criminal trial system in a given jurisdiction develops a local culture regarding what the relevant community will and will not tolerate.

The trial lawyers, both prosecutors and defense attorneys, use

⁶⁸ The indictments of Michael David and Dennis Levine for insider trading sent shock waves through the Wall Street financial and legal communities and apparently have led to many changes in practices. Herzog and Katz, *Insider Trading Cases*, The L. A. Daily J., June 26, 1986, at 4, col. 3; Galen, *Security More Crucial Than Ever*, The Nat'l L.J., June 30, 1986, at 1, col. 3.

⁶⁹ T. ARNOLD, *supra* note 53, at 147.

their knowledge of local culture to evaluate cases and to determine whether they are triable. Essentially, it is the defense that determines whether or not a case is tried because, generally, only the defense can force a trial. A case is triable for the defense if it clearly raises an unresolved normative point, if it has significant factual indeterminacies or if there is nothing to lose by going to trial.

Although in theory the structure of adversary criminal trial gives both the prosecution and the defense bargaining power and makes trial results unpredictable, in reality the local normative culture, as developed over time through convictions, considerably reduces this unpredictability. Practitioners develop the ability to evaluate and grade situations according to probable findings of criminal liability. In effect, convictions set the standards by which other cases are judged and graded. Practitioners, in assessing and negotiating settlements in other cases, spread the normative messages convictions convey throughout the criminal justice system. "Truth-finding" is an ideal in this system, and, as an ideal, it is symbolically important for its norm-production value. Therefore, the norms created are valid as they relate to stories presented, and juries must believe that some construction of the information presented to them represents the true state of affairs. The ritual features of criminal trials insure that the jurors and everyone else will take the trials seriously. It is beside the point that jurors may come to believe something other than what actually happened, as long as their error is in the direction of acquittal, which is structurally guaranteed by the defendant's trial rights and the adversary ethos.

Jury decision is a key element in the public acceptance of criminal trial decisions. The jury represents the community, and the trial and deliberative processes make the jury a decisional community with a special authority. Assuming that a criminal trial is conducted properly, society may assume that the prosecution's case has been severely tested. When a jury convicts, society may also assume that the defendant is guilty and that his conviction represents a referential norm expressive of community sentiment in similar cases.

X. CONCLUSION

The essential criminal trial need is to generate decisions in a manner and with results that the community can accept and use. Criminal trial decisions will be accepted if they are arrived at through a process which itself conforms to fundamental, dominant social beliefs and attitudes. Among those beliefs are certain deep

suspensions about the inevitable oppressive tendencies of government and official decision-making, a deep concern about making mistakes in matters involving life or liberty, and a confidence, or democratic belief, in the ability of citizens to come to wise communal decisions and govern themselves. "The law fulfills its functions best when it represents the maximum of competing symbols,"⁷⁰ and American beliefs and attitudes, which sometimes conflict, are structurally and symbolically realized in criminal trials through the defendant's trial rights. These rights were adopted by our founders as essential to liberty. In our fidelity to these rights and, perhaps, in our development of them in the direction of liberty beyond what the founders conceived, we show that we are as committed to liberty as the founders were and affirm, or confirm, each individual's identity as a member of the American polity.⁷¹

⁷⁰ T. ARNOLD, *supra* note 53, at 147.

⁷¹ The following case arose in 1967 in West New Britain, New Guinea. I place it here on the margin as an example of a "fact-finding trial" in another culture. I leave it to the reader to draw the parallels.

Bruno, Manu's only son, aged twelve years, became ill and died. The symptoms of his illness were running, ulcerated sores in his mouth and throat, a posture of some kind of seizure, great pain and high temperature. His death was highly unusual, and everyone knew it was caused by sorcery.

Speculation centered around the three village sorcerers, but finally settled on Panga. In the villagers' minds, these facts singled him out as a sorcerer and perpetrator. He was not a native of the village, but an outsider who had married a native and moved to the village. In this village, sorcerers by definition were outsiders.

Panga had the qualities of a sorcerer. He lied, he was greedy, selfish, pretentious and bullying. In general, he was neither liked nor trusted.

Panga had a motive. Bruno's father, Manu, had led a group of men who had once driven Panga from the village. As Bruno was an only son, killing him would have been effective revenge against Manu.

Panga knew sorcery, had a relative who had been a sorcerer, had been jailed for threatening sorcery, and bragged that he knew how to make poison. Shortly before Bruno's death, villagers saw Panga perform a ritual.

While the villagers suspected Panga, they did not believe there was enough proof of guilt to take vengeance. While he could have killed the boy with poisoned food, he did not admit it, was not seen in a position to have done it, and had never before been suspected of using sorcery against a villager. The villagers believed that one killed by sorcery knows his killer and that his ghost can, through a proper divination ritual, tell the living who it was. This was held, as follows:

After dark, a bamboo pole decorated with aromatic herbs and pig mandibles was carried to Bruno's grave. Bruno was awakened, as were the spirits of his deceased kinsmen, and they were carried in the pole to Bruno's home where a bowl of food had been placed inside the house. A hole was made in the wall of the house, the doors of the house were locked, and the pole containing the spirits was thrust into the house near the bowl of food. Bruno was instructed to eat, and after a few minutes, as ritually prescribed, his maternal cross-cousin spoke to him by asking him to identify his killer. The cousin then began calling out the names of Kaliai people, village by village, while the pole was rhythmically moved into and out of the hole. The pole began moving more and more rapidly when the questioner reached Kandoka, and at the question did your father's mouth eat you? the pole was jerked

into the house and held fast, resisting the efforts of some twenty five men to pull it out.

At this point, the ritual was halted in order to interpret the meaning of the spirit. Speeches were made asserting that, obviously, Bruno did not mean that he had been killed by a direct act of his father. Instead, his death was the indirect result of his father's hot temper and quarrelsome ways. Bruno was saying that he had been killed as an act of vengeance by someone who had been offended by Manu. When the content of the speeches indicated that agreement had been reached on the interpretation of Bruno's message, the divination was resumed, this time to discover the village home of the killer. . . . As the naming neared Panga's house, the pole moved increasingly faster.

At this point, the diviner broke off the divination, explaining he had seen Bruno's kinsmen carrying weapons. He feared they would kill whoever was named as the murderer and was worried about what the government would do about that killing. Nonetheless, while the trial was aborted, its most likely result is evident: Panga would have been named the murder of the sorcerer, a judgment all the villagers would readily have accepted. Counts, *The Kaliai Lupunga: Disputing in the Public Forum* in *CONTENTION AND DISPUTE*, 113, 135 n.141 (A.L. Epstein ed.).