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Ellen E. Sward
University Of Kansas School of Law

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Values, Ideology, and the Evolution of the Adversary System

ELLEN E. SWARD*

INTRODUCTION

The hallmark of American adjudication is the adversary system. The virtues of the adversary system are so deeply engrained in the American legal psyche that most lawyers do not question it. The majority of the world, however, uses some version of the inquisitorial system that evolved primarily in continental Europe.1 Furthermore, some chinks in the adversarial armor have recently begun to appear: There is considerable debate over the adversary system in the literature in recent years,2 and many non-

* Associate Professor of Law, University of Kansas School of Law. B.A. 1970, University of Cincinnati; J.D. 1979, Harvard Law School. The author thanks her colleagues, Robert C. Casad, Philip C. Kissam, Peter C. Schanck, Elinor P. Schroeder and Sidney A. Shapiro for their helpful comments on an earlier draft. Thanks also to the following students at the University of Kansas School of Law for their research assistance: Tina Callahan, Class of 1989, and Neal Coates and James Thompson, Class of 1990. The support of the University of Kansas General Research Fund is gratefully acknowledged.


adversarial elements\(^3\) have become important parts of the American adjudicatory system under the Federal Rules of Civil Procedure.

The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard. An ideology has developed that seeks to justify the adversary system, but the adherents have had some difficulty settling on the most appropriate justification. The current ideology extols the adversary system primarily as the best system for protecting individual dignity and autonomy, but some theorists continue to profess the original ideology, which says that adversarial presentation and argument are the best way to arrive at the truth.\(^4\)

The trends away from adversarial adjudication and the difficulty in justifying the adversary system suggest that there are significant failures in the system that we are trying to adjust for.\(^5\) These failures are primarily in adversarial fact-finding. Thus, we might ask whether adversarial ideology is correct or even useful. Focusing on the ideology tends to rigidify our thinking; it is more important to consider how to build a system that meets our goals and reflects our values. This article examines the values, the ideology, and the trends in American adjudication and concludes that most of the effectiveness of the current, imperfect system stems from the non-adversarial elements that have developed, especially over the last fifty years; this conclusion is best illustrated in complex litigation. The article seeks to demystify the adversarial ideology so that we can move confidently toward a more efficient—and probably more inquisitorial—system.

The most important task is to identify the values and goals that an adjudicatory system reflects. The article begins with that examination in Part I. Part II then defines the adversary system, particularly in compar-

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3. By "non-adversarial elements" I mean elements that are inconsistent, to some degree, with the two primary characteristics of adversarial adjudication: party control of the investigation and presentation of evidence, and a passive judge. See infra notes 43-49 and accompanying text; see also Langbein, supra note 2, at 824 n.4. Contentiousness is obviously part of adversarial adjudication. See, e.g., J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80 (1949); Pound, supra note 2, at 738-40. I do not, however, use "non-adversarial" to mean "non-contentious." There is some debate over how contentious litigation tactics ought to be. See, e.g., Goldberg, Playing Hardball, A.B.A. J. 48 (July 1, 1987); Sayler, Rambo Litigation: Why Hardball Tactics Don't Work, A.B.A. J. 79 (March 1, 1988).

4. See infra notes 67-74 and accompanying text.

ison with inquisitorial systems such as are found in continental Europe. It also summarizes and evaluates the ideology of the adversary system. Part III traces how we arrived at the present system, beginning with its origins in medieval procedure. To take us to the present, the history then turns to the developing non-adversarial elements in litigation and their relationship to complex litigation, which is less adversarial than the simpler forms. Finally, Part IV relates the values and ideology to modern developments, concluding that while modern trends in litigation do not comport well with adversarial ideology, they promote sound values and contribute to a more effective system.

I. Values in Adjudicatory Systems

The goals of adjudication are a starting point for assessing the values reflected in an adjudicatory system. The goals say something about the structure of society and how society views the role of authority. Similarly telling is society's view of the importance and definition of "fair" adjudication. Finally, the adjudicatory system reflects the relative importance that society places on individual and communitarian values. This section describes the values as reflected in Western systems in general and the American system in particular.

A. Goals of a Procedural System

Procedure is simply the means by which we reach decisions. In theory, it has no substantive content but is a neutral set of rules that enables us to reach fair substantive decisions. It is, however, important to look at the goals of the procedural system itself, distinct from the substantive decisions that come out of it. Those goals might be termed conflict resolution, rule-making, and behavior modification.

1. Conflict Resolution

Resolving conflicts is the primary goal of any procedural system. By providing a forum for conflict resolution and sanctions for failing to abide

by decisions of that forum, society reduces its citizens’ desire for self-help. The result is a more orderly society. But if the goal were simply to resolve conflicts, it could be achieved by allowing a judge to flip a coin. Much of the agonizing over appropriate procedural rules could be avoided in such a system. Obviously, however, such a system would not be seen as fair: Victory would depend solely on a random event. Citizens would not voluntarily submit to such a system. The conflict resolution goal, then, is tempered by other goals that limit how conflicts can be resolved.

The first of these goals is "truth." Our procedural system must resolve conflicts in such a way as to achieve a true characterization of the events out of which the conflict arose. Because truth is elusive, however, it is not always possible to be sure of the past. Witnesses may differ in what they think they saw; or there may be no witnesses on a significant issue so that the past must be reconstructed from circumstantial evidence; or, in some cases, witnesses may deliberately lie. Once the evidence is presented, it must be interpreted, leaving room for further indeterminacy.

These problems with reconstructing the past are a primary reason for the existence of burdens of proof. Each party to a dispute must try to

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8. See generally J. Frank, supra note 3, at 37-41; J. Frank, Fate and Freedom 1-41 (1945).


11. Despite occasional convictions such as that of former White House aide Michael Deaver, perjury is difficult to control. See Campion & Hamilton, A Review of Perjury, 6 Litigation 22 (Spring, 1980). Because it completely undermines the search for truth and justice, however, perjury is "considered one of the most odious crimes in our law." Gershman, The "Perjury" Trap, 129 U. Pa. L. Rev. 624, 636 (1981). One reason for the difficulty in controlling perjury are the conflicting ethical obligations of attorneys, who are supposed to uphold the integrity of the judicial system while at the same time provide zealous advocacy to their clients, some of whom choose to lie. See Nix v. Whiteside, 475 U.S. 157, 166-70 (1986); Foster, The Devil's Advocate, 8 Bull. of Am. Acad. of Psych. & L. 229 (1980); Note, The Search for Truth, 55 U. Mo. K.C. L. Rev. 310 (1987). See generally S. Bok, Lying: Moral Choice in Public and Private Life (1978).

12. See J. Frank, supra note 3, at 37-41.

13. Burdens of proof originated during the time of ordeal, battle, and wager of law.
persuade the trier of fact that his version of the facts corresponds to truth, and someone must bear the risk of nonpersuasion. Failure to persuade the trier of fact does not necessarily mean that one's position is untrue; it means simply that the party has failed to convince the court of its truth. A procedural system ideally should resolve conflicts in such a way that truth (to the extent it can be known) and persuasiveness correspond more often than not.

A second aspect of the conflict resolution goal of a procedural system is justice, which is usually related to truth. But justice may also be related to substantive rules that the court applies and to additional procedural goals such as rule-making and behavior modification. If, for example, the substantive rules that are applied strike most people as unjust, the result that the procedural system achieves cannot be just, however accurately it determines the past. One way to guard against this problem is to build some flexibility into the procedural system. For example, judges have considerable discretion in determining how the case will be litigated, including such matters as consolidation and severance, and the granting of new trials when the jury has returned a verdict that the judge thinks is not supported by the evidence. Such procedural matters can affect the substantive outcome of a case—and the parties' perception of the justice.


15. See J. Frank, supra note 3, at 14-33. 16. It is undoubtedly impossible to achieve 100% correspondence in any system. But a system that was wrong a significant amount of the time would not have the support of the people it was serving. The level of error that can be tolerated is difficult, if not impossible, to measure because, while we know the outcome of cases, we have no way of accurately measuring error in those outcomes. The outcome itself is the best measure of truth. See J. Frank, supra note 3; Donagan, Justifying Legal Practice in the Adversary System, in The Good Lawyer, 127 (D. Lubin ed. 1983). For an attempt to construct a scientific measure of the relative truth-finding abilities of adversarial and inquisitorial systems, see Thibaut, Walker & Lind, Adversary Presentation and Bias in Legal Decisionmaking, 86 Harv. L. Rev. 386 (1972). For a critique of that attempt, see Damaska, Presentation of Evidence and Factfinding Precision, 123 U. Pa. L. Rev. 1083 (1975).

17. Fed. R. Ctv. P. 42; see, e.g., Gordon v. Eastern Air Lines, 549 F.2d 1006, 1013 (5th Cir. 1977); Kisteneff v. Tiernan, 514 F.2d 896, 897 (1st Cir. 1975); Stemple v. Burke, 344 F.2d 393, 396 (6th Cir. 1965); Ammesmaki v. Interlake Steamship Co., 342 F.2d 627, 631 (7th Cir. 1965).

of the result. Some persons also argue that the jury is a safeguard against injustice, in that it can ignore substantive rules it thinks are unjust, and there is no effective sanction for its doing so.19

The conflict resolution goal is also related to two concepts that will receive greater attention later in this section. The first of these is fair adjudication: A goal of most adjudicatory systems is to resolve conflicts fairly. Defining "fair adjudication" thus becomes important. The second concept is social value: Adjudicatory systems reflect the values that members of society share. In our adjudicatory system, as in our society, individualism is one of the most prominent values that can be identified.20 To some extent, the concepts of fair adjudication and social value are related: The fairness of adjudication is often measured by the system's ability to promote goals the society sees as important.21

2. Rule-making

A second goal of some procedural systems is rule-making. This goal is particularly likely to be found in common law systems, where there is a long tradition of judge-made legal rules.22 In the American system, rules are made by legislatures, administrative agencies, and courts.23 While

19. See J. FRANK, supra note 3, at 127-35. The idea, according to Frank, was first proposed by Roscoe Pound and Wigmore. Frank castigates the idea as inherently tyrannical, though he concedes that the jury was, especially in colonial times, an effective voice against colonial authority. He contends, however, that the jury has outlived that justification.


21. See infra notes 32-42 and accompanying text.


Much of the commentary of so-called "strict constructionists" seems disingenuous given
Legislatures and administrative agencies are often viewed as the primary rule-making bodies, it is undeniable that judges make rules as well. Indeed, entire bodies of substantive law have grown out of judicial rule-making in all the common law countries. Even when judges are purportedly just interpreting legislation, it is well-established that their interpretations are final, barring subsequent legislative action.

Judicial rule-making, however, is done in the context of a specific conflict that must be resolved. It is not done in the rarefied atmosphere of a legislative or administrative rule-making proceeding, where specific applications of the rule must be imagined. The relationship of the rule-making goal to the conflict resolution goal imposes some constraints on judicial rule-making. For example, in some cases judges are reluctant to apply a newly announced rule to the parties before them because the new rule is such a drastic change from past practice that it is unfair to burden the losing party with it. Despite such constraints, it is fair to say that one goal of at least some procedural systems is to permit judicial rule-making, either directly as with common law rules or indirectly in the guise of interpretation, when such rule-making is necessary to resolve a particular case before the court and can be done in a way that is fair to the parties.

3. Behavior Modification

A third goal of a procedural system is behavior modification. Behavior modification is, of course, significantly tied to the substantive legal rules that are being applied, but the procedural system itself promotes this goal by providing sanctions for behavior that is disapproved in the substantive


24. These bodies of law include contracts, torts and property. See generally Cooter, Unity in Tort, Contract, and Property: The Model of Precaution, 73 CALIF. L. REV. 1 (1985). Many of these bodies of law have been modified to some extent by legislation. See generally Rubin, Common Law and Statute Law, 11 J. LEGAL STUD. 205, 208-11 (1982).


rules. All procedural systems do this to some extent because substantive rules that emerge from litigation, coupled with the likelihood of sanctions, affect how non-parties behave in the future. Some systems, however, make it easier for plaintiffs to seek such sanctions than do others. For example, it may be economically inefficient for a single individual to vindicate his rights in the courts because his losses are small—especially compared to the losses that the potential defendant might suffer by being forced to pay damages or modify his behavior. But if the losses of all affected individuals were measured against the potential defendant's gains, it might well be more efficient, substantively, to force the defendant to change his behavior. A procedural rule makes this result possible. In the American system, it is the class action rule. The existence and vitality of rules that facilitate such joinder are a clue to the importance of a behavior modification goal. It is perhaps significant that the federal class action rule was strengthened at the height of the civil rights movement.

The behavior modification goal, like the rule-making goal, is met only in the context of a specific dispute. Unlike the rule-making goal, however, behavior modification may be the primary purpose of the lawsuit. In other words, the conflict to be resolved may be more a conflict over the defendant's behavior in general than his behavior with respect to any particular plaintiff.

B. The Elements of Fair Adjudication

Adjudication involves the presentation of a dispute to a decisionmaker who has the authority to render a decision that is binding on the parties to the dispute. All systems of adjudication that could be characterized as "fair" must have certain additional features, whether the system is adversarial or inquisitorial. First, the decisionmaker must be impartial. This requirement helps to ensure that the decision is based on the merits of the controversy and not on any bias—negative or positive—on the part of the judge. It is probably impossible to eliminate bias entirely, simply because judges are human and therefore have certain conscious and unconscious predilections. But a fair system will not permit judges (or
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Jurors) to decide cases when they have an interest in the outcome of the litigation or when there are other elements in their backgrounds that make it difficult for them to be impartial.

The second feature of fair adjudication is that the decision rendered by the court must have a rational basis. There are elements of irrationality in all human institutions, of course, because we are not wholly rational beings. But predictability, which is a feature of rational decisionmaking, is essential to a fair system of adjudication. Our system of dispute resolution must be reasonably predictable, or people will not know how to order their affairs. No legal system is perfectly deterministic, however, so predictability is never perfect. But people must be able to make some reasonable calculation of the likely legal effect of their actions.

Thus, we have "substantive" rules governing behavior and "procedural" rules governing the conduct of litigation, and the judge is expected to apply those rules in rendering her decision. The result, it is hoped, is that people in similar situations will be treated similarly. A related feature of predictability is the requirement that the decision be based on facts and law that are presented and argued in open court; in other words, the decisionmaker should have no hidden agenda. It should be possible to make a reasonable prediction of the outcome by considering the facts and law that were argued in court.

33. Jurors, for example, are routinely removed if they have had experience with issues similar to those that are the subject matter of the litigation or if they have biases that may affect their ability to be fair. See, e.g., Flowers v. Flowers, 397 S.W.2d 121 (Tex. Civ. App. 1965). See generally Note, Fair Jury Selection Procedures, 75 Yale L.J. 322 (1965).


35. On the difficulty of distinguishing between substance and procedure, see materials cited supra note 6.

36. I say "reasonable" prediction because of the impossibility of being certain. Most practicing attorneys, when making predictions for their clients, deal in probabilities, and explain carefully all the variables that can affect the outcome. In calculating probabilities, attorneys assume that the decisionmaker considers only the evidence and legal argument
A third feature of fair adjudication is that the parties to the dispute have a voice in the adjudicative process. There are two reasons for this requirement. First, a voice is needed because each party knows more about his or her own case than anyone else and can be expected to bring forth any favorable information that impartial investigators might overlook. This rationale for a voice might be called the "information-based" rationale. Furthermore, each party has a stake in the outcome and is motivated to bring all favorable information to the attention of the decisionmaker. This rationale for a voice might be called the "motive-based" rationale. Thus, giving the parties a voice helps to ensure that the court has full information on which to base its decision.

A second reason for giving each party a voice is that it enhances the individual dignity of the participants in the adjudicative process. Indeed, in a society that values the autonomy of the individual, such a voice is essential. It allows the party to participate in a decision that may affect him profoundly. To ensure that the party’s voice is effective, fair adjudication may also require a statement from the decisionmaker of the reasons for his decision. This statement tells each party that the decision was based on the relevant substantive and procedural rules, and that his arguments were considered.

C. Social Values in Adjudication

The perceived need to give the parties a strong voice in the adjudicatory process reflects social values going much beyond the adjudicatory system. Many commentators have remarked on the strong individualism that is reflected in the adversary system, which depends on the parties to define and present the issues. Some have also remarked that the opposite of this individualism is a communitarian ideal, which calls for cooperation rather than confrontation in resolving society's problems, including dis-

37. Individual dignity is currently the primary justification given for the adversary system. See infra notes 75-82 and accompanying text. For the disaffected, the alternative to voice in any society that values the individual is exit. See generally A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970). In a dispute resolution system, that probably means self-help—and chaos.


40. See supra note 20.
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It is intuitively obvious that a society’s system of dispute resolution would reflect the relative importance of these two “opposite” values. Thus, it is not surprising that a strongly individualistic society such as ours would have a system of dispute resolution that emphasizes individual control and initiative.

Individualistic values can result in a highly creative society—one that develops new ideas that contribute to the good of all. In an individualistic system of litigation, that creative force is helpful to the case-by-case development of legal doctrine: the common law. But individualism untempered by communitarian values can lead to unremitting selfishness, including an utter lack of concern for the consequences of one’s action. That selfishness could completely counter any creative value that individualism promoted.

Communitarian ideals can result in a society that is caring and supportive of its members, ensuring that none goes without basic needs. Often, however, communitarian ideals mean a kind of egalitarianism that removes much of the incentive for individuals to be creative: If one’s needs are guaranteed, and there is little or no reward for outstanding effort, the effort often will not be made. In the extreme, communitarian societies may suppress the individual entirely, making the community the sole raison d’etre for each member.

41. See, e.g., Kennedy, supra note 20. The conflict between individualism and communitarianism is a favorite theme of Critical Legal Studies (CLS) theorists, who seek to “deconstruct” the dominant individualism in liberal democracies. See generally M. KELMAN, supra note 34; R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986). I draw on some CLS scholarship in this article, but am more interested in achieving a balance of values through evolution, rather than a revolutionary restructuring of society and its legal system. Understanding the history and process of adjudication as well as the values reflected in a particular system can help us guide that evolution. There is considerable recent literature on legal evolution, though it focuses primarily on the evolution of substantive legal rules. See, e.g., P. STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA (1980); A. WATSON, THE EVOLUTION OF LAW (1985); Elliott, The Evolutionary Tradition in Jurisprudence, 85 Colum. L. Rev. 38 (1985).

42. I say intuitively, because I know of no objective attempt to relate those values to the kind of dispute resolution system that has evolved. A system of adjudication, of course, reflects many values in addition to these. Much of the debate over adversarial ideology, however, seems to reduce to a debate over the relative importance of these two values. See infra notes 67-82 and accompanying text; see also Mansbridge, Living With Conflict Representation in the Theory of Adversary Democracy, 91 Ethics 466 (1981) (adversarial theory of political representation). See generally M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986). Communitarian theorists argue that individuals are defined with reference to a community and are not as autonomous as liberal theorists suppose. See, e.g., A. MACINTYRE, AFTER VIRTUE 216-20 (2d ed. 1984); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 159-62 (1982); R. UNGER, KNOWLEDGE AND POLITICS 191-235 (1975); Kennedy, supra note 20, at 1774; Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Ind. L.J. 145 (1977-78); Michelman, The Supreme Court, 1985 Term—Foreward: Traces of Self-Government, 100 Harv. L. Rev. 4 (1985); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985).
Each of these values has advantages to both individuals and society as a whole; each can, in the extreme, be quite destructive. Very few societies reflect the extremes of either value, but all lean in one direction or the other. Because the society's system of adjudication reflects societal values, significant changes in the system of adjudication probably reflect a shift in societal values. Conversely, changes in the system of adjudication may act as a catalyst for changes in society; the legal system can lead as well as follow.

II. ADVERSARIAL IDEOLOGY

A. Adversarial and Inquisitorial Adjudication

Adversarial adjudication is often defined in tandem with its antithesis, inquisitorial adjudication. The comparison helps to illustrate the relationship between the system of adjudication a society uses and the values it emphasizes.

1. Elements of Adversarial Adjudication

An adversary system of adjudication, as generally defined, has two essential elements. First, the parties themselves are responsible for gathering and presenting evidence and arguments on behalf of their positions. Second, the decisionmaker knows nothing of the litigation until the trial, when the parties present their neatly packaged cases to him. These elements are related to some of the elements of fair adjudication identified above. Party control over the development and presentation of the case clearly satisfies the requirement that the parties have a voice in the litigation. It gives effect to both the information-based rationale and the motive-based rationale, and it helps ensure the autonomy of the individual. One difficulty, as many critics have noted, is that it may give too much effect to the motive-based rationale: The parties may simply have too much incentive to hide or distort evidence. Another problem is that the parties may be quite unequal in resources or skill. Adversary theory tends to ignore this inequality, though many non-adversarial elements have evolved to help equalize the parties.

43. These elements are repeatedly identified in the commentary. See, e.g., S. Landsman, supra note 2, at 1-6; Fuller, The Adversary System, in TALKS ON AMERICAN LAW (H. Berman ed. 1961); Schwartz, The Zeal of the Advocate, in THE GOOD LAWYER 153 (D. Lubin ed. 1983).

44. See, e.g., Langbein, supra note 2, at 842.

45. See infra section III.B. for a discussion of some of those equalizing elements.
The requirement that the decisionmaker know nothing of the case until the parties present it is related to the requirement that the decisionmaker be impartial. Adversary theorists worry that a judge who has taken an active role in the development of the case might come to a decision too early and, consciously or unconsciously, stop looking for evidence or argument contrary to his conclusion. The passive decisionmaker may also help make the litigation more predictable: If the decisionmaker is confined to reasoning from admissible evidence presented by the parties in open court, the parties, who control the evidence, can predict the outcome somewhat better than if they must wait to see what inquiries the decisionmaker pursues.

This system is highly individualistic. It gives both control and responsibility to the individuals who are most interested in the result and takes advantage of their self-interest in complete and creative argument. It seeks a solution by enabling the litigants to seek their own self-interest without regard for others; indeed, it expects them to argue selfishly. It is also open to the problems associated with extreme individualism: When an individual argues selfishly, he may be more motivated to hide or distort evidence. Two people arguing selfishly may cast the dispute in terms of their own self-interest but fail to articulate a reasonable societal view.

2. Elements of Inquisitorial Adjudication

Inquisitorial adjudication is generally cast as the opposite of adversarial adjudication. Thus, two essential elements of inquisitorial adjudication are: first, that the judge is primarily responsible for supervising the gathering of evidence necessary to resolve the issue; and, second, that the decisionmaker is not, therefore, merely a receptor for information at a neatly packaged trial, but is, instead, an active participant. In practice,

46. See, e.g., Damaska, supra note 16, at 1091-92, 1105; Fuller, supra note 43. For an effort to test this proposition, see Thibaut, Walker & Lind, supra note 16. For a critique of the test, see Damaska, supra note 16.

47. On the distortion effects of active judicial inquiry in an adversarial jury trial, see Frankel, supra note 2, at 1042-43. See also Frankel, The Adversary Judge, 54 Tex. L. Rev. 465 (1976). One commentator favors freer judicial inquiry in bench trials than in jury trials. See Uviller, supra note 7, at 1069 n.1.

48. In reality, the control and responsibility may fall largely to advocates, whose motivations are quite different. Legal ethics codes requiring zealous advocacy are designed to ensure that the advocate gives his maximum effort to the client's interest in prevailing. See generally Model Code of Professional Responsibility and Code of Judicial Conduct (1980); Schwartz, supra note 2, at 673.

49. This may especially be a problem when professional advocates have the primary responsibility for argument. Not always knowing how selfish the client wants to be, an advocate can assume the extreme and proceed on that basis. Advocates, in their ethically required zeal, may push the client to extremes that the client would not otherwise choose. See, e.g., Simon, supra note 2, at 52-59.
an inquisitorial "trial" such as is found in continental Europe may continue as a series of hearings for several months as the judge considers what further information he might need to resolve the dispute.\textsuperscript{50} At these hearings, the parties offer suggestions about further avenues for investigation, witnesses to examine, and so on.\textsuperscript{51} They do not, however, present their own witnesses; indeed, they generally do not interview witnesses in advance.\textsuperscript{52}

To some extent, the impartiality of the judge is guaranteed in much the same way as in adversarial adjudication: Judges with an interest in the outcome may not be involved in the case.\textsuperscript{53} But inquisitorial systems require the judge to be involved in fact investigation, which adversarial apologists argue could result in prejudgment and a lack of due diligence in pursuing opposing facts.\textsuperscript{54} Perhaps for this reason, inquisitorial systems have additional checks to counter this kind of bias in the decisionmaker. One is the opportunity that the parties have to suggest avenues of investigation—in other words, parties in inquisitorial systems have a substantial voice in the proceedings, even though they do not control the investigation and presentation of evidence.\textsuperscript{55} Another check is the fact that inquisitorial systems generally have at least one level of \textit{de novo} review, so that any fact missed by the original judge may be brought forth on review.\textsuperscript{56} Because the parties are participating with the judge in the investigation of the case, and because there are substantive and procedural rules in inquisitorial systems, the outcome should be at least as predictable and rational as in an adversarial system.\textsuperscript{57}


\textsuperscript{51} See Langbein, supra note 2, at 826-30.

\textsuperscript{52} Id. at 833-35. Damaska, supra note 16, at 1088-89.


\textsuperscript{54} See supra note 46 and accompanying text.

\textsuperscript{55} At least one commentator argues that the German system, generally characterized as inquisitorial like other continental systems, is really adversarial, and that the only difference between the German system and our own is in the degree of party participation. Langbein, supra note 2.

\textsuperscript{56} See, e.g., Langbein, supra note 2, at 856-57. See generally Kaplan, von Mehren & Schaefer, supra note 50.

\textsuperscript{57} The substantive rules in civil law systems are codified. See J. Merryman, supra note
Inquisitorial systems of adjudication are more communitarian than individualistic in nature. The goal is to seek the socially correct solution to the litigants' dispute by demanding cooperation among court and litigants in the development of evidence and argument. In theory, less importance is given to individual self-interest, though fair adjudication requires that inquisitorial systems allow individuals to argue their self-interest. Nevertheless, the judge, with a broader, disinterested perspective, has a relatively free hand in pursuing investigations and is not confined to considering only the parties' interests and arguments.

3. Comparison of Adversarial and Inquisitorial Theory

We have already seen that several checks exist in inquisitorial systems to ensure that the inquisitorial judge remains impartial throughout the process. The adversary system, with its division of responsibility, does not have so great a need for such checks. The potential for distortion of evidence in the adversary system has also been noted, however, and it means that checks are needed in the adversary system as well. Indeed, the distorting effects of the motive-based rationale are probably the primary reason for a number of non-adversarial checks that are evolving in the adversary system.

Inquisitorial theory does not require that the parties participate in the investigation of facts because that task belongs to the judge. But fair adjudication requires it, and all fair inquisitorial systems encourage the parties to offer suggestions. Thus, while party participation is not necessarily an inherent feature of inquisitorial theory, it exists in reality.

50, at 26-33. Perhaps for historical reasons, civil law systems generally have inquisitorial systems of adjudication, while common law systems generally have adversary systems of adjudication. The adversarial debate format is probably well-suited for common law development of legal doctrine. See infra section IV.

58. See Damaska, supra note 16, at 1103-04 (systematic social reality more important than details of case in continental systems).

59. See supra note 16 and accompanying text. The problem of a single person being responsible for both fact-finding and decisionmaking is a troublesome one in administrative law, where the fact-investigators and the fact-finders sometimes overlap. American administrative law generally requires a separation of function within an agency even if the agency is charged with both investigative and adjudicative functions. See R. Pierce, S. Shapiro & P. Verkuil, Administrative Law and Process 502-05 (1985).

60. Adversarial judges may also decide cases too quickly. Such quick decisions may affect evidentiary rulings, instructions to juries, or the decision itself if there is no jury. There is anecdotal evidence that quick decisions are sometimes made in adversarial adjudication. See, e.g., J. Frank, supra note 3, at 168-69. In addition, the writer once participated in a case in which the judge clearly had made up his mind after opening statements. It took a Herculean effort just to get permission to present evidence and arguments, and it was not at all clear that the judge listened to them.

61. A number of these are described in detail infra section III.B.

62. See, e.g., Langbein, supra note 2, at 826-30.
Conversely, adversarial adjudication may overemphasize party control to the point of distortion. Some commentators argue that inquisitorial adjudication offers a better balance of tasks than does adversarial adjudication because it gives the parties a significant voice but gives them considerably less opportunity to hide or distort evidence.63

Finally, the requirement of a rational basis for the decision is not really an inherent part of either adversarial or inquisitorial theory. In fact, however, each system has both substantive and procedural rules, which the judges must follow, and outcomes in each system are reasonably predictable. Indeed, in continental European systems, where judges are not former lawyers but are professional judges trained to the task,64 a judge's advancement and standing will depend upon the quality both of his investigations and of the justification for his decisions.65

Both adversarial and inquisitorial adjudication can be fair adjudication. Both have built-in biases that must be adjusted for. But the checks that the two systems have to counter their inherent biases probably make the two systems more similar than theory would suggest.66

B. An Evaluation of Adversarial Ideology

The adversary system has vociferous critics as well as passionate defenders. This section focuses on the two principal justifications that have been offered for adversarial adjudication. The arguments for and against adversarial adjudication center around the two principal justifications.

1. Truth

The first justification is that the adversary system is the best system for determining the truth.67 When each side presents its best case, the deci-

63. See generally Langbein, supra note 2.
64. See J. MERRYMAN, supra note 50, at 34-38; Langbein, supra note 2, at 848-55. Special training for judges has been proposed in this country as well. See J. FRANK, supra note 3, at ch. XVII. See generally MODERN JUDICIAL ADMINISTRATION: A SELECTED AND ANNOTATED BIBLIOGRAPHY 329-32 (R. Fremlin ed. 1973) (bibliography on judicial training).
65. A corps of professional judges whose advancement depends upon their work could result in a very dependent judiciary, one that was unwilling to render decisions contrary to the prevailing political mood. The propensity for judicial lawmaking in the United States, however, seems to be due less to adversarial adjudication than to other features of our system, such as constitutional guarantees of an independent judiciary and a common law tradition of judicial lawmaking. Adversarial argument can, however, make the points for and against a significant legal development crisper and clearer.
66. Inquisitorial and adversarial systems have been converging, in part to counter the biases described here. See, e.g., Langbein, supra note 2, at 825, 858-66. The movement that is taking place in inquisitorial systems, however, is not the subject of this article. While similar observations could probably be made about inquisitorial systems, I will not be making them. See generally M. DAMASEKA, supra note 42.
67. See J. FRANK, supra note 3, at 80; S. LANDSMAN, supra note 2, at 36; Freedman, Judge Frankel's Search for Truth, 123 U. PA. L. REV. 1060, 1065 (1975); Luban, Calming the Hearse Horse, supra note 2, at 468-69.
sionmaker has all the information he needs to reach a just result. When presentation of the case is left in the hands of the parties, the information- and motive-based rationales both suggest that each side will, indeed, present its best case.

Paradoxically, then, the principal criticism of the adversary system is that it masks the “truth.” 68 Truth is, of course, difficult to ascertain if only because people may view truth differently depending on their backgrounds, interests, and perspectives. But, as we have seen, adversarial adjudication encourages people actively to cover up facts that could lead to a more accurate portrayal of truth. 69 The result could be that information relevant to the decision is kept from the decisionmaker. In theory, discovery rules are supposed to alleviate this problem. 70 But discovery itself has become a weapon in the adversary arsenal and may not accomplish the lofty goals that the rules envision. 71

There has been some attempt to determine empirically whether the adversary system does, indeed, promote that uncovering of truth. 72 Despite these valiant efforts, however, it is unlikely that an accurate empirical study can ever be done. Truth itself is difficult to define 73 and even more difficult to ascertain. There are both factual and legal elements in any adjudication, so that a determination of liability may reflect a factual determination, or a view of the proper application of law, or even a community standard only vaguely related to the facts and the law. Adjudication is much more than determining facts, as the discussion of the goals of a procedural system should demonstrate. 74

2. Individual Dignity

Perhaps for all of these reasons, some of the most passionate defenders of the adversary system now focus on another justification, all but abandoning the truth theory. That new justification is the preservation of individual dignity. 75 This theory says that the adversary system best preserves the autonomy of the individual by allowing him free rein in making

68. See, e.g., J. FRANK, supra note 3, at ch. VI.
69. See, e.g., Langbein, supra note 2, at 842.
71. See infra note 146 and accompanying text.
72. See supra note 16.
73. See supra notes 7-16 and accompanying text.
74. See supra notes 6-31 and accompanying text. See generally J. FRANK, supra note 3.
75. See, e.g., S. LANDSMAN, supra note 2, at 37; M. FREEDMAN, supra note 2, at 9-24. One difficulty in justifying the adversary system may stem from some confusion about whether we are justifying a fact-finding procedure or a law-finding procedure. The problems with the “truth” justification suggest that fact-finding is not the adversary system’s strength. See Langbein, supra note 2, at 841-48.
his case to the court. Only by giving the litigants the fullest voice possible can individual dignity be preserved. Indeed, Landsman argues that a preoccupation with truth may be "dangerous," in that truth-seekers may find it appropriate to use torture and other devices to find the "truth." Several aspects of adversarial adjudication, he argues, help to check this tendency, including party control of litigation, the requirement of zealous advocacy, and a strict evidentiary code.

This argument is a strong statement of support for individualism. In other words, it is a statement of value more than a statement about the adversary system itself. There is nothing wrong with arguing about values, but it is helpful to understand what we are doing. The adversary system is a highly individualistic system of adjudication, but the more communitarian inquisitorial systems seem to work equally well in modern practice, and without unduly compromising individual dignity. Perhaps we should ask whether it makes sense to employ an individualistic, confrontational system for resolving disputes. Casting the parties as adversaries doing battle to protect their respective interests makes one kind of statement about the dignity and worth of the individual; casting them as people with a problem that needs to be resolved with outside help makes another kind of statement about individual dignity. The argument seems to be about which is the more valid statement.

Additionally, it is not clear that the adversary system preserves individual dignity. One lay critic of the adversary system has focused on a problem that practitioners have seen from another perspective: the litigant's loss...
of control to the attorney who represents her.\textsuperscript{80} This loss of control can cause considerable anger, and it is a principal reason for the elaborate and often bizarre system of ethics under which lawyers operate.\textsuperscript{81} This loss of individual control is hardly consistent with either individual dignity or an individualistic ethic.\textsuperscript{82}

The criticisms that have been leveled against the adversary system reflect symptoms of a deeper malaise—one that has not yet been sufficiently analyzed. Indeed, like Simon's "ideology of advocacy," the adversary system seems to be a phenomenon in search of justification. The justifications shift over time, but the basic phenomenon remains unexamined. But it is not only the justifications that shift over time; our present system of dispute resolution sometimes looks quite unlike a theoretically pure adversary system. How we arrived at this system and where we are likely going with it are examined next.

### III. EVOLUTION OF THE ADVERSARY SYSTEM

#### A. Early History

1. Starting Points

Most early histories of civil procedure concentrate on the transition, during the twelfth and thirteenth centuries, from ancient, irrational modes

\textsuperscript{80} See A. Strick, Injustice for All (1977); see also Simon, supra note 2. The existence of a professional elite of attorneys has also been identified as a cause of inequality in the administration of justice. See, e.g., J. Auerbach, Unequal Justice 10, 12 (1976); Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974).

\textsuperscript{81} See generally Model Code of Professional Responsibility and Code of Judicial Conduct (1980); Ethics and the Legal Profession (M. Davis & F. Elliston eds. 1986); The Good Lawyer (D. Luban ed. 1984).

\textsuperscript{82} The adversary system is also frequently criticized on the ground that it causes unnecessary delays in litigation. See, e.g., S. Landsman, supra note 2, at 34-36; Miller, supra note 2. With the pace of litigation largely in the hands of the litigators, it was often possible for a party, usually the defendant, to delay the resolution of the issue for years, by which time any compensation paid to the plaintiff had lost considerable value. Recent amendments to the Federal Rules of Civil Procedure are designed to give the judge more discretion in preventing or dealing with delaying tactics. These include more authority over pre-trial conferences and discovery conferences, including the authority to set time limits, Fed. R. Civ. P. 16, and more authority to impose sanctions on recalcitrant lawyers and their clients. Fed. R. Civ. P. 11, 26, 27. Landsman argues that contentions that the adversary system delays litigation may be inaccurate, and suggests that delay may be attributable to other causes. S. Landsman, supra note 2, at 34-36. In any event, he says, delay is related to the fact that the parties are heard in full, and that is a good thing. Id.; see also Gross, The American Advantage: The Value of Inefficient Litigation, 85 Mich. L. Rev. 734 (1987) (reply to Langbein, supra note 2).
of proof to the jury "trial." The adversary system, however, has many sources, and a broader perspective is needed. Nevertheless, several aspects of early procedure are starting points for the development of adversarial adjudication.

a. Party Control and the Passive Decisionmaker

During the twelfth and thirteenth centuries, the parties were primarily responsible for commencing litigation (including criminal actions) and for defining the issue through pleadings. They also had some control over selecting the mode of proof. Selecting the mode of proof was important because the proof itself was irrational and difficult to control; the power to select the most advantageous mode of proof was therefore critical.

The ancient modes of proof were ordeal, battle, and wager of law. All employed an oath to invoke the judgment of God. In ordeal, the party who had the burden of proof was required to swear an oath, then submit to some test, such as holding a red-hot iron rod for a prescribed time; if the iron did not burn him, his case was proved. In battle, the litigant challenged his adversary to battle, though champions were often used to perform the actual fight in civil cases. The winner of the battle, who had also sworn an oath, thereby proved his case. Wager of law depended on oaths by the litigant and his "suitors," who swore to the truth of his story. If the litigant and his suitors performed their oaths, which were difficult and elaborate, without error, the litigant proved his case. In wager of law, the oath was everything; the penalty for a false oath was thought to be eternal damnation. No matter which ancient mode of proof was selected, the party who had the burden of proof was the only rational element in the process.

83. See, e.g., 2 F. Pollock & F. Maitland, supra note 13, at 598-674; T. Plucknett, supra note 6, at 379-418.
84. See 2 F. Pollock & F. Maitland, supra note 13, at 604-05.
85. See id. at 598-620; T. Plucknett, supra note 6, at 399-418.
86. See 2 F. Pollock & F. Maitland, supra note 13, at 603-10.
87. Pollock and Maitland say that assignment of the burden of proof was the only rational element in the process. Id. at 603.
88. While this sounds like an impossible test, there is evidence that the party who suffered the ordeal prevailed about half the time. Id. at 599 n.1. The ordeal has ancient origins and was a widespread primitive means of proof. See generally Glotz, The Ordeal and the Oath, in 2 Primitive and Ancient Legal Institutions 609-20 (A. Kocourek & J. Wigmore eds. 1915).
89. See 2 F. Pollock & F. Maitland, supra note 13, at 600, 632-33; T. Plucknett, supra note 6, at 116-17.
90. See 2 F. Pollock & F. Maitland, supra note 13, at 600-01, 634-36; T. Plucknett, supra note 6, at 115-16.
91. See 2 F. Pollock & F. Maitland, supra note 13, at 600-01.
92. See id. at 600.
proof was employed, failure to "prove" one's case after taking an oath could lead to perjury charges.\textsuperscript{93}

Superficially, these ancient modes of "proof"\textsuperscript{94} seem to provide the ultimate in party control. The outcome depended entirely on the physical strength, stamina, intelligence, or self-control of the party.\textsuperscript{95} But the ultimate decisionmaker was assumed to be God, and the parties and the court had to rely heavily on clergy for the invocation of God's power and for the interpretation of his signs. This reliance on clergy left considerable power in the hands of human interpreters, for whom there was no test of either impartiality or passivity.\textsuperscript{96} Because of the clergy's power, party control itself was undermined.

The ancient modes of proof began to fall into disuse in the thirteenth century. The Lateran Council of 1215 forbade clergy from participating in ordeal;\textsuperscript{97} because their participation in seeking the guidance of God had been important, ordeal virtually disappeared after the ban. Battle continued in the form of duels, which were not banned in England until 1819,\textsuperscript{98} but battle, too, became less significant during the thirteenth century.\textsuperscript{99} And wager of law, with its elaborate ritual and risk of loss after the slightest misstep, had always been so difficult that litigants had often taken their chances with the hot iron.\textsuperscript{100} Thus, litigants were ready for a new mode of proof.

As these ancient modes of proof declined during the thirteenth century, the precursor of the modern jury trial began to gain ascendance. Originally termed an inquest "by the country," this mode of proof required the sheriff to summon a number of freemen of the county who had some knowledge of the facts or who were required to inquire about the facts before coming together to serve as a jury.\textsuperscript{101} Thus, these jurors were not

\textsuperscript{93} Id.

\textsuperscript{94} The ancient modes of proof were not, of course, proof in the modern sense. There was no rational examination of evidence; indeed, the only "evidence" relied upon was the supposed judgment of God.

\textsuperscript{95} In the case of wager of law, it also depended on his ability to find suitors who could get through the elaborate oath. The theory, of course, was that the proof was out of the party's control and in the hands of God. But the party, in some sense, exposed his body (or his soul) to the judgment of God.

\textsuperscript{96} See 2 F. Pollock & F. Maitland, supra note 13, at 599 n.2; T. Plucknett, supra note 6, at 115. There is some tendency in the literature to confuse impartiality with passivity. See, e.g., S. Landsman, supra note 2, at 2-4. The two concepts must be distinguished. A judge can be impartial but very active in developing the case, as judges are in continental inquisitorial systems. Impartiality is a requirement for fair adjudication, but judicial passivity is not. Those who confuse the two ideas betray a bias in favor of adversarial adjudication.

\textsuperscript{97} 2 F. Pollock & F. Maitland, supra note 13, at 599.

\textsuperscript{98} Id. at 641.

\textsuperscript{99} See id. at 632.

\textsuperscript{100} Id. at 601. Nevertheless, wager of law was favored by some and "was not finally abolished until 1833." T. Plucknett, supra note 6, at 116.

\textsuperscript{101} See 2 F. Pollock & F. Maitland, supra note 13, at 621-22.
passive receptors of pre-packaged information presented at trial, as modern jurors are; rather, they were active inquirers who were, themselves, required to take an oath. Their resulting "findings" often amounted to "retail[ing] the gossip of the countryside." They were more like witnesses than passive fact-finders. Similarly, the judges actively questioned witnesses, examining, for example, a litigant's suitors to ensure that they were not interested parties and, that they really knew something about the facts. Even the jury, then, did not preserve party control through the proof stage. Nevertheless, the jury became a popular substitute for other modes of proof, and by the middle of the thirteenth century, it was the predominant mode of proof. In part, this practice may be a testament to the uncertainties in the other modes of proof.

b. Legal Profession

Litigants in the twelfth and thirteenth centuries had a good deal of help. Pleading was complex even then, and a strong legal profession was already in existence to help litigants through that stage of the proceedings. Pleading was, as noted above, an important part of the proceedings. Not only did it determine the issue to be decided, but it helped determine the burden of proof and the mode of proof. Assistance was also available at the proof stage. Those litigants who were forced to undergo the ordeal could turn to people who advised them on how to enhance their chances of prevailing. Those who selected battle could sometimes hire champions to fight for them, and a large—and disreputable—company of such champions developed. It is easy to see how the lawyers, with their rational approach to pleading, would ultimately take over the proof stage

102. T. PLUCKNETT, supra note 6, at 124.
103. This tradition of non-professional jurors may be a factor in the development of the adversary system. Because the jurors' primary responsibilities lie elsewhere, the system needs to make minimal demands on their time. A single-event trial at which the fact-finder merely listens to the evidence and decides the matter is well-suited to the use of such non-professional fact-finders. A more inquisitorial approach probably would not work well.
104. 2 F. POLLOCK & F. MAITLAND, supra note 13, at 609-10. This questioning went to the suitor's qualifications and not to the evidence as such. At this time in history, there was little concept of evidence as a basis for decision.
105. Id. at 641.
106. See T. PLUCKNETT, supra note 6, at 216-23. Pleading at this time was the "central stage" in the process. Id. at 399.
108. The ordeal was primarily reserved for those charged with a criminal act. See id. at 603.
109. See id.
110. See id. at 633; T. PLUCKNETT, supra note 6, at 116-17. Champions could not be used in criminal cases. See id. at 116.
111. See 2 F. POLLOCK & F. MAITLAND, supra note 13, at 633; A. STRICK, supra note 80, at 30-31.
of litigation as well, when that stage, too, came to be seen as a rational process.112

c. The Common Law

The common law was a strong tradition even in the thirteenth century.113 That strength was a factor in England's resistance to the movement toward codification. While most of continental Europe adopted classical Roman law in a movement known as the Reception,114 England retained its customary law, resisting both the ancient Roman ideas and the process of codification. With case-by-case legal development, there was, perhaps, more of a need for a debate format in the adjudicative process. By contrast, in continental Europe the debate over the shape of the law took place more clearly in the bodies that codified the law, and judges were viewed more as law-appliers than as law-makers.115

2. Additional Conceptual Developments

The starting points for the development of the adversary system, then, were all in place by the end of the thirteenth century. There existed a modicum of party control over the litigation process, a strong legal profession, and a tradition of customary, or common law development that was strong enough to resist later pressure to codify. All these factors were important in the formation of the adversary system, but several additional elements helped the adversary system solidify in England and its daughter countries.116

112. See infra notes 118-24 and accompanying text. It has been suggested that lawyers prefer not only adversarial adjudication, but complex legal rules and common law development as well, because those institutions are professionally advantageous to them. See Galanter, supra note 80, at 119. Galanter also points out, however, that legal professionals such as ours, that tend to be advantageous to the "haves," also have room for "agents of change," professionals who identify with have-nots and press their claims. Id. at 151.


114. T. Plucknett, supra note 6, at 43-44.

115. There is considerable current debate over the proper role of judges. See supra note 23. It appears, however, that judicial law-making and adversarial adjudication go hand in hand.

116. There may be other factors in the development of adversarial adjudication as well. For example, the growth of a non-professional jury, ideally suited to a single-event trial, may be a factor. See supra note 103. The developments I identify in this subsection were important in continental Europe as well, and certainly had an impact on the development of inquisitorial systems of adjudication. I am, however, concerned here only with their relationship to adversarial adjudication. It is the relationship between these developments and the starting points identified above that led to the adversary system. If the premises are different, we should expect these developments to have a different impact.
Two of these were broad-based political and philosophical movements and two were refinements of legal thinking. The first broad movement was the rise of democratic principles and institutions. While this movement is traceable at least to the Magna Carta in 1215, democratic principles were refined over a period of many centuries. The critical principle for adversarial adjudication is the principle of individual autonomy. The adversary system is a highly individualistic system of adjudication. It depends on individual autonomy and initiative because it places the burden of developing and presenting the case on the individual who is interested in the outcome. Without a democratic ideal that honored the dignity and autonomy of the individual, the adversary system could not have worked.

The second broad movement was the rise of scientific method in philosophy. Parts of the legal process in England had always been rational, of course. Common law development is highly rational, moving step by step, analyzing small differences in cases and determining the likely social impact of a given decision. Even the jury trial had an element of rational investigation in it: The jury was supposed to investigate the facts and determine the right result. But until the rise of science in the seventeenth century, the notion of systematic evaluation of physical and testimonial evidence was not strong. Such philosophers as Descartes and Spinoza helped demonstrate how to reason from physical evidence. The significance of this movement for judicial procedure is great. The notion that there is an objective truth that can be discovered through reason is quite different from the irrational ancient modes of proof, which appealed to magic—if the right formula is used, or the right ordeal is prescribed, or if God is invoked properly, there is no need to think through the factual evidence. Rather, God and the system will provide the answer. The modern adversary system still has magical elements, but it is essentially a rational system. It depends on proof being presented by the two sides, and on a judge’s or jury’s power to reason from the evidence to a conclusion. A belief in reason’s power to tame the evidence is, therefore, a factor in the development of adversarial adjudication.

117. J. Frank, supra note 3, at 92.
118. See generally B. Russell, A History of Western Philosophy 525-40 (1945); Main Currents of Western Thought 249-354 (F. Baumer ed. 1970). This may be more important in continental systems, where a rational social order is more openly sought. See Damaska, supra note 16, at 1104-05.
119. For an illuminating example of the rationality of common law development, see Fuller, supra note 38, at 375-77.
120. See 9 W. Holdsworth, A History of English Law 130-31 (1926).
121. See generally 31 Great Books of the Western World, (R. Hutchins ed. 1952) (Descartes and Spinoza).
122. See generally 9 W. Holdsworth, supra note 120, at 126-44.
123. J. Frank, supra note 3, at 37-61.
124. I do not mean to suggest that other adjudicatory systems are irrational. The
This discussion leads us to the two legal ideas that aided in the development of the adversary system. The first of these ideas is the distinction between law and fact. Early modes of proof made no such distinction, but simply asked which of the two parties should win. But the distinction started to appear quite early, with a division of authority in jury trials whereby juries decided facts, and judges decided law. Dividing authority between judge and jury is still the primary reason for making the distinction. There is no hint that fact and law are different enough to require different treatment. But arguments about law and fact are different. An argument about fact is about what happened at some time in the past; proof is presented, and the trier of fact must reconstruct the past from that proof. An argument about law, on the other hand, is about what rule ought to apply to the situation that has been proved. It does not involve proof, but is, to some extent, a debate about the structure of society and its institutions. To the extent that the structure evolves through legal institutions, as it does in all common law countries, that debate is an important one and has been for centuries. That the debate format has been co-opted for fact-finding may be an aberration: It is, simply, a different kind of problem and requires a different kind of analysis.

The second legal development that aided formation of the adversary system was the substance-procedure distinction, which is identified pri-inquisitorial system also depends on reason, and probably values “scientific” adjudication more highly than does the adversary system. See Damaska, supra note 16, at 1104-05. It might be said that no modern system of adjudication could develop without a faith in the power of reason.

125. See 2 F. Pollock & F. Maitland, supra note 13, at 602; J. Frank, supra note 3, at 41.

126. See T. Plucknett, supra note 6, at 417-18.

127. Id. This left the decision on the law in the hands of the sovereign or his representative.


129. Fact-finding is not pure, as I recognized earlier in this paper. See supra notes 7-16 and accompanying text. It does sometimes involve debate and persuasion. But, as I also noted earlier, a goal of fair conflict resolution is to make truth and persuasiveness coincide as often as possible. Id. Adversarial fact-finding may make that goal harder to reach. See Langbein, supra note 2, at 841-48.
arily with Blackstone in the eighteenth century.\textsuperscript{130} It is not surprising that modern adversarial theory and practice consolidated shortly after that.\textsuperscript{131} The substance-procedure distinction was important for the development of the adversary system because it elevates the role of procedure and, therefore, makes devising and justifying the right procedure that much more important. The "right" procedure will produce the "right" result. The system becomes God, and it is the system that is invoked to answer the substantive question about who should win. The adversary system is not an inevitable result of the substance-procedure distinction, but in combination with the other developments described here, it was the most logical kind of procedural system to appear in England and other common law countries.

The factors that came together to produce an adversarial system of adjudication, then, are: The tradition of party control over some aspects of adjudication; the strong legal profession that would naturally gravitate to a system that increased that control, thereby giving the parties and their attorneys more power; the democratic and individualistic ideals that grew in England, which would naturally lead to an individualistic system of dispute resolution;\textsuperscript{132} the growing faith in reason in decisionmaking, including faith in the ability of reason to tame the facts; and the growing faith in procedure as a magical substitute for God. The adversary system is seen as a mode of proof, but one thesis of this article is that its use as a mode of proof is not entirely consistent with its fundamental character as a debate.

B. Non-Adversarial Elements in Modern Litigation

Many recent innovations in procedure have substantially modified the adversary system. These modifications have not been uniform. The adversary system remains more robust in some forms of litigation than others. Complex litigation, involving multiple parties or difficult scientific or social issues, is the area where the adversary system has undergone the most significant modification. The reasons, which are more fully developed

\begin{thebibliography}{9}
\bibitem{130} See T. Plucknett, supra note 6, at 381-82.
\bibitem{131} See S. Landsman, supra note 2, at 7; cf. Langbein,\textit{ Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources}, 50 U. CHI. L. REV. 1, 123-34 (1983) (development of adversary system in criminal law). Until this distinction was made, substance and procedure had been tied together in the forms of action. It is not surprising that soon after this distinction was made, the forms of action were finally abolished in England, see T. Plucknett, supra note 6, at 375, and a uniform procedure for all common law actions was developed.
\bibitem{132} Several commentators have noted the close relationship between adversarial modes of proof and an individualistic society. See, e.g., J. Frank, supra note 3, at 92; Damaska, supra note 16, at 1103-06; Elliott, supra note 20, at 336 n.94.
\end{thebibliography}
EVOLUTION OF THE ADVERSARY SYSTEM

later, center largely on the need for a manager in such litigation—a task that often falls by default to the judge. The adversary system has also been significantly modified in family law, where “alternative dispute resolution” is prominent. In family law, it is thought that adversarial procedure merely increases the contentious behavior of people who must, ultimately, be able to work together, and that adversarial dispute resolution is therefore inappropriate. Adversarial fact-finding also fails significantly in complex litigation, and some non-adversarial elements have developed to remedy that problem. This section examines in detail some of these recent innovations, showing how they are non-adversarial, and evaluating how well they promote fair adjudication as defined in Section I.B.

1. Discovery

Discovery is the generic term for a number of procedures for obtaining information from one’s opponent in litigation. Together, these discovery devices enable the parties to learn the facts that the other side knows, thereby equalizing the information that the parties possess. In a sense, it is an admission that the assumption of equality behind adversarial theory is unfounded; to overcome the inequality, the parties must be required to share their factual information.

133. See infra notes 232-67 and accompanying text.
134. See infra notes 208-18 and accompanying text. There are non-judicial case managers as well. See infra notes 219-23 and accompanying text.
136. See, e.g., S. LANDSMAN, supra note 2, at 52-53; Friedman & Anderson, Divorce Mediation’s Strengths, 3 Calif. Law. 36 (1983); Hyman, supra note 135, at 864; Riskin, Mediation and Lawyers, 43 Ohio St. L.J. 29, 33 (1982); Sander, supra note 135, at 13-14. This rationale could easily apply to all kinds of litigation. A procedure for resolving disputes of any kind may work better if it is designed to diminish rather than encourage contentious behavior. Some commentators worry that non-contentious procedure may encourage too much compromise: People will abandon their rights too early. See Brunet, supra note 135, at 38; Edwards, Alternate Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 677 (1985); Fiss, Against Settlement, 93 Yale L.J. 1073, 1076 (1984). I am not convinced of this, but even if it is a potential problem, we are certainly creative enough to devise ways of protecting against it. Furthermore, a contentious procedure may well encourage people to press unsubstantiated claims beyond all reason. See generally J. LIEBERMAN, THE LITIGIOUS SOCIETY (1981).
138. Discovery is limited to facts in the possession of one’s opponent. In general, it cannot be used to learn the other side’s legal theories or litigation strategy. See Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947).
Although pretrial discovery has origins in Roman and canon law, its development in Anglo-American law has been relatively recent. Use of discovery broadened beyond its moorings in equity procedure in England during the nineteenth century, but its early development in the United States was largely confined to individual states. With the adoption of the Federal Rules of Civil Procedure in 1938, discovery became an essential part of federal procedure. Since that time, it has been the subject of considerable discussion and debate.

Discovery is a non-adversarial element in adjudication. It works some changes in both party control and judicial passivity, but the scope of those changes is open to some debate. On the one hand, discovery was designed to operate independently of the judge to the extent possible. With rare exceptions, no judicial order is required to conduct discovery. The parties involve the judge only when they have a dispute over discovery. Thus, the traditional roles of the parties and the judge are preserved. On the other hand, the parties are required, under threat of sanctions that could include loss of the case or contempt, to turn over facts in their possession to their opponent in the litigation. The party, then, loses some control over what he does with the information he has. Most litigants engage in considerable negotiation over discovery disputes in hopes of avoiding a trip before the judge; this negotiation can restore some of that lost control.

141. See Millar, supra note 139, at 442-46; Sunderland, supra note 140, at 219-21.
142. See 5 R. POUND, JURISPRUDENCE 493-99 (1959); Developments in the Law, supra note 137, at 950; Millar, supra note 139 at 446-52.
144. The principle exception is for physical and mental examinations. See FED. R. CIV. P. 35. Judicial orders are also required for follow-up examinations of testifying expert witnesses. FED. R. CIV. P. 26(b)(4)(A)(ii).
145. Parties are not normally required to turn over documents prepared by that party or his representatives. See FED. R. CIV. P. 26(b)(3). That "work product" rule is designed to prevent parties from obtaining material that reveals litigation strategy or other "mental impressions" of lawyers and other professionals. However, it is not designed to prevent a party from revealing facts in his possession.
Even so, their knowledge that the judge could force them to disgorge information affects their strategic decisions, including settlement decisions. The seriousness of the interference with party control is also somewhat mitigated by the use of discovery as an adversarial weapon. Many lawyers use discovery offensively, as a tool to harass or delay. Because judges are not routinely involved in discovery, and because the parties are generally reluctant to take even discovery disputes to the judge, the parties can sometimes use discovery tools with considerable contentious effect. Such use of discovery is more likely to occur in major litigation where the stakes are high and money can be spent on discovery. But such use of discovery was not intended; it occurs because discovery is anomalous in an adversary system. It is, in fact, a non-adversarial element in adjudication, which might be expected to have the mixed results it has had.

Discovery exists because the adversary system does not work perfectly. It is an attempt to overcome the effects of one of the inequalities—the inequality of information—that undermines adversarial fact-finding. It is an admission that one of the assumptions of adversarial adjudication—the assumption of equality—cannot be supported. The assumption of equality became part of the adversary system some time after it was recognized that magic could not determine victors. If God does not decide who wins, the system must do so; but the system can do so only if the parties are equal—in resources, analytical skill, creativity, advocacy skill, and information. In other words, the adversary system itself is the magic that replaces God’s intervention. Discovery is a subtle admission that the system does not do what it is intended to do.

In addition to equalizing the parties (in theory, at least), discovery is consistent with the elements of fair adjudication, and may enhance some of them. While judges who become involved in discovery disputes are certainly less passive than the traditional adversary model requires, their impartiality should not be affected. Judges in continental Europe, who

146. The subject of “discovery abuse” is a recurrent theme in the debate. The problem is that discovery, which is an essentially cooperative device, has been grafted onto a non-cooperative system; the result is predictable. Instead of being used to open up the fact files of all the parties, as was intended, discovery has come to be another weapon in the adversarial arsenal. It is sometimes used to harass opponents or to delay the litigation. Problems of discovery abuse, however, are most prominent in complex litigation, where the parties can afford to use discovery tactics and where discovery strategizing is more likely to pay off. See generally W. Glaser, supra note 143; Brazil, supra note 70; Brunet, supra note 135 at 34; Speck, supra note 143; Developments in the Law, supra note 137; Note, Deterrence Orientation, supra note 143; Note, Discovery Abuse Under the Federal Rules: Causes and Cures, 92 Yale L.J. 352, 356-60 (1982).

147. See, e.g., W. Glaser, supra note 143, at 36, 130, 197; Brazil, supra note 70, at 1314-15; Speck, supra note 143, at 1149-50; Developments in the Law, supra note 137, at 942; Note, Deterrence Orientation, supra note 143, at 1033-35.

are much more active than is an American judge who decides a discovery dispute, are not considered to lose their impartiality because of their active role. Furthermore, while judges who decide discovery disputes sometimes see evidence that is inadmissible at trial, our system has always assumed that judges are capable of ignoring inadmissible evidence. In any event, judicial intervention is still the exception rather than the rule, and discovery disputes are often decided by magistrates rather than judges, thus preserving the judge's pristine purity for the trial.

Discovery may, moreover, have a significant impact on rational decisionmaking. If the parties know the information that is available to both sides, they can better predict the outcome. That knowledge, in turn, prepares them better for presenting factual and legal argument to the trial judge. At the same time, the parties still have an undiminished voice in the proceedings. They are free to make their own arguments based on the information that is available—indeed, based on fuller information than there would be without discovery. That voice should help preserve their individual dignity, though some might argue that dignity is undermined by the requirement that litigants disgorge information on the threat of

149. See Langbein, supra note 2, at 857.


151. Errors in admitting evidence are generally considered harmless within the meaning of Fed. R. Civ. P. 61 when the judge is the fact-finder, unless it can be proven that the judge relied on the inadmissible evidence. See, e.g., Goodman v. Highlands Ins. Co., 607 F.2d 665, 668 (5th Cir. 1979); Multi-Medical Convalescent & Nursing Center of Towson v. N.L.R.B., 550 F.2d 974, 977-78 (4th Cir.), cert. denied, 434 U.S. 835 (1977); Builders Steel Co. v. Commissioner, 179 F.2d 377, 379 (8th Cir. 1950); Granin Grain & Seed Co. v. United States, 170 F.2d 425, 427 (8th Cir. 1948). Such errors are more likely to be grounds for reversal when the jury is the fact-finder. See, e.g., Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1099 (7th Cir. 1987). See generally Jurors Unlikely to Follow Judge's Order to Disregard Testimony, Study Shows, Chi. Daily L. Bull., March 28, 1988, at 1.


153. Predictability is never perfect, of course. See, e.g., J. Frank, supra note 3, at 49. But it is virtually impossible if neither side knows what the other side is likely to present at trial.
contempt. A more persuasive argument, however, is that the dignity that is achieved by a fair "fight" on full information outweighs any compulsion that exists in the system. On balance, the system is more fair with discovery than without it. Discovery, then, is a non-adversarial element in American adjudication that enhances the fairness of the process.

2. Class Actions

a. History and Rationale

The class action originated in the English equitable procedure, the Bill of Peace.\textsuperscript{154} Three requirements had to be met for suits to be brought under the Bill of Peace: (1) there had to be too many class members for the legal device of joinder to be practicable; (2) the members had to be bound by common interests; and (3) the named parties had to adequately represent the other class members.\textsuperscript{155} Cases brought under the Bill of Peace generally involved customary groups such as manors and parishes, and related to claims regarding land or status.\textsuperscript{156} Under English equity practice, questions of the adequacy of a named party's representation or the effect of a judgment on unnamed parties never arose. The named party had to seek consent from all unnamed parties, so that they did, in fact, personally choose their representative in the litigation.\textsuperscript{157} Furthermore, the class being represented was, as a customary group, easily delimited, so it was easy to determine who was abound.\textsuperscript{158} The Bill of Peace, then, was a device of limited applicability, chiefly beneficial as a means of controlling the docket.

The principles underlying the Bill of Peace were incorporated into the early equity rules in the United States. In the United States, however, where classes were defined by common interests not necessarily associated with any pre-existing customary group,\textsuperscript{159} there was controversy over whether such a judgment could be binding on persons not before the court.\textsuperscript{160} The original class action rule, Federal Equity Rule 48, stated explicitly that such persons were not bound.\textsuperscript{161} In 1912, that provision was


\textsuperscript{155} See 7A C. Wright & A. Miller, supra note 154, § 1751, at 7-8.


\textsuperscript{157} See Yeazell, supra note 156, at 878.

\textsuperscript{158} See id. at 876-78.

\textsuperscript{159} See id. at 876-77.

\textsuperscript{160} See 7A C. Wright & A. Miller, supra note 154, § 1751, at 12-14.

\textsuperscript{161} See id. at 12-13.
dropped, creating confusion that was further aggravated by apparently conflicting Supreme Court decisions regarding the binding effect of judgments under the new rule.\textsuperscript{162}

When law and equity were merged in 1938, the class action became part of the new federal rules, but the new concept of class actions was different from the one that informed the equity rules. Three categories of class actions were set up, based on the nature of the right involved. The first two, commonly referred to as "true" and "hybrid" class actions, permitted suits similar to those brought under the Bill of Peace.\textsuperscript{163} True class actions concerned joint or common interests in such areas as tort or contract.\textsuperscript{164} Hybrid class actions had to do with several interests in property—nuisance was the paradigm.\textsuperscript{165} The third category, termed "spurious," covered several interests that were bound only by a common question of law or fact.\textsuperscript{166} True and hybrid class actions were considered binding on all members of the class, but "spurious" class actions bound only those class members who explicitly joined in the class action.\textsuperscript{167} This limit on the binding effect of spurious class actions lessened the impact of an otherwise significant change, permitting class members to choose to be bound if victory were assured, but not if defeat seemed likely.

In 1966, the class action rule was overhauled: the three categories were restructured; the intervention privilege for common question class actions was changed to an "opt-out" privilege, strengthening the binding effect of judgments; and judicial oversight of the class action litigation was strengthened and systematized.\textsuperscript{168} The three categories are now defined functionally. The first permits class actions to be maintained when individual actions would be so related as to involve substantially the same issues, creating a risk of inconsistent adjudication. The second covers cases where the relief sought is an injunction generally applicable to the class. The third category, which is similar to the spurious class actions of the original rule, was thought by some to have been broadened considerably


\textsuperscript{163} Compare 7A C. Wright \& A. Miller, \textit{supra} note 154, § 1752, at 16 with Z. Chafee, \textit{supra} note 156, at 201. As noted above, one difference is that suits under the Bill of Peace involved groups that had an independent existence. See Yeazell, \textit{supra} note 156, at 876-77. The original federal class action rule bound otherwise unrelated people who had a common interest in the dispute.

\textsuperscript{164} See 7A C. Wright \& A. Miller, \textit{supra} note 154, § 1752, at 16.

\textsuperscript{165} See \textit{id}.

\textsuperscript{166} See \textit{id}.


\textsuperscript{168} See \textit{Fed. R. Civ. P.} 23; \textit{id.} advisory committee's notes to 1966 amendments.
in scope when the opt-in privilege was changed to an opt-out privilege.\textsuperscript{169} While it has been argued that the rise in the incidence of class actions is attributable to the 1966 revision of the rule,\textsuperscript{170} Professor Arthur Miller has argued that the increase is due to a confluence of societal changes, so that even the old equity rules would have been made to accommodate the growing need for class actions.\textsuperscript{171}

b. Non-Adversarial Aspects of the Class Action

The position of unnamed class members presents the most obvious compromise of adversarial principles. Unnamed class members have no choice in the initiation of a suit that can affect them profoundly. Class actions brought under either Rule 23(b)(1) or 23(b)(2)—the first two categories of class actions—do not even require notice to the individual class members that the suit has been initiated, though it is within the judge's discretionary power to order it.\textsuperscript{172} While notice is required in all three categories before settlement or dismissal of a class action,\textsuperscript{173} it is not clear that the unnamed class members have any substantial power once they have received notice. Certainly, one protest against a settlement that the judge thought was fair would not be likely to have much effect. In any event, the first two categories of class actions could proceed normally through the trial to a judgment binding on all unnamed class members without any notice ever being given.

Unnamed class members have somewhat more freedom of choice in the third category of class actions, though it is still limited. The best practicable notice must be given them soon after the suit is begun,\textsuperscript{174} and they have the opportunity to opt out of the suit. If they opt out, they of course do not share in any damage award, but they then have the opportunity to relitigate the issue, perhaps winning a higher judgment.\textsuperscript{175} Many modern class actions, however, are brought precisely because the individual damages are too low to make individual suit worthwhile.\textsuperscript{176} Even if damages

\textsuperscript{169}. See Miller, supra note 31, at 670.
\textsuperscript{171}. See Miller, supra note 31; see also Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1373 (1976).
\textsuperscript{174}. FED. R. Civ. P. 23(c)(2).
\textsuperscript{175}. If the class loses, it is unlikely that an individual would attempt a suit.
\textsuperscript{176}. But cf. Miller, supra note 31, at 685-86 n.92 (incentives for such actions may change in the future).
are substantial, the award is likely to be higher than in an individual suit because of the overall savings in attorney resources. A final alternative—to intervene as a named party—would give the class member more control over the course of the litigation, but may be prohibitively expensive in relation to the expected judgment. Thus, there is considerable incentive to remain in the class as an unnamed member, and little to opt out.

The lack of control over initiation of the suit may be the unnamed class member's smallest concern. In the first two categories of class actions, and in the third when the class member chooses to remain in the class, the unnamed class member has no effective control over the course of the litigation. He does not choose the attorney, he does not consult with the attorney as to his wishes, and he has no knowledge of the development of proofs and the legal arguments. In short, though bound by the judgment, he has no adversarial participation in the suit. From the perspective of the unnamed class member, then, the class action severely compromises adversarial principles, despite the fact that it is theoretically extending them to persons previously unable, for economic reasons, to take advantage of them.

It might be expected that the named parties, at least, have almost full advantage of the principles of adversarial adjudication. But because the unnamed class members are so vulnerable, they must be protected against the potential incompetence of the persons who claim to speak for them. Thus, a lengthy certification process must begin soon after commencement of the suit.

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177. Attorneys are often paid out of the judgment or settlement in the third category of class actions, and some fees have attracted attention for being excessive. See, e.g., Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, 70 F.R.D. 199, 202 (1976); American College of Trial Lawyers, Recommendation of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure 20-21 (1972). But see Miller, supra note 31, at 667.

178. Indeed, often the attorney chooses the client. See Lee & Weisbrod, Public Interest Law Activities in Education, in Public Interest Law, supra note 28, 313 (school finance).

179. Presumably, he could make his wishes known, but the attorney's client is the named party, and unless there was massive rebellion in the ranks of the class, it is unlikely that one class member would have much effect.

180. The class action also creates ethical problems for the attorney with respect to the unnamed class members. Though he is representing them as well as the named parties, he has no systematic way of learning their wishes. Often the class is massive, making effective communication impossible even if the attorney wished to attempt it. Because he is out of touch with most of the people he is representing, the attorney may make incorrect assumptions as to their wishes. See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 505-11 (1976). Adversarial participation is thus further diluted. See generally Levenhagen, Class Actions: Judicial Control of Defense Communication with Absent Class Members, 59 Ind. L.J. 133 (1984); Note, The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation, 97 Harv. L. Rev. 947 (1984).

class only if the class and its proposed representative meet all four requirements of Rule 23(a):

\[(1)\] the class is so numerous that joinder of all members is impracticable; \[(2)\] there are questions of law or fact common to the class; \[(3)\] the claims or defenses of the representative parties are typical of the claims or defenses of the class; and \[(4)\] the representative parties will fairly and adequately protect the interests of the class.182

In addition, the suit must fall into one of the three categories outlined in Rule 23(b).183

Of these requirements for class certification, the most important in terms of the named party's ability to participate is adequacy of representation. Adequacy has two prongs: Both the class representative and his attorney must adequately represent the class.184 Judicial inquiry into adequacy of counsel could result in a determination that, for example, more experienced counsel is needed to adequately press the claims of the class. The judge may require that additional counsel be hired, or even, in extreme cases, that counsel hired by the named party be replaced. This kind of supervision can interfere with the attorney-client relationship even when both the named party and the attorney are satisfied. Not only does this supervision compromise the principle that a person should choose his own representative, but it also diminishes the party's ability to participate by forcing on the party an attorney with whom he may be less comfortable and, therefore, less forthcoming. The named party becomes almost unnecessary as attention is focused on the class as a whole and on its attorney.

The named party also loses most of his control over termination of the suit. Though he can choose whether to initiate the suit, his power to end the suit is limited. The traditional power of a party over settlement is gone, as judicial approval of any proposed settlement is required.185 Approval is also required for dismissal of a suit, including voluntary dismissal by the named party.186 This judicial power over settlement and

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182. FED. R. CIV. P. 23(a). Rule 23 applies to defendant class actions as well as plaintiff class actions. FED. R. CIV. P. 23. While acknowledging that fact, this article will use the terminology of plaintiff class actions for reasons of simplicity. For a discussion of the special problems associated with defendant class actions, see Note, Defendant Class Actions, 91 HARV. L. REV. 630 (1978).

183. See FED. R. CIV. P. 23(b).


185. See FED. R. CIV. P. 23(e).

186. See id. In fact, if the party drops out and no class member comes forward to replace him, the judge may have no choice but to dismiss. In such a case, however, it is not clear that the case was strongly supported in the first place. In any event, judicial power over settlement is more intrusive than dismissal.
dismissal—particularly settlement—may mean that a party will be required to continue litigation that he could have terminated satisfactorily, further interfering with his participation in the suit.

It is already clear that the adversarial principle of judicial passivity is not honored in the class action. Indeed, if neither the class nor the named representative has control over the litigation, a logical place to find that power is in the judge. In addition to his power over settlement and choice of counsel, the judge, in determining, for example, whether there are questions of law or fact common to the class, must often conduct a full inquiry into the nature of the evidence and arguments in the case. While a certification decision is not a decision on the merits, this power gives the judge considerable control over the development of the case for trial. Indeed, the certification decision is the most important decision in a class action. Depending on the outcome, the case often ends in settlement or non-prosecution. The judge's control over the case, then, is almost as complete as is the party's control under the adversarial model. Furthermore, the judge becomes so familiar with the case before trial that he may well decide the case early in the proceedings; indeed, with the certification decision, he is almost required to do so.187 The class action is clearly one of the most non-adversarial elements in modern American procedure.

c. The Class Action and Fair Adjudication

The rationale given for the Bill of Peace, and carried over into all versions of the American class action, was an efficiency rationale: The device prevents multiplicity of suits,188 thereby benefiting the plaintiffs, who can pool their resources; the defendant, who can save considerable time and money by litigating the issues only once; and the judicial system itself, which has limited ability to handle an influx of cases.189 Recently, however, a substantive "fairness" rationale has been offered for the modern American class action: The device permits claims to be brought before the courts that otherwise would be economically infeasible. This rationale is related to changes in substantive law that widen the reach of communitarian public law ideals190 and provide for vindication of those

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187. Presumably a different judge, or a magistrate, could conduct pretrial procedures in class actions, but that would entail some efficiency losses over current procedures.

188. See Z. CHAFFEE, supra note 156, at 200-01.

189. See Developments in the Law—Class Actions, supra note 171, at 1353-72; see also Scott, supra note 27, at 940.

ideals through private causes of action. Very often the individual losses from violations of laws that confer broad new rights on people are too small to support a lawsuit, but when combined with other individuals' losses, a suit for damages becomes supportable. While the class action does not, in theory, add to the schedule of individual substantive rights, it does facilitate enforcement of those rights that do exist. The fairness rationale for the class action, then, might be thought to be that it is appropriate to broaden the operation of the adversary system, so that its benefits are available to communities of interests and not just autonomous individual interests. The fairness rationale for class actions does not relate to an individual lawsuit or the relationships of the parties, but rather to the operation of the system as a whole. In this way it differs from the fairness rationale for discovery.

The strengths of the class action, in terms of the elements of fair adjudication, are that it provides for a more rational decision by enabling the full scope of a controversy to be presented to the court, and it provides a voice for some individuals who might not otherwise have one. When a controversy affects hundreds or even thousands of individuals, but transaction costs make it impossible for them to join together to prosecute their case, the court may not be fully cognizant of the number of people affected. And if those people do not have a sufficient stake to support an individual lawsuit, as is often the case, they may be left without a voice at all unless the class action remedy is available. In that way, their individual dignity in being able to vindicate their rights is also enhanced. Finally, judicial impartiality need not be affected any more than it is in other kinds of litigation in which the judge is involved early in the proceedings.

The class action, a thoroughly non-adversarial device, seems nevertheless to be a fair procedure. The only potential concern is that the judge will become so involved in the merits of the case on the certification decision that his impartiality will be affected. Certification, however, often is the thrust of a class action. The class action is the kind of case that fulfills the behavior modification goal described above. If the goal is behavior modification, it may be appropriate that the major decision in class action

191. Examples of these include antitrust, securities, and discrimination. See Chayes, supra note 190, at 1284. A private cause of action for a public law violation is a clear example of combining individualist behavior of self-reliance with communitarian values such as the public interest.
192. This was also part of the rationale behind legal programs serving the poor. See Weisbrod, Conceptual Perspective on the Public Interest: An Economic Analysis, in Public Interest Law, supra note 28, at 28-29.
litigation is the certification decision.\textsuperscript{194} The importance of the certification decision may also make it appropriate that the judge is involved heavily in the decision at this early stage.

3. Specialized Courts

Specialized courts might also be seen as a non-adversarial development in adjudication. Judges in specialized courts acquire expertise that may—indeed, is intended to—influence their decisions to some extent. A judge with some independent knowledge of the legal principles and policies surrounding the controversy may be less subject to influence through briefing and argument. In other words, the parties have somewhat less control in the sense that their careful packaging of the case may be transparent to an expert. This potential loss of control is one reason why specialized courts have engendered so much opposition over many decades.\textsuperscript{195} To some extent, attorneys have come to expect a decisionmaker—whether judge or jury—who can be persuaded. Indeed, many hope to overcome a weak case through persuasive skills. That may be harder to do when the judge is an expert.\textsuperscript{196}

There are many specialized courts in this country, at both the state and the federal levels.\textsuperscript{197} Indeed, specialized courts have existed for most of

\textsuperscript{194} Most of the resources in class action litigation are expended in the certification phase. Cases often settle after the certification decision. See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463 (1987); Coker, "Not Dead But Only Sleeping": The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification, 59 B.U.L. Rev. 257 (1979); see also In re Master Key Antitrust Litig., 528 F.2d 5 (2nd Cir. 1975); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2nd Cir. 1974); Kamp, Civil Procedure in the Class Action Mode, 19 Wake Forest L. Rev. 401 (1983).


\textsuperscript{196} Of course, one always runs the risk that the judge who hears a case may be an expert in the area of law at issue, but in a specialized court, it is a virtual certainty.

this century. Most of these courts are relatively low-level courts, with at least one and usually two levels of review available from their decisions. Several years ago, Congress created the first permanent specialized appellate level federal court when it set up the United States Court of Appeals for the Federal Circuit. An impetus for creating the Federal Circuit was the lack of uniformity in patent law, with different circuits developing different, and often inconsistent, legal principles. Now all patent appeals go to the Federal Circuit, so the problem of uniformity should resolve itself.

Specialized courts reflect an increasing specialization within society as a whole. People who have developed expertise in a given area are seen as more qualified to resolve differences in those areas. If decisionmakers are experts themselves, they are better able to evaluate the technical arguments presented to them in complex subjects. But this necessarily means that the decisionmakers will, to some extent, bring their expertise to bear on their decision. There is less opportunity for the advocates to influence them, with the result that parties lose some control. And because the judge is an expert, he is less passive than he is in matters where he does not have expertise; he is more likely to want to explore technical matters that the parties have tried to avoid.

A judge who thoroughly understands a complex field, such as bankruptcy or patents, should be better able to evaluate the arguments that are presented to him. In that sense, the proceedings should be more rational; attorneys are adept at evaluating their arguments and will know that weak arguments should fare especially poorly in a specialized court. In theory, predictability is enhanced. Some may argue that there is more chance of a biased judge in specialized courts, as he will bring his own knowledge, expertise and predilections to the matter. This, however, is true in all courts—one takes the judge as he is, with all his background. Any loss of impartiality from this cause should be marginal, and is greatly outweighed by the gains in rationality. Specialized courts should have little


199. See supra note 197. For example, cases in the Court of International Trade are appealed to the Federal Circuit, with discretionary review in the United States Supreme Court. The bankruptcy courts are considered adjuncts to the district courts, and their decisions are reviewable at all three federal levels. See 28 U.S.C. § 158 (1982 & Supp. II 1984).

200. See supra note 197.

201. Attorneys generally know the judge's background and biases in any court. Thus, it is possible both to account for the judge's background and biases in making predictions, and to couch one's argument in terms more likely to play to those biases.
or no impact on the voice that parties have, as they are still expected to
investigate and present their own cases. For similar reasons, there should
be little or no impact on the individual dignity of the parties. In short,
specialized courts have non-adversarial elements, but they are still fair.

4. Masters and Court-Appointed Experts

A fourth non-adversarial element that exists under the federal rules is
the use of masters and court-appointed experts. These people are ap-
pointed by the court and are able to help sort out the complexities of the
issues. Masters existed in equity procedure prior to the promulgation of
the federal rules, but they are most useful in complex litigation, which is
much more common today. Indeed, the increasing complexity of liti-
gation, in terms of subject matter and number of parties, may be an
important reason for the increasing use of such persons. The Manual
for Complex Litigation recommends fairly liberal use of such aides.

Masters and court-appointed experts are non-adversarial for much the
same reason that specialized courts are non-adversarial. Although they are
not decisionmakers, unlike the expert judges in specialized courts, they
may carry considerable weight with the judge. A judge who relies on a
master or court-appointed expert may view that person as less biased than
expert witnesses called by the parties. The parties, after all, are looking
for expertise that supports them; the judge is simply looking for the right
answer. The master, functioning as an arm of the court, is anything but


203. See, e.g., Horowitz, Decreeing Organizational Change: Judicial Supervision of Public
Institutions, 1983 Duke L.J. 1265; Kirp & Babcock, Judge and Company: Court-Appointed
Masters, School Desegregation, and Institutional Reform, 32 Ala. L. Rev. 313 (1981);
Little, Court-Appointed Special Masters in Complex Environmental Litigation: City of
over court-appointed experts is taking place in other countries that use adversarial adju-
dication as well. See Freckleton, Court Experts, Assessors and the Public Interest, 8 Int'l

204. See generally Manual, supra note 202, at 97-98, 100-02; Brazil, Special Masters in
Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 53 U. Chi. L. Rev.
394 (1986); Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452
(1958); Lieberman & Henry, Lessons from the Alternative Dispute Resolution Movement,
53 U. Chi. L. Rev. 424 (1986); Silberman, Masters and Magistrates Part I: The English
Model, 50 N.Y.U. L. Rev. 1070 (1975); Silberman, Masters and Magistrates Part II: The

205. See, e.g., W. Brazil, G. Hazard & P. Rice, Managing Complex Litigation: A

206. See Manual, supra note 202, at 98-102. Masters are sometimes used to assist in
discovery management though there is some dispute over the propriety of that use. See W.
Brazil, G. Hazard & P. Rice, supra note 205, at 315-88; Lord, Discovery Abuse: Appointing
Special Masters, 9 Hamline L. Rev. 63 (1986).
passive in searching out the right answer. In addition, masters and court-appointed experts undermine party control. Masters may have considerable freedom to explore the issues related to their expertise.\textsuperscript{207} It may be more difficult for the parties to hide or distort evidence, or to package the evidence to best suit their aims.

While masters and court-appointed experts alter both principal features of adversarial adjudication, it would be hard to argue that their use is unfair. The decisionmaker—the judge—remains impartial, but he seeks more information on which to base his decision. As long as that additional information is available to the parties, there should be neither a hidden agenda nor a loss in predictability. Indeed, a decision based on fuller information may be inherently more rational: It may be possible to evaluate more of the relevant factors in coming to a decision. An unbiased view of the issue may in itself enhance rationality. In addition, the parties still have a substantial voice in the matter and can make arguments before both the master and the judge. If the parties disagree with the master, they have a full opportunity to explain to the decisionmaker why the master's view is wrong. Their individual dignity is in no way compromised by the use of masters and court-appointed experts.

5. Case Managers—Judicial

There is considerable recent literature on the phenomenon of "managerial judging"—the practice of judges intervening in the litigation process early and often.\textsuperscript{208} Managerial judges are more willing to take control of the case, whether it means holding regular pre-trial conferences, setting scheduling orders and discovery orders, questioning witnesses, or performing any of a number of other things that judges did not traditionally do.\textsuperscript{209}

\begin{itemize}
  \item \textsuperscript{207} See Fed. R. Civ. P. 53(c).
  \item \textsuperscript{209} See, e.g., Caruth v. Pinkney, 683 F.2d 1044 (7th Cir. 1982) (judge as case manager); Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.) (Judge as case manager), \textit{amended in part, vacated in part}, 688 F.2d 266 (5th Cir.), \textit{cert. denied}, 460 U.S. 1042 (1982); Schwartz, \textit{The Other Things That Courts Do}, 28 UCLA L. REV. 438 (1981). One area of considerable dispute is the judge's role in encouraging settlement. See, e.g., W. Brazii, supra note 208; Landers, \textit{The Judge's Role in Fostering Voluntary Settlements}, 29 VILL. L. REV. 1363 (1984); Resnick, supra note 208.
\end{itemize}
Such activism is certainly at odds with the traditional notion of the passive judge, sitting back and listening to the parties and then rendering a decision. A judge who interrupts to ask questions may well influence the course of the trial, and in a way not anticipated by either of the parties. The parties' careful packaging may be disrupted, and they may be forced to respond to points that they thought were not at issue. Thus, in addition to altering the traditional role of the judge, this kind of activism also removes some party control.

Judicial case management brings the American system closer to the inquisitorial system of Continental Europe than any of the other non-adversarial elements discussed here. Therefore, in considering whether managerial judging is fair, one must consider whether the Continental European system is fair. We have already seen, however, that inquisitorial adjudication can be fair, especially as it exists today in Europe. To reiterate, some would argue that such active participation in the case makes it difficult for a judge to remain impartial throughout the litigation process: The judge is likely to decide the case too early. But European systems have devices designed to help ensure the continued impartiality of the judge. If there is a potential problem with impartiality, the American system may need to adopt some of those protective devices. Similarly, rules—both substantive and procedural—continue to exist, and contribute to the rationality of both systems. A judge who takes an active role may require the parties to adjust more to unexpected developments, but that means only that predictions must be hedged and adjusted to meet new conditions. Even in Continental Europe, the parties continue to have a voice in the conduct of the investigation and the trial. They are respected as individuals, but their personal bias is recognized and countered. Thus, proponents of the inquisitorial system argue that that system is more rational because full information is more likely to be available to the judge, and without the potentially distorting packaging that adversarial parties and their attorneys try to present.

It is not clear, however, that judicial management in the United States is yet like the Continental European system. While American judges have become managers, they have not become agents for the investigation and presentation of evidence. Thus, the incursion on party control is not yet

210. Some commentators favor such active participation by the judge as protection for the litigants. See, e.g., J. FRANK, supra note 3, at 93.
211. See supra notes 50-66 and accompanying text.
212. See Fuller, supra note 43.
213. See supra notes 53-57 and accompanying text.
214. Attorneys hedge their predictions in the existing adversary system as well. See J. FRANK, supra note 3, at 26.
215. See, e.g., Langbein, supra note 2, at 826-29.
216. Id. at 823.
as great in the United States as it is in continental Europe. While the parties may be forced to adhere to timetables that they would not otherwise have chosen, they are still responsible for the packaging. Opponents of managerial judging seem to fear that judges will take more control over substantive aspects of litigation, particularly by pressuring the parties to settle.\textsuperscript{217} Whether this fear is justified is doubtful.\textsuperscript{218} In any event, the experience of continental Europe establishes that an adjudicatory system can withstand much more judicial management than the American system has and still be fair. But it also suggests that the system itself may need additional procedures to help ensure that fairness.

6. Non-Judicial Case Managers

Judges do not necessarily enter into case management themselves. There are provisions in the rules for non-judicial case managers. Masters, for example, might be used for this purpose, especially in complex litigation where it makes sense to have someone devote his attention to management.\textsuperscript{219} In the bankruptcy courts, the United States Trustee is a case manager to some degree, as are trustees appointed in individual cases.\textsuperscript{220} These non-judicial case managers are non-adversarial elements in adjudication in the same way that managerial judges are: They remove some party control. They do not, however, necessarily undermine the traditional role of the judge as a passive receptor of information on which to make a decision. Where non-judicial case managers are used, the judge can still retain his traditional role. Indeed, to the extent that discovery and other pre-trial matters are problems of case management, magistrates can play

\textsuperscript{217} See, e.g., Elliott, supra note 20, at 308; Resnick, supra note 208, at 379.
\textsuperscript{218} See Flanders, supra note 208, at 510-14.
\textsuperscript{219} See Fed. R. Civ. P. 53(c); Manual, supra note 202, at 12. See generally Brazil, supra note 204.
an important role in such management without involving the judge at all. 221 Thus, non-judicial case managers may be less of an intrusion on traditional adversarial adjudication than is an activist judge. 222

Non-judicial case managers may be a better solution to problems of management than are managerial judges. There is less danger of a judge losing his impartiality because of too-early involvement in the case, and the parties' voice is undiminished even if it is more controlled. To the extent that case management by a disinterested person aids in the collection and organization of relevant information, the system may also become more rational. Finally, some might argue that individual dignity is diminished by having someone control the parties' pre-trial preparation and activities. The alternative of chaotic pre-trial procedures, however, must be equally damaging to individual dignity. 223

7. Alternative Dispute Resolution

"Alternative dispute resolution" is a term that encompasses a number of non-adversarial dispute resolution devices, such as mediation, arbitration, "mini-trials," and negotiation. 224 Many of these devices have been


222. To the extent that such non-judicial managers are perceived as having less authority than judges, however, there may still be some attempt to involve the judge, particularly by the party that has lost a pre-trial skirmish. See Fed. R. Civ. P. 73(d), 74, 75.


224. See, e.g., CPR LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (1987); S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985). Mediation is a device whereby a neutral third party helps the parties negotiate a settlement. In arbitration, the parties select an arbitrator, or more commonly a panel of arbitrators, and agree to abide by the arbitrators' decision. In mini-trials, the parties go through pre-trial preparation, then present their cases to each other or to a neutral third party. They are then better prepared for negotiation, particularly when the neutral third party gives his informal view of the case. See Green, Growth of the Mini-Trial, 9 Litigation 12 (1982); Parker and Radoff, The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes, 38 Bus. Law. 35 (1982). Negotiation needs no definition, but it is
part of the dispute resolution universe for some time, but they have been getting considerable attention lately and are being systematically studied in law schools for the first time. Indeed, they are explicitly favored in some applications because they get away from the adversarial tension that exists in our system of adjudication. They are essentially cooperative, rather than contentious, devices for dispute resolution.

To some extent it makes little sense to examine these means of dispute resolution in terms of the elements of adversarial adjudication because they are not elements of an adjudicatory procedure, but rather are alternatives to that procedure. But it is instructive to consider, at least, the issue of party control because the parties have considerably more control over the outcomes in all of the methods of alternative dispute resolution than they do in adversarial adjudication. In mediation, negotiation, and mini-trials, for example, they have ultimate control over the decision because it is essentially a negotiated decision to which they must agree, freely, in order for it to have any effect. Arbitration, which is more like adversarial adjudication than the other forms of alternative dispute resolution, normally requires the advance consent of the parties, usually by contract. Arbitration also normally gives each party the opportunity receiving more attention in the literature lately, including some literature on the principles of negotiation. See, e.g., R. Fisher & W. Ury, Getting to Yes: Negotiating Agreement Without Giving In (1981). See generally J. Auerbach, Justice Without Law? (1983) (alternative dispute resolution as part of a quest for community).

225. Interest in alternative dispute resolution began to grow in the late 1960's. See S. Goldberg, E. Green & F. Sander, supra note 224, at 3.


227. See S. Landsman, supra note 2, at 52 (family law); D. McGillis, Consumer Dispute Resolution: A Survey of Programs (National Institute for Dispute Resolution 1987) (consumer law); see also R. Coulson, How to Stay Out of Court 13-28 (1984); Cooke, Mediation: A Boon or a Bust?, in A.B.A. Special Committee on Dispute Resolution, Dispute Resolution Papers (Series 2 1983).

228. See A.B.A. Special Committee on Dispute Resolution, Dispute Resolution Papers (Series 3 1984); S. Goldberg, E. Green & F. Sander, supra note 225; Green, supra note 224. The flexibility that stems from allowing the parties to select the ground rules is one of the primary reasons why they choose ADR. "The parties can agree to change virtually anything that will occur, for it is their arbitration and the arbitrator's authority is drawn from them." Resolving Disputes Without Litigation 14 (BNA Special Report 1985) (emphasis in original).

to select one of the arbitrators. The parties have no opportunity to select the judge who will hear their case in ordinary litigation.

Alternative dispute resolution represents a strong movement away from traditional adversarial adjudication. As such, it merits our careful consideration. It is yet another indication that the traditional adversary system of adjudication, to which we render so much obeisance, is not a completely satisfactory method of resolving disputes. Furthermore, the fact that parties seem to have more control over the resolution of their disputes under these alternative methods suggests that principles of party participation and individual dignity—so extolled by apologists for adversarial advocacy—may be better served by more cooperative methods of dispute resolution.

C. Modern Complex Litigation

The adversary system is most compromised in complex litigation. It remains to define complex litigation and to analyze whether the modern non-adversarial innovations are most in evidence in complex litigation. This section describes three kinds of complex litigation: complex factual issues, multi-party litigation, and legally complex litigation. The uses of non-adversarial mechanisms are then described with respect to each of them.

1. Complex Factual Material

Historical equity procedure allowed for a bill in equity for an accounting. This device allowed a decisionmaker to get help in sorting out complicated bookkeeping and to trace funds. Today, under the federal rules, accounting is not a particularly difficult matter to litigate. But

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233. See generally F. James, Civil Procedure 341, 345 (1965).

234. The equitable procedure of accounting was designed for those cases where the bookkeeping was too difficult for resolution in a court of law. See id.

other areas of substantive knowledge, such as complicated scientific and technical areas, can prove extremely difficult to litigate, in large part because the decisionmaker—whether a judge or jury—does not have the expertise to evaluate the evidence and arguments. Litigation involving complex subject matter requires the decisionmaker to evaluate specialized facts about which experts in the field can legitimately disagree. Often there is statistical data involved, such as statistical data on the incidence of disease among persons exposed to an allegedly disease-causing chemical.\textsuperscript{236} The growing awareness of problems caused by toxic wastes, including radioactive wastes, gives rise to a good deal of complex litigation as well.\textsuperscript{237} The issues presented by such litigation may be the subject of considerable debate within the field. Yet adversarial adjudication requires that a decisionmaker with no prior knowledge of the dispute—and probably of the subject matter itself—decide the issue.

Several of the non-adversarial elements identified in the previous section, including the use of court-appointed experts,\textsuperscript{238} masters,\textsuperscript{239} and specialized courts,\textsuperscript{240} are much in evidence when such complex factual issues are before the court. Discovery is likely to be heavy and problematic in such cases.\textsuperscript{241} The presence of many pre-trial issues may lead to more management by

\begin{footnotes}


\item[240] Tax, international trade, and patents all have specialized courts. See \textit{supra} notes 195-201 and accompanying text.

\item[241] As might be expected, one study found that discovery was heaviest in "big" cases—cases where the stakes are high. See W. Glaser, \textit{supra} note 143, at 189-202. Most complex litigation is high-stakes litigation, or it would not be economically feasible to litigate it.
\end{footnotes}
the judge\textsuperscript{242} or to a general reference to a magistrate for resolution of those issues.\textsuperscript{243} Increasingly, the parties are making use of alternative dispute resolution devices, particularly the mini-trial.\textsuperscript{244}

Three general principles are in evidence in the use of such non-adversarial elements in factually complex litigation. One, evident in the growing use of mini-trials, is the principle of party control, which is an essential principle of adversarial adjudication. In factually complex litigation, it appears that efforts to assemble, manage, and evaluate the issues as an ordinary adversary proceeding so compromise party control that the only way for the parties to keep such control is to go outside the "adversary" system. A second principle in evidence is that of management; because there are so many matters to consider, some effort must be made to manage the flow of information. That supervision can diminish party control if it is the judge or another judicial officer who does the managing. The third principle in evidence is that of expertise. In a highly specialized society such as ours, where people have very complex but very narrow areas of expertise, it makes more sense for someone with some expertise to evaluate the data and make the decision. Someone who knows nothing about a complicated scientific issue simply cannot evaluate the arguments effectively, even if the parties do a superb job of presenting them.

Administrative agencies have operated under principles of expertise for some time.\textsuperscript{245} Adversarial adjudication is much modified in agencies, even when those agencies have adjudicative functions.\textsuperscript{246} Indeed, there is considerable case law on the scope of hearings required in agency adjudication, with adversarial hearings required in some instances\textsuperscript{247} but not

\textsuperscript{242} Several recent amendments to the federal rules give judges increased managerial authority. See, e.g., \textit{Fed. R. Civ. P.} 16, 26(f).
\textsuperscript{243} See \textit{Manual}, supra note 202, at 103.
\textsuperscript{244} See, e.g., Parker & Radoff, \textit{supra} note 224.
\textsuperscript{245} See R. Pierce, S. Shapiro & P. Verkuil, \textit{supra} note 59, at 125.
all. But in all instances, the expertise of the agency is respected. Indeed, on review, agency expertise must be given substantial deference. There is, then, an existing tension within American systems for resolving disputes. Expertise is recognized as a legitimate basis for administrative agency decisionmaking, but is feared as an encroachment on party participation in judicial decisionmaking. To some extent, these different views may be due to the different historical and constitutional bases for agency and judicial adjudication. Agency adjudication involves some government regulation, and it is the application of that regulation that is being adjudicated. In other words, it is adjudication between an individual and his government. There is not much historical precedent for that, and there seems to be more opportunity to adapt procedures as a result. On the other hand, judicial adjudication is historically the adjudication of private disputes, and there is a long history of adversarial adjudication there, with less opportunity to adapt. But much modern litigation has an impact far beyond the individual parties to the dispute.

It is obvious that adversarial adjudication has serious shortcomings in factually complex litigation. So many non-adversarial elements appear in such litigation, and so many principles support the use of such non-adversarial elements, that it is safe to say that adversarial adjudication does not work in such litigation.

2. Multi-Party Litigation

A second form of complex litigation is litigation involving multiple parties. Multi-party litigation was virtually unknown in common law litigation, but it has come to fruition under the federal rules, with their liberal joinder and class action rules. Unlike the prototypical common law case, with one party on each side arguing over a single issue, modern litigation can involve thousands of parties, and frequently has many parties


The issues in such cases may be factually complex as defined above, but even if they are simple, the case presents significant management problems. For example, unless some limitations are imposed, each plaintiff could ask each defendant the same questions in discovery, imposing an unproductive multiple burden on the parties.

The class action is the most prominent non-adversarial element that can be found in this kind of litigation. Among other things, the class action binds class members without permitting them full participation as parties. As might be expected, the other non-adversarial elements prominent in multi-party litigation are those that aid in case management. Thus, the judge may be much more active in such litigation, issuing scheduling orders and other orders aimed at preventing harassment from excessive discovery. Alternatively, the judge might refer matters to a magistrate for case management.

The prominence of non-party case management in multi-party litigation suggests that the adversary system does not work well in that kind of complex litigation. As in factually complex litigation, significant modifications are necessary—modifications that call into question the propriety of continued reliance on adversarial adjudication in multi-party litigation.

3. Complex Legal Material

There are two kinds of legal complexity. The first is the complexity that comes with a heavily regulated area of law, such as tax, securities, or bankruptcy. Such areas of law usually are defined by a code (often cumbersome) and may also have volumes of rules or regulations. Often,
they also have their own courts to administer the complex regulations.\textsuperscript{258} The expertise that comes with such specialized courts is critical in such areas of law, where a crash course is likely to miss many of the important interconnections and nuances in the law. Lawyers or judges with no experience in those areas may be ill equipped to sort out the legal issues and reach a decision that is rational in terms of the overall goals and structure of the law. Unless other kinds of complexity are also present, however, the other non-adversarial elements identified in the previous section are not likely to play a great role.

The other kind of legal complexity is legal development, where new legal rights and new legal doctrine are developed in the courts. In our common law system, judges have always had considerable responsibility for the development of legal doctrine. In the last three decades, however, the pace and scope of that development has taken a quantum leap, working a substantial revolution in societal institutions and relationships.\textsuperscript{259} Such litigation may require judges to consider issues that are often claimed to be legislative rather than judicial issues.\textsuperscript{260} They are argued to be legislative because they may involve difficult considerations of social policy and evaluations of the social effects of various options presented to the judge. Some think that evaluation of such issues is primarily for the legislature, which is ultimately accountable to the voters, rather than the judiciary.\textsuperscript{261}

Litigation over the direction society should take is primarily a debate. It is important for the decisionmaker, whether court or legislature, to have full information and argument on the reasons for and against a significant change in direction. But even with full information, the decision can be difficult, and the decisionmaker needs to satisfy himself that he understands the issues before him. Strong arguments from those who propose the change and from those who oppose it can help to clarify the issues. The adversary system provides a forum for that debate.


\textsuperscript{259} See Chayes, supra note 190; Fiss, supra note 23. Some significant and difficult new doctrines that adjudication has developed over the last 30 or 40 years include implied rights of action under the Constitution, see, e.g., Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); and a revolution in equal protection ideas under the fourteenth amendment, see, e.g., Reed v. Reed, 404 U.S. 71 (1971); Brown v. Board of Educ., 347 U.S. 483 (1954).

\textsuperscript{260} See supra notes 22-26 and accompanying text. Professor Fiss has argued that this kind of revolution is well suited to judicial direction. See Fiss, supra note 23.

\textsuperscript{261} The respective roles of courts and legislatures are the subject of much debate. See supra note 23. In common law countries, however, the distinction is especially blurred, with courts often deciding important social policy issues. See, e.g., Pound, Do We Need a Philosophy of Law?, 5 Colum. L. Rev. 339, 346 (1905) ("[T]he common law knows individuals only . . . . It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe.").
4. Combinations

Figure 1 provides a graphic illustration of the three fundamental forms of complex litigation and the non-adversarial elements that help make them work. It is significant that non-adversarial elements are most important in factually complex litigation and least important in legal development litigation. But most litigation is not as pure as this analysis suggests. Certainly most legal development will take place in the context of factually complex or multiple-party litigation, or both. Thus, most such litigation will involve significant non-adversarial elements because of the factual complexity or the multi-sidedness.

FIGURE 1

<table>
<thead>
<tr>
<th>Type of Complexity</th>
<th>Non-adversarial elements</th>
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<tbody>
<tr>
<td>Factual</td>
<td>Discovery</td>
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<td></td>
<td>Specialized courts</td>
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<tr>
<td></td>
<td>Masters</td>
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<td>Court-appointed experts</td>
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<td>ADR</td>
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<td>Multiple parties</td>
<td>Case managers</td>
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<td>Legal</td>
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<td>Legal doctrine</td>
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<td>Legal development</td>
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Public law litigation, to employ Professor Chayes's term, is often long, expensive, and complex. Nevertheless, this kind of complex litigation, which produces much of the social change described in the previous subsection, is not likely to employ many of the non-adversarial elements identified in this article unless there are also factually complex issues or multiple parties. In other words, it is the factual complexity or the

262. Some litigation can be complex for all three of the reasons identified in this section. For example, a case could seek damages and injunctive relief for injuries allegedly caused
multi-sidedness that forces the use of non-adversarial elements, rather than
the problem of legal development itself. Factual complexity can be intro-
duced in such litigation, for example, when the party proposing change
attempts to prove, rather than merely speculate on, why the existing system
is unsatisfactory. Litigation over school desegregation, for example, often,
involved complicated analyses of the psychological effects of segregation.263
Such attempts to prove the social effects of the court’s decision implicate
all of the difficulties associated with factually complex litigation, and lead
to the use of the non-adversarial devices discussed above. Similarly, many
social reform cases are brought as class actions, so the difficulties in
management associated with the class action are part of the case.264

This analysis suggests some uncertainty over the proper approach to
social change. On the one hand, it has traditionally been considered a
legislative function to determine the direction society will take. The leg-
islative process is investigative, inquisitorial.265 It requires active investi-
gators, and the concept of a “party” is non-existent in the legislative
process.266 On the other hand, the value of a debate, in which the strongest
cases are made for and against the proposed change, is also unquestion-
able.267 Debates occur in the legislative process as well, of course, but they
are the essence of adversarial adjudication. And in combination with the
non-adversarial devices that help judges and parties evaluate factually
by chemicals leaking from a toxic waste dump. Such litigation could involve complex issues
of causation (including epidemiological evidence), multiple parties on both sides of the case,
and arguments for new legal doctrine such as enterprise liability or other forms of imposing
liability when responsibility for injury is based on statistical evidence.

Judges and litigants sometimes resolve the problem of factual complexity by relying on
published studies that suggest the point urged by the proponent of change or on general
statements concerning social issues. This so-called “Brandeis brief” is not exactly proof of
facts as is normally required in litigation, but has often formed the basis for the court’s
decision. On the origins of the “Brandeis brief,” see L. Baker, Brandeis and Frankfurter:
A Dual Biography 470-71 (1984); S. Konewsky, The Legacy of Holmes and Brandeis: A
Study in the Influence of Ideas 84-92 (1956); A. Lieb, Brandeis: The Personal History
of an American Ideal 135-37 (1936); C. Peare, The Louis D. Brandeis Story 153-55

264. Party control is often minimal in social reform litigation. Much of it is prosecuted
by public interest lawyers who are acting out of a social conscience but who conceived the
litigation themselves; the parties do not come to the lawyers, but the lawyers to the parties.
Party control loses all significance if the potential parties have no opportunity to participate
at all. Public interest lawyers give them an opportunity to participate.

265. See Thibaut, Walker, LaTour & Houlden, Procedural Justice as Fairness, 26 Stan.

266. Interested persons can express their views in the legislative process, of course. They
can communicate with legislators and, in some cases, testify before legislative committees
that are investigating issues related to pending legislation.

267. A debate formulated solely by the parties may be problematic, however, at least
when the issue is significant and goes to the structure of societal institutions. Fiss argues
that judges must take a more active role in such cases. See Fiss, supra note 23.
complex issues and join all interested parties, it is not surprising that the adversary system has taken on the challenge of such socially transforming litigation. It is the debate format that makes the adversary system ideal for such litigation, but it is the non-adversarial elements that have developed to overcome information and party-participation problems that make it possible to use the adjudicatory system for such litigation.

IV. VALUES AND IDEOLOGY IN THE ADVERSARY SYSTEM

The adversary system evolved in a society where common law legal development was prominent, and where a strong legal profession and a tradition of party control over dispute resolution prevailed. Over several centuries, society's devotion to democratic ideals strengthened, and its growing faith in reason helped solidify the idea that dispute resolution could be systematized. Procedure came to be treated as a science—a methodology that, if done right, would enable a court to arrive at the right answer, whether the dispute was one of fact or one of law. In England and other common law countries, these developments seemed to point to an adversary system, which both gave effect to the new scientific and rational view of the world and maintained the strong legal profession and party control that had existed for centuries.

The adversary system is a highly individualistic method of dispute resolution, leaving the formulation and presentation of the dispute entirely to the parties. The state provides only a judge to decide the case and its authority to enforce the judge's decision. Yet recently, the courts in the United States have been the forum for a significant social transformation, which has helped to make the substantive law as a whole less individualistic and more communitarian. A primary element of this transformation is the expansion of anti-discrimination principles in housing, education, employment, and public accommodations.

The apparent anomaly of an individualistic system of dispute resolution producing communitarian social change is not so difficult to fathom when one realizes that the adversary system itself has undergone significant communitarian development. Many non-adversarial elements in modern litigation reduce party control over the investigation and presentation of evidence, and thrust the judge into the process early and often. These developments make it possible to bring before the courts complex disputes, the effects of which extend far beyond the nominal parties to the case. They make both the dispute resolution system and its potential substantive effects more communitarian, in part by enabling legal decisionmaking to give greater effect to the rule-making and behavior modification goals. In short, it is the non-adversarial elements in modern adjudication that make it possible to bring such disputes before the courts. At the same time, the adversarial debate format aids in the important evaluative process by
requiring that the strongest arguments for and against proposed social change be made. Whether this joinder of non-adversarial elements and the adversarial debate format is a marriage made in heaven remains to be seen, but it cannot be doubted that significant legal development has taken place in the courts in recent years.

The principles developed here do not apply only to complex litigation, though complex litigation is where they are most evident. Some non-adversarial elements in modern litigation exist because adversarial investigation and presentation of evidence is not well suited to fact-finding. The problems with adversarial fact-finding have come to the surface as the factual basis of disputes has grown more complicated, but the problems exist in litigation that is factually simpler as well. For fact-finding, a neutral investigator aided by the parties—the inquisitorial system—may well be better.

CONCLUSION

Adversarial ideology has failed. The adversary system is transforming itself into a more inquisitorial, less individualistic methodology even as apologists debate the various justifications for adversarial adjudication. The transformation seems to be bringing about a system that is more effective at fairly complex fact-finding, socially significant rule-making, and behavior-modifying litigation. The less individualistic, more communitarian ethic that is reflected in the transformation should be recognized and encouraged. That recognition may entail abandoning adversarial ideology, but a focus on our goals and values is more helpful in evaluating and modifying our adjudicatory system than any rigid ideology could be.