

POPULAR CULTURE AND THE ADVERSARY SYSTEM

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Lawyers and lay people in the United States generally believe that the adversary system is the best way to deliver justice in a civil or criminal trial. Broadly speaking, adversarial procedure leaves most critical pre-trial and trial decisions such as discovery, the framing of issues, the choice of witnesses, the questions directed to witnesses, and the order of proof in the hands of lawyers. The central precept of the adversary system is that the sharp clash of proofs presented by opposing lawyers, both zealously representing the interests of their clients, generates the information upon which a neutral and passive decision maker can most justly resolve a dispute.¹ In contrast, legal systems outside the Anglo-American world employ inquisitorial pre-trial and trial procedures that leave critical elements of the process under the control of a judge rather than the attorneys.²

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1. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 99–125 (2001) (criticizing perceived excesses of the U.S. adversary system). Kagan's important book is the subject of a series of review essays in Review Symposium, *Kagan's Adversarial Legalism: The American Way of Law*, 28 *LAW & SOC. INQUIRY* 719 (2003); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2 (1984). Indeed, the U.S. employs a more extreme version of the adversary system than any other country. See WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* 117–40 (1999) (comparing criminal procedure in the U.S., the U.K., Norway, and Germany).

2. See generally Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *HARV. INT'L L.J.* 1, 7–26 (2004) (discussing different approaches to the adversarial and inquisitorial legal systems). The inquisitorial system used in civil law countries is nothing like the Spanish Inquisition and probably should be renamed the “inquiry system” or some other title

Because of the preeminence of the adversary system in the United States,³ most lawyers (and probably most lay people as well⁴) oppose various innovations that would enhance the role of the judge at the expense of the attorneys.⁵ For example, proposals to allow judges to supervise criminal investigations or civil discovery, frame the issues, select neutral expert witnesses, participate in the examination or cross-examination of witnesses, summarize the evidence for the jury, or reject plea bargains may or may not make sense on the merits. Nevertheless, the quick response to such heretical ideas is that they should be rejected out of hand because they would undermine the adversary system.⁶ This Article is a speculative attempt to understand the American love affair with the adversary system despite its numerous shortcomings.

The dominance of the adversarial system seems paradoxical because the general public despises and distrusts lawyers. In an ABA poll conducted by M/A/R/C Research, only 14% of the public were extremely or very confident in lawyers and 42% were only

that does not suggest torture. In reality, there are many inquisitorial systems since each country has its own unique variation. See generally CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE (Adrian A.S. Zuckerman ed., 1999) (discussing the national civil justice systems of thirteen common law and civil law countries). However, these variations are unimportant for the purposes of this article.

3. LANDSMAN, *supra* note 1, at 1.

4. First year law students at UCLA School of Law, surveyed on the second day of class, favored a model of lawyer control over a model of judicial control by a vote of 61 to 16 (or about 79% to 21%). Survey by Michael Asimow, Professor of Law Emeritus, UCLA School of Law, in L.A., Cal. (2003) (on file with author). I refer to this survey herein as the *2003 UCLA Law Student Survey*. I make no claim, of course, that first year American law students represent a valid sample of the population at large. They are obviously better educated than the general population. Since they have committed themselves to a profession deeply imbued with the adversary system, it is not surprising that they believe in that system even before learning anything about it. They also may be more competitive and argumentative than the general population. In contrast, however, one study found that small claims court litigants expected inquisitorial procedures to be used in their trials. They thought that the judge would help them make their claims. The litigants were disappointed and frustrated by the adversarial procedures actually used, even though no lawyers were allowed. William M. O'Barr & John W. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137, 159-60 (1988).

5. See Adrian A.S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, in CIVIL JUSTICE IN CRISIS, *supra* note 2, at 3, 44-45.

6. As David Luban writes, lawyers may be troubled by ethical conundrums such as whether to disclose to frantic family members a client confidence about the location of a murder victim's body: "The smile fades, the forehead furrows, he retreats into a nearby phone booth and returns moments later clothed in the Adversary System, trailing clouds of glory. Distant angels sing. The discussion usually gets no further." David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83, 89 (David Luban ed., 1983).

slightly or not all confident.⁷ People had far more confidence in judges: 32% were extremely or very confident in judges and only 22% had slight or no confidence in judges.⁸ *Why, therefore, would people want to turn over something as important as control of the pre-trial and trial processes to lawyers whom they thoroughly distrust, rather than to judges whom they distrust much less?* Why would they prefer a system whose objective is to generate “trial truth” rather than real truth,⁹ procedural justice rather than substantive justice?¹⁰ This article speculates about some possible solutions to these puzzles.

People might adhere to adversarialism for several reasons despite their distrust of lawyers and despite numerous practical problems with adversarial trials. Some of these reasons are explored in Part I. However, Part II suggests that there is another important, though usually overlooked, reason for people’s instinctive attachment to adversarialism. Popular culture has taught us that the adversarial system uncovers the truth about past events. According to familiar pop culture narratives that we absorb from the cradle

7. AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 50 (1999) [hereinafter M/A/R/C SURVEY]. Only the media (at 8% confidence) ranked below lawyers. *Id.* at 52. These results are consistent with a great deal of polling data. According to the Gallup Poll, 18% of respondents give lawyers a very high/high rating for honesty and ethics; 35% give lawyers a low/very low rating. Press Release, Jeffrey M. Jones, Gallup Poll, Nurses Remain Atop Honesty and Ethics List (Dec. 5, 2005), <http://office.mobi.ee/~lauri/Ethics%20poll.pdf>. The only professions trailing lawyers in the honesty and ethics department are congressmen, labor union leaders, business executives, advertising practitioners, car salesmen, and telemarketers. *Id.* See generally Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 536–49 (1999) (discussing many such polls and speculating as to the reasons for the abysmal public image of lawyers).

8. M/A/R/C Survey at 50.

9. The trial lawyer’s job is to zealously represent a client within the constraints of the rules of ethics, not to assist in seeking the truth. See, e.g., Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J. L. ETHICS & PUB. POL’Y 209 (2006). In contrast, I believe that a desire to find out the truth about a contested past event is fundamental to human psychology. See Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1064–68 (2006).

10. Most American lawyers object to the idea that the justice system should be held accountable for discovering the truth or delivering substantive justice. Landsman, for example, argues: “Truth is not the end the courts seek. Truth is nothing more than a means of achieving the end, justice. The disclosure of material facts is not the only means of achieving justice, and to treat it as the end is to open the way to unsavory abuses.” LANDSMAN, *supra* note 1, at 37. A memorable statement of this view occurs in the film *A CIVIL ACTION* (Paramount Pictures & Touchstone Pictures 1998). Defense lawyer Jerome Facher (Robert Duvall) says to plaintiff’s lawyer Jan Schlichtmann (John Travolta): “If you’re really looking for the truth, Jan, look for it where it is: at the bottom of a bottomless pit.”

onward, lawyers working within an adversary system are champions of justice and liberty. Their efforts are likely to reveal who committed the murder and why or what really happened in the hospital operating room. Pop culture, therefore, may reinforce our belief in adversarialism and confer legitimacy on the adversarial system.

The purpose of this article is not to argue in favor of either the adversarial or inquisitorial systems.¹¹ Nor is it to set forth a case for any particular reform of the adversary system, to describe or advocate any of a multitude of possible alternatives, or to argue that the benefits of a major change would outweigh the costs of making the transition. Adversarialism is so deeply rooted in the United States,¹² so compatible with its competitive culture, and so well protected politically, that any fundamental change is unthinkable.¹³

11. An analysis based on the factors of accuracy, acceptability to the parties, and efficiency might suggest a preference for inquisitorial methods even in an American legal environment dominated by the jury system. Asimow, *Adversarial Ideology*, *supra* note *, at 609–21.

12. Despite the public's commitment to adversarialism, large segments of the legal process are already inquisitorial rather than adversarial in nature: judges are active in pre-trial proceedings, often aggressively seeking to settle cases; judges manage class actions; administrative law judges control administrative adjudications, such as Social Security hearings, to make sure pro-se litigants get a fair shake or that the issues are properly addressed.; and small claims court judges control their hearings without any lawyers present. There are many other examples of processes that lean toward the inquisitorial. Nevertheless, the core area of civil and criminal trial practice remains solidly adversarial in nature (even though the number of actual trials is very small in relation to the number of cases settled or plea-bargained). See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 463 (2004) (noting that in 2002, of the 258,876 civil dispositions in U.S. District Courts, only 4569—or 1.8%—resulted in a trial).

13. While lawyers and ordinary people seem committed to adversarialism, scholars have often questioned it. Attacks on the adversary system date back to Roscoe Pound's famous 1906 address to the ABA, which condemned the sporting theory of justice. Roscoe Pound, Address to the American Bar Association: The Causes of Popular Dissatisfaction with the Administration of Justice (Aug. 29, 1906) (abridged form available in 57 A.B.A. J. 348 (1971)); see Paul Verkuil, *The Search for a Legal Ethic: The Adversary System, Liberalism and Beyond*, 60 SOUNDINGS 54, 58–61 (1977). Numerous American judges and academics have urged adoption of changes that move the justice system in inquisitorial directions, to no discernible effect. See Langer, *supra* note 2, at 26, n.111; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 534–51 (1992); Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 658–59 (2005). Kagan argues that the adversary system is a good example of path dependency; as a result, it is very difficult to alter. Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711, 727 (2006); see also Alec Stone Sweet, *Path Dependence, Precedent and Judicial Power*, in ON LAW, POLITICS AND JUDICIALIZATION 112 (Martin Shapiro & Alec Stone Sweet eds., 2002) (providing theoretical foundations for the path dependence of legal institutions, and discussing the impact of path dependence).

Instead, my objective is to speculate on why people believe so fervently in it.

I. WHY DO PEOPLE BELIEVE IN THE ADVERSARY SYSTEM?

This section explores, in a brief and tentative way, some of the reasons why people might believe in adversarialism despite its practical problems,¹⁴ their distrust of lawyers, or their desire to have a system that seeks to deliver substantive justice. Many of these reasons are closely related to one another, and people are likely to believe in several of them (or even all of them).

A. *Tradition and Lack of Knowledge of Alternatives*

Of course, an important reason why people believe in the adversary system is that things have always been done that way and they know of no alternative. In my experience, people, even many lawyers, are surprised and intrigued to learn that the brand of adversarialism practiced in the United States is more extreme than that practiced anywhere else in the world, including the United Kingdom.¹⁵

Thus in the 1999 ABA M/A/R/C survey, only 30% of respondents were either extremely or very confident in the United States justice system.¹⁶ Yet, remarkably, 80% agreed or strongly agreed to the statement “[i]n spite of its problems, the American justice system is still the best in the world[!]”¹⁷ Needless to say, few, if any, of these respondents had a clue about foreign justice systems.

However, people may believe there are important reasons to adhere to traditional ways of resolving disputes, even when they are

14. Many of these practical problems are discussed in Asimow, *Adversarial Ideology*, *supra* note *, at 609–21. They include disparity between the skills and resources of the lawyers, the tendency of a process controlled by lawyers to obscure rather than reveal the truth, and the inefficiency of adversarial pre-trial and trial procedure. *See also* Luban, *supra* note 6, at 91–97.

15. PIZZI, *supra* note 1, at 117–39 (comparing criminal procedure in the U.S., the U.K., Norway, and Germany). The U.K. is considerably less adversarial than the U.S. *Id.* at 118. The U.K. and commonwealth countries make much less use of juries than the U.S. *Id.* at 117. Where juries are used, U.K. procedures allocate greater powers to the judge than in the U.S. *Id.* Most British criminal cases are tried to lay magistrates rather than judges, with fewer procedural protections for the defendant than in judge trials. *Id.*

16. M/A/R/C SURVEY, *supra* note 8, at 50.

17. *Id.* at 59.

aware of the alternatives.¹⁸ Certainly, many of the framers of the Constitution and the Bill of Rights were familiar with different models of dispute resolution.¹⁹ Various provisions of the founding documents seem more consistent with an adversarial than an inquisitorial approach to litigation.²⁰ These include the due process and self-incrimination clauses, the rights to jury trial, the right to confrontation and counsel in criminal cases, the right to bail, and the right to question incarceration through the writ of habeas corpus.

In addition, traditionalists point to the law of unintended consequences and argue that the devil you know is better than the one you don't. Under this argument, an ideal inquisitorial system may look better than a flawed adversarial one, but the ideal system will have its own flaws if it is ever put into practice and turned over to fallible human beings.²¹ Moreover, the transitional costs of changing from one system to a radically different one may be sufficient reason to leave well enough alone.

B. Personal Autonomy

The adversary system allows litigants to make the major strategic decisions about their own cases. It also allows the lawyers to make the tactical decisions about how to conduct the case. Thus, litigants decide on the extent of resources that should be invested in the case and whether to settle the case and on what terms. The lawyers decide which jurors to challenge, what the issues are, what witnesses to call, what questions to ask, and what arguments to make to the jury.²² Judges make none of those decisions. Thus, the adversary system exalts the value of personal autonomy.

The idea that persons should make their own decisions about how to conduct their own lives is deeply cherished in Anglo-

18. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 59 (2003).

19. See generally *id.* at 63–73 (discussing the Founders' ideas about the judicial role in dispute resolution and in the constitutional structure).

20. *Id.*

21. See Eric Manch, *Throwing the Baby Out with the Bathwater: How Continental-Style Police Procedural Reforms Can Combat Racial Profiling and Police Misconduct*, 19 ARIZ. J. INT'L & COMP. L. 1025, 1047–49 (2002).

22. Granted, litigants may have little control over the tactical decisions made by their lawyers, but lawyers are at least somewhat constrained by their clients' desires. In any event, the tactical decisions are made by someone who the client is paying and can discharge at any time.

American society. Our economic system is rooted in personal choice, laissez-faire values.²³ The market allows a person great freedom in making decisions to buy or sell or in choosing to take risks that may lead to success or failure. Conservative economists believe that government regulation can be justified only in cases of market failure.²⁴ Although litigation is not an exchange transaction in the market, many people would probably apply the same principles and oppose government regulation, absent a strong showing that the system of individual choices is somehow damaging to the general public as opposed to the parties themselves.²⁵

Philosophers extending back to John Stuart Mill insist that government should avoid interfering in decisions solely involving an individual's personal life or welfare. In *On Liberty*, Mill wrote:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . The interference of society to overrule his judgment and purposes in what only regards himself must be grounded on general presumptions; which may be altogether wrong, and even if right are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.²⁶

23. See U.S. DEP'T OF STATE, THE U.S. ECONOMY: A BRIEF HISTORY, <http://usinfo.state.gov/products/pubs/oecon.chap3.htm> (last visited Jan. 25, 2007).

24. See, e.g., Gerald P. O'Driscoll, Jr. & Lee Hoskins, *The Case for Market-Based Regulation*, 26 CATO J. 469, 470 (2006).

25. In the 2003 *UCLA Law Student Survey*, six of the sixty-one students who favored the adversarial approach said that the inquisitorial approach interfered with personal autonomy. Survey, *supra* note 4.

26. JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, REMARKS ON BENTHAM'S PHILOSOPHY 78, 144-45 (Geraint Williams ed., 1993). Similarly, John Locke stressed that in leaving a state of nature and joining civil society, man gave up no more liberty than was absolutely necessary to secure the benefits of government. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 59, at 307 (Peter Laslett ed., 1967) (1960). It should follow that, along with all other liberties, men retained the power to decide precisely how their own disputes should be presented in court. See *id.* Another libertarian philosopher, F.A. Hayek, makes the same point: "It is because freedom means the renunciation of direct control of individual efforts that a free society can make use of so much more knowledge than the mind of the wisest ruler could comprehend." FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 31 (1960); see also ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) (justifying the "minimal state" from a moral perspective); PETER J. VAN KOPPEN & STEVEN D.

C. Social Science Support for Adversarialism

The notion that people seek to maximize their control of the dispute resolution process is supported by social-scientific literature.²⁷ Thibaut and Walker conducted the seminal psychological study of the dispute resolution process in the early 1970s.²⁸ They staged a simulated “trial” involving undergraduate students who were found “guilty” or “innocent” of business plagiarism by a “judge.”²⁹ Half of the students experienced an “adversarial” trial, meaning that each of the subjects chose a “lawyer” who argued on the subjects’ behalf to a “judge.”³⁰ The other half experienced an “inquisitorial” trial, meaning that the students did not have their own lawyers; instead, a single appointed “lawyer” made arguments for both sides to a “judge.”³¹

The students expressed greater satisfaction with the fairness of the adversarial procedure than with the inquisitorial procedure.³² This result generally held *regardless* of whether the students believed they were “innocent” or “guilty” of the charges against them and *regardless* of whether they were actually found “innocent” or “guilty” by the “judge.”³³ Thibaut and Walker’s findings are the basis for many subsequent works involving the social psychology of the dispute resolution system. They showed that the litigants’ perceptions that they have been treated fairly are extremely

PENROD, ADVERSARIAL VERSUS INQUISITORIAL JUSTICE 352–54 (2003) (attributing the difference between American and Dutch criminal procedure to American individualistic traditions—the John Wayne version of justice); Marian Neef & Stuart Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L.F. 123, 161–62 (1974); Verkuil, *supra* note 13, at 56–57.

27. See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 110 (1988); Tom R. Tyler, *Justice and Power in Civil Dispute Processing*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 313–15 (Bryant G. Garth & Austin Sarat eds., 1998).

28. See JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 67–80 (1975).

29. *Id.* at 68–69.

30. *Id.* at 69–70.

31. *Id.*

32. *Id.* at 74–75 tbl.8-3.

33. *Id.* Unsurprisingly, those students found “innocent” were much happier with either process than those found “guilty,” but in nearly all of the various combinations, the subjects found the adversary approach to be fairer than the inquisitorial approach. *Id.*

important *even if they are disappointed with the substantive outcome*.³⁴

I do not question the fundamental insight of the Thibaut-Walker study and many subsequent studies that procedural justice matters to people independent of the final ruling. People are deeply concerned that decision makers seem neutral, unbiased, and honest as well as fair, polite, and respectful.³⁵ They care greatly about their opportunity for self-expression. And litigants are sensitive to whether they (or their advocates) control the proceedings, because that affects whether they will have sufficient opportunity to tell their side of the story. However, it may be that the disputants are concerned less about the details of how control is exercised than their perception that the decision maker is trying to be fair, polite, and respectful of their rights.³⁶

It is wholly understandable that experimental subjects in the Thibaut-Walker study would distrust a system in which they are deprived of choosing their own lawyer. Naturally, they are suspicious of a system in which they must depend on the judge alone or on an assigned “investigator” to state the subject’s side of the dispute fairly. It is not so clear, however, whether the subjects would equally resent the introduction of inquisitorial techniques into adversarial trials so long as they could select a champion to represent their interests.

Indeed, a follow-up study by Thibaut and Walker suggests that parties who can choose their own advocates find little difference

34. Thibaut and Walker also surveyed “observers” who had watched the proceedings but were not themselves “litigating.” *Id.* at 76 tbl.8-4. The observers agreed that the adversarial approach was better. *Id.* Thibaut and Walker also wondered whether their results mirrored the fact that American students are accustomed to adversary procedures so would of course prefer them. *Id.* at 77–78. They found that English, French and German students had about the same preferences as the American students. *Id.* at 80 tbl.8-5. This experiment involved a written questionnaire describing different trial and decisional models, not a simulated trial. *Id.* at 78; *see also* John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1272–73 (1974).

35. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 135–56 (1990).

36. *See* LIND & TYLER, *supra* note 27, at 107–10. Tyler conducted an ethnographic study of Chicago residents who had actual experiences with the police and courts (as opposed to Thibaut and Walker, who studied college students who had no such experience). *Id.* at 107. Tyler was able to derive a ranking of the importance in the minds of respondents of the various elements of procedural justice. *Id.* at 108. He found that fairness (meaning the perceived willingness of the hearer to be fair) ranked first; ethicality (meaning politeness and respect for the rights of the parties) ranked second; representation (which includes the extent to which the disputants have an opportunity to present arguments, be listened to, and have their views considered) ranked third. *Id.* at 108 tbl.5-4.

between an active and a passive judge.³⁷ Here the subjects were undergraduates in both the United States and Paris.³⁸ The case was a simulated trial involving an assault arising out of a fight in a bar and a possible self-defense excuse.³⁹ Each “plaintiff” and “defendant” chose an advocate to present his side of the dispute. In half the cases, the “judge” asked the questions and in the other half, the advocates presented the evidence without interference from the judge.⁴⁰ The subjects in both the United States and France were *equally satisfied with both versions*.⁴¹

It is unclear whether the results derived from studying undergraduate students in a pristine environment would describe the opinions of real litigants in our civil and criminal justice systems. The undergraduates gave no consideration to efficiency concerns; they were not bogged down in an expensive and slow process that is often bitterly resented by real world litigants. The stakes were low, they did not have to pay their lawyers, and the whole process wrapped up in an hour. Nor were they subjected to the problem of capricious or confused juries, inconsistent results, perjurious or biased witnesses, uncivil and often rude lawyer behavior, lawyer strategies that obscure the truth, or serious inequalities of skill, experience or resources as between the advocates. Confronted with some of these rather unpleasant realities of the litigation process, each of which might be ameliorated by enhancing judicial control over the process, the undergraduates might reconsider their preferences.

D. Dislike of Government Officials in General

A generalized distrust of government officials and government power is a recurrent strain in American history. The original colonists—and probably most of the millions of immigrants who followed them—sought to escape oppressive authoritarian governments at home. The American Revolution threw off the despised British rule. The Revolution was followed by enormous

37. THIBAUT & WALKER, *supra* note 28, at 97–101.

38. *Id.* at 98.

39. *Id.* at app. B.

40. *Id.* at 98.

41. *Id.* at 99.

popular resistance to the centralization of federal power.⁴² A substantial number of Americans suspect government officials and agencies of meddlesomeness,⁴³ incompetence, or corruption.⁴⁴ These convictions are shared by people on both the left and right of the political spectrum. These feelings are the same whether we are talking about the police, the IRS, the FBI, the Bureau of Alcohol, Tobacco and Firearms, or the local Department of Motor Vehicles. The degree to which people trust government has fluctuated throughout American history, but has been at a low ebb for the last generation.⁴⁵ People who distrust government officials will firmly oppose any proposal to give a government bureaucrat called a judge greater control over dispute settlement.

E. Distrust of Judges in Particular

A good many Americans, and almost all lawyers, are suspicious of the competence and impartiality of judges.⁴⁶ As a result, the idea of enhancing judicial power over trials is troubling to many people.⁴⁷ Their reservations have merit. The legal realists have taught us that judges, like every other human being, have their own political and

42. See GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 17, 318 (1999).

43. See Eric M. Uslaner, *Is Washington Really the Problem?*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 128 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (noting that conservatives are more likely than liberals to believe that the federal government interferes with the lives of citizens).

44. SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 34, 88, 95 (1981). "In sum, the distinctive aspect of the American Creed is its antigovernment character. Opposition to power, and suspicion of government as the most dangerous embodiment of power, are the central themes of American political thought." *Id.* at 33.

45. See generally John R. Alford, *We're All in This Together: The Decline of Trust in Government, 1958–1996*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?*, *supra* note 43, at 28, 30–32 (discussing election surveys that show significant decline in trust of government over a four-year period in the late 1990s).

46. Recall that the general public has more confidence in judges than lawyers. See *supra* note 8. Nevertheless, suspicion of judges runs deep (though not as deep as suspicion of lawyers). *Id.* The relatively favorable opinion of the general public about judges was based on their conventional neutral and rather passive role in the adversary system. See M/A/R/C SURVEY, *supra* note 5, at 62–63. Giving judges greater powers at the expense of lawyers would undoubtedly rouse suspicions of judicial impartiality and of the capability of judges to handle the assignment.

47. The 2003 *UCLA Law Student Survey* asked students the reasons for their choice between adversarial and inquisitorial models. Survey, *supra* note 4. Of the sixty-one respondents who favored the adversary system, thirteen mentioned their fear of biased judges. *Id.* Another fourteen believed that the inquisitorial system reposes too much power on judges. *Id.*

social opinions.⁴⁸ Judges might not be able to set these opinions aside and act neutrally when called upon to conduct a trial in an inquisitorial mode (for example, when summing up the evidence). Some judges are lazy and would do a poor job if the structure of the trial and examination of witnesses were left in their hands. Judges might lack the energy, motivation, skills, or time to gain an understanding of the issues necessary for deciding who the expert witnesses should be, questioning witnesses, or commenting on the evidence before the jury considers the case. Instead, people might well believe that adversarial lawyers, who are paid by their clients and intensely motivated to win, will do a better job of fact investigation and presentation of their client's position than a judge ever could do.⁴⁹

The fundamental differences between United States and European judges suggest that inquisitorial methods might not work here. In continental Europe, virtually all judges are trained professionals.⁵⁰ Only the best law school graduates are admitted into judicial training institutes.⁵¹ Judging is a career track; most judges are trained and reeducated throughout their careers, and they are promoted to more responsible roles depending on their performance.⁵² In the United Kingdom judging is not a separate career track; however, the appointment of judges has always been non-political, and generally the most capable barristers have been selected as judges.

The manner in which American judges are selected bears little resemblance to these European models. The quality of judges is mixed, depending on the jurisdiction. Some states have merit selection systems, while other states, as well as the federal system,

48. See, e.g., John Hanas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 86–91 (1995).

49. In the 2003 *UCLA Law Student Survey*, of the sixty-one students who favored the adversarial system, eighteen thought that lawyers would do a better job than judges of conducting a fair trial because of the lawyers' desire to win and because of the financial incentives for doing so. Survey, *supra* note 4.

50. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 848 (1985).

51. *Id.* at 849.

52. *Id.* at 849–51; see also EVA STEINER, *FRENCH LEGAL METHOD* 125–30 (2002).

rely on political appointments.⁵³ Appointments at the federal level have become increasingly politicized. Although executives generally try to appoint qualified judges—if only to avoid being blamed for later fiascos—politics has everything to do with these appointments. In most states, a prospective judge must be an active member of the governor's political party.⁵⁴ Indeed, a newly appointed judge may be a politico who has been defeated for election and needs a new job. Campaign contributions do not hurt. In many places, particularly big cities, the judges may be the dregs of the profession.

In states that rely on judicial elections, there are deeper reasons for concern about judicial quality and independence. Elected judges are sometimes reluctant to render unpopular decisions that might arouse disfavor from groups likely to organize non-retention campaigns. Increasingly, judicial elections feature the same sort of attack television advertising and corrupt fundraising practices as other electoral contests.⁵⁵ Regardless of the selection method, judges are drastically underpaid relative to successful practicing lawyers, and often receive inadequate staff support.⁵⁶ As a result, many able lawyers cannot afford to become or remain judges and some lawyers who cannot make a living practicing law want to become judges.

All these concerns about biased or incompetent judges have merit. But the present system of adversarial lawyer combat also has problems aplenty. Most trial judges are experienced in finding facts, appraising witness credibility, and conducting trials—unlike jurors who do not have a clue.⁵⁷ Judges have better access to knowledge

53. AM. JUDICATIVE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf>; Federal Judiciary Frequently Asked Questions, <http://www.uscourts.gov/faq.html> (last visited Jan. 28, 2007).

54. AM. JUDICATIVE SOC'Y, MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES 1 (2003), available at http://www.ajs.org/js/ms_descrip.pdf.

55. A 2002 study of over 2400 state court judges showed that 45% of trial judges and 49% of appellate judges believe that campaign contributions influence judicial decisions to at least some degree. GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE: STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), available at <http://faircourts.org/files/JASJudgesSurveyResults.pdf>.

56. See, e.g., Corey Staughton, Staff Attorney, New York Civil Liberties Union, Testimony Before Judiciary Committee of the New York State Assembly Regarding Proposals to Reform the New York State Justice Courts (Dec. 14, 2006), available at http://www.nyclu.org/town_courts_tstmny_121406.html.

57. Obviously, judges are inexperienced when first appointed. In most systems, however, they are assigned to less difficult cases (such as misdemeanors) until they get some experience.

about results in other trials and so can facilitate fair and consistent applications of vague legal standards by the jury. Research indicates that they are less likely to make common cognitive errors than juries and thus can structure trials in a way that minimizes the risk of such errors.⁵⁸ And at least judges are trained and socialized to act in a fair and neutral manner, regardless of their political biases.

F. Fuller's Hypothesis

Harvard Professor Lon Fuller famously criticized the inquisitorial system on neutrality grounds. Fuller argued that a judge who is involved in framing the issues and choosing witnesses prior to the trial would decide prematurely which side was correct and downgrade evidence to the contrary. In contrast, Fuller argued, the passive judge in an adversarial trial is likely to remain neutral until all the evidence is in.⁵⁹

Fuller's insight was subsequently validated by Thibaut and Walker.⁶⁰ They constructed an experiment in which undergraduate students were asked to serve as "judges" in an assault case involving a self-defense issue. The experimenters biased half of the "judges" by exposing them to information about cases in which the similar conduct had been found unlawful. Half of the trials simulated an "adversary" mode because the facts were presented by two "lawyers" labeled "prosecution" and "defense." The other half simulated an "inquisitorial" mode, meaning that a neutral "lawyer" presented the facts to the judge. Thibaut and Walker concluded that the biasing information had a larger impact on the conviction rate when the case

Since judges tend to remain on the bench for lengthy periods, the odds are that any given judge will have considerable experience.

58. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 826–27 (2001). A common cognitive error consists of "anchoring," meaning that the choice of the correct number is heavily influenced by the numbers initially presented. Thus, it appears that the more plaintiffs ask for, the more a jury is likely to award. See Gretchen Chapman & Brian Bornstein, *The More You Ask For, The More You Get*, 10 APPLIED COGNITIVE PSYCHOL. 519, 521–24 (1996); Cass Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 141–44 (1999). Judges who are accustomed to seeing exaggerated damage claims should be less susceptible to this error than juries. However, Guthrie and his co-authors did believe that juries might have an advantage over judges, since group decisionmaking could reduce some cognitive errors. Guthrie et al., *supra*, at 827.

59. See Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 42–47 (Harold Berman ed., 1971); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–84 (1978). Fuller's hypothesis is criticized in Luban, *supra* note 6, at 95–97.

60. THIBAUT & WALKER, *supra* note 28, at 41–53.

was presented in an inquisitorial mode than an adversarial mode.⁶¹ When the judge was not “biased,” the conviction rates were the same whether an adversarial or inquisitorial trial occurred. Where the judge was biased, however, the judge was more likely to convict the defendant in an inquisitorial rather than an adversarial trial.

Nevertheless, Fuller’s hypothesis remains open to question. The “judges” in the Thibaut-Walker experiment were relatively unmotivated undergraduates. Couldn’t professional judges who hear cases every day and are socialized to remain neutral do better? At least, couldn’t they do a better job of remaining neutral than kids who may or may not have been serious about the experiment, have never done anything like this before, and are doing it in a simulated, laboratory setting?⁶²

Moreover, Fuller’s hypothesis seems somewhat quaint, given that the citadel of neutrality has long since been breached. Judges now routinely engage in a host of pre-trial case management activities, decide on preliminary injunctions or summary judgment motions, and become deeply involved in promoting settlement.⁶³ All of this exposes them to vast quantities of information about the case and could cause them to lose their neutrality.

G. Relation to Sport and War

One reason for people’s belief in adversarialism may be their enjoyment of contests. The media coverage of many celebrity trials is similar to coverage of a sports event, concentrating on gimmicks and who is ahead on a given day. Scholars trace the origins of the adversarial system back to primitive systems of trial by battle and

61. *Id.* Thibaut and Walker also discovered that the *order* in which the case was presented made an even bigger difference, regardless of which trial mode was used and whether or not biasing information was presented. *Id.* at 45. The last evidence presented was the most influential under both the inquisitorial and adversarial modes. *Id.* Thus defendants did much better when the order was unlawful-lawful than when the order was lawful-unlawful. *Id.*

62. See Samuel Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740 n.22 (1987). Gross wrote: “[I]t is pointless to use college students and first-year law students to simulate the roles of judges and lawyers in adversary and investigatory systems of litigation; even if these subjects develop the appropriate motivation for their roles, they cannot possibly have the essential training.” *Id.* Indeed Gross thought an investigatory judge should be better able than a passive one to confirm or disconfirm his initial hypotheses. *Id.* at 743. Mirjan Damaška also criticized the Thibaut-Walker experiment. Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1095–1103 (1975).

63. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386–413 (1982).

trial by ordeal.⁶⁴ It may be that people like adversarial trials for some of the same reasons they like sporting events and other contests, and perhaps for the same reasons that many of them have a taste for war. Certainly, the adversarial system (with its potential for lawyerly strategy and gamesmanship) is vastly more entertaining for spectators and probably for the participants than the inquisitorial system (in which lawyers have relatively little to do).

H. Lawyers' and Judges' Preference

One reason why we retain pure adversarialism is that it is good for lawyers. Like all human beings, lawyers prefer a system that they control (whether through trials or through settlements and plea bargains) rather than one that subordinates them to figures, such as judges, whom they cannot control.⁶⁵

Even the judges with whom I have discussed the matter appear uninterested in reforms that would increase their power. Many would prefer to avoid political heat that could jeopardize their chances of re-election or promotion to higher courts. Moreover, inquisitorial systems involve more work and more responsibility which many judges would prefer to avoid or which they believe they would have no time for. A judge who is obligated to sum up the evidence for the jury, for example, has to pay much closer attention to the trial testimony than one who delegates full fact-finding responsibility to the jury.

II. THE ADVERSARY SYSTEM IN POPULAR CULTURE

A. Popular Culture as a Teacher

The stories told by pop culture media reflect the public's array of myths, opinions and beliefs.⁶⁶ Of course, that reflection is distorted by the process of pop culture production. The creators of cultural products need to tell interesting and concise stories, entertain

64. See Neef & Nagel, *supra* note 26, at 133–47, 153–61.

65. Of course, financial considerations also come into play. Endless discovery and lengthy trials are good for lawyers' income. Indeed, for big firms, litigation is the engine that drives their profits. In all countries, lawyers with vested interests in the status quo are likely to resist procedural reforms. Zuckerman, *supra* note 5, at 44–45.

66. See MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE: A COURSE BOOK 54 (2004).

a mass audience, and turn a profit. Nevertheless, one can learn a lot from media about what the public thinks and believes (or at least what the creators of cultural products think they believe). Thus legal pop culture products have represented the adversary system at work in countless films, television shows, and novels about American civil and criminal justice. The endless repetition of adversarial narratives in media products says a lot about how deeply rooted the adversary system is in American society.

I believe that pop culture not only reflects but also changes public opinion, and attitudes.⁶⁷ People are influenced by the popular culture they consume, just as they are influenced by the news or by commercials or political advertisements. As a thought experiment, ask yourself whether you know what it was like to fight in Vietnam or in World War II. Undoubtedly you have a lot of information on that subject, but where did it come from? For most people, such information could have been derived only from pop culture treatments of those wars. Similarly, do you know anything about the lives of cowboys or detectives? Undoubtedly, you do—and that information (or misinformation) probably came exclusively from pop culture narratives.

There is considerable theoretical dispute about the extent to which consistent fictitious stories presented in film or television actually change (or at least reinforce) people's attitudes and opinions and, if they do, the mechanism by which this occurs. "Cultivation theory" is a well-studied approach that was developed by theorists in the fields of social and cognitive psychology.⁶⁸ While some theorists

67. As Richard Sherwin puts it:

For many, perhaps most, the mass media today are in fact the primary if not the exclusive source of the public's knowledge about law, lawyers, and the legal system as a whole. . . . Put simply, [popular culture, especially visual mass media] is a source of both meaning and the meaning-making tools people use to think and speak with. . . . [It is the source of the] common narratives that organize our experience . . . [that we] use to make sense of things in our everyday lives. . . . This vast electronic archive provides us with the knowledge and interpretation skills we need to make sense of ordinary reality. From these familiar sources we learn the familiar plot lines, story genres, and character types out of which meanings are made. In a sense, we "see" reality the way we have been trained to watch film and TV. The camera is in our heads. We've internalized the media's logic.

RICHARD K. SHERWIN, WHEN LAW GOES POP 18–21 (2000). For a good survey of the literature on media effect, see Kimberlianne Podlas, "The C.S.I. Effect": *Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 443–50 (2006).

68. George Gerbner is generally credited with pioneering cultivation theory. See generally George Gerbner et al., *Growing Up With Television: Cultivation Processes*, in MEDIA EFFECTS:

have criticized cultivation theory,⁶⁹ I believe that it has held up well.⁷⁰ Cultivation theorists treat film and especially television as the common story-teller of our age. Pop culture media (especially television) is consumed in massive amounts by nearly all members of the general public. It transmits a consistent set of images and messages about social reality into nearly every home. In answering questions or forming opinions, cultivation theorists assert, each of us accesses information stored in mental “bins” or “files” or “schema” on every conceivable subject. Generally we tend to access the most recently filed information in the bin. Whether a particular item is accessed when needed to answer a question or form an opinion depends on the frequency with which similar items have been deposited, the recency of the deposit, and the vividness of the event that caused us to acquire the information.⁷¹ Most significantly, we

ADVANCES IN THEORY AND RESEARCH 17–41 (Jennings Bryant & Dolf Zillman eds., 1st ed. 1994) (studying how heavy exposure to television shapes the viewer’s image of reality). For discussion of the psychological mechanisms by which the cultivation effect operates, see Asimow, *supra* note 8, at 553–61; Richard E. Petty & Joseph R. Priester, *Mass Media Attitude Change: Implications of the Elaboration Likelihood Method of Persuasion*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 155–57 (Jennings Bryant & Dolf Zillman eds., 2d ed. 2002); L. J. Shrum, *Media Consumption and Perceptions of Social Reality: Effects and Underlying Processes*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, *supra*, at 69–91; Michael A. Shapiro & T. Makana Chock, *Media Dependency and Perceived Reality of Fiction and News*, 48 J. BROAD. & ELEC. MEDIA 675, 676–78 (2004).

69. A well established set of media-effect theories, sometimes referred to as the uses-and-gratification approach, revolve around viewer response or reception. These views are often identified with the Birmingham School. See, e.g., LAWRENCE GROSSBERG, ELLEN WARTELLA, & D. CHARLES WHITNEY, *MEDIA MAKING: MASS MEDIA IN A POPULAR CULTURE* 235–57 (1998); Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 105–10 (2005); Alan M. Rubin, *The Uses-and-Gratifications Perspective of Media Effects*, in MEDIA EFFECTS, *supra* note 68, at 525–28. Reception theorists tend to disagree with the passive-sponge approach of cultivation theory. Mezey & Niles, *supra*, at 98. They credit the viewer with the ability to make meanings different from those that were encoded by the creator of the pop culture item. See generally *id.* at 99 (comparing fans’ view of Madonna as a “symbol of female sexual autonomy” and her conventional image as a “patriarchal boy toy”). I believe that viewer response approaches accurately characterize the behavior of some pop culture consumers some of the time, although I believe that it probably describes only a relatively small minority of cultural consumption experience. Nevertheless, this article does not further discuss these theories because of their instant impracticability: the reaction of viewers who make their own meanings is sufficiently indeterminate that it is difficult to predict their reaction to the adversarial narratives discussed here.

70. See Michael Morgan & James Shanahan, *Two Decades of Cultivation Research: An Appraisal and Meta-Analysis*, 20 COMM’N Y.B. 1, 10–19 (1997).

71. This is an application of the well-known “availability” heuristic, which suggests that we are heavily influenced in our behavior or opinions by the most recent and most vivid information available to us. See Cass R. Sunstein, *What’s Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1297 (2003). For example, people are most concerned by

often fail to “source discount” information acquired from pop culture by remembering that it was based on fiction, not on fact.⁷²

Numerous psychological studies confirm the presence of this cultivation effect. They indicate that people’s opinions are influenced by long-repeated, consistent themes in pop culture. People who watch a lot of television believe in a meaner world—more crime, more drugs, more prostitutes—than people who do not.⁷³ People who watched *L.A. Law* had more favorable attitudes toward the personalities and even physical appearance of lawyers than people who did not.⁷⁴ Frequent watchers of *Judge Judy* have entirely different beliefs about the appropriate role of a trial judge than those who do not.⁷⁵ Heavy watchers of television crime dramas are more favorably disposed toward capital punishment than light watchers.⁷⁶ Furthermore, many believe that a “CSI effect” predisposes jurors to

risks that have been heavily and recently publicized, such as shark attacks or the Washington, D.C. sniper, despite the extremely low probability of being a victim of sharks or the sniper. *Id.* at 1297, 1299. The stock stories of pop culture stories are highly “available” to TV or film consumers, since they are likely to be recent, repeated, and vivid.

72. A recent study revealed that first-year law students in six different countries acknowledge that pop culture and the news are their most important sources of information on the character of lawyers. Michael Asimow et al., *Perceptions of Lawyers—A Transnational Study of Student Views on the Image of Law and Lawyers*, 12 INT’L J. LEGAL PROF. 407, 424 tbl.4 (2005). For example, in the U.S., 53% of the 1Ls found that news coverage was helpful or very helpful in forming their opinions; 43% of the 1Ls found that pop culture was helpful or very helpful. *Id.* However, another study suggests that first year law students are not influenced by television when they make judgments about how lawyers spend their day. Victoria S. Salzmann & Philip T. Dunwoody, *Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think About the Legal Profession?* 58 SMU L. REV. 411, 446–51 (2005). The 1Ls’ guesses were much closer to the reality of how lawyers spend their time than were the portrayals on television. *Id.* at 447. There was no significant difference between the time estimates made by heavy and light TV watchers. *Id.* at 451.

73. Gerbner et al., *supra* note 68, at 52–53.

74. Michael Pfau et al., *Television Viewing and Public Perceptions of Attorneys*, 21 HUM. COMM’N RES. 307, 324–27 (1995).

75. Kimberlianne Podlas, *Please Adjust Your Signal: How Television’s Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1, 13 tbl.1 (2001). An earlier study of small claims court litigants indicated that many of them were relying on what they had learned from watching Judge Wapner on *The People’s Court*. See generally O’Barr & Conley, *supra* note 4, at 152 & n.11. This show still runs on TV (presided over by Judge Wapner’s successors). It inspired *Judge Judy* and the many similar afternoon judge shows. See Roger M. Grace, *Seven Courtroom Shows Appear on TV’s Fall Docket*, METRO. NEWS-ENTER., Oct. 2, 2003, at 15, available at <http://www.metnews.com/articles/reminiscing100203.htm>. For a discussion of the TV judge shows, see Michael Asimow, “Justice with an Attitude”: *Judge Judy and the Daytime Television Bench*, 38 JUDGES’ J., Fall 1999, at 24–27.

76. R. Lance Holbert, Dhavan V. Shah & Nojin Kwak, *Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Punishment and Gun Ownership*, 81 JOURNALISM & MASS COMM’N Q. 343, 351–52 (2004).

acquit unless the prosecutor presents forensic evidence.⁷⁷ Studies also indicate that jurors are heavily influenced by news media coverage of trials and that the judge's admonition to jurors to ignore what they have learned from the media is useless and even counter-productive.⁷⁸ Other studies indicate that media exposure to information about particular crimes (such as rape) influence the way potential jurors assess evidence.⁷⁹

Another approach to media effects appears in recent implicit bias literature.⁸⁰ This research distinguishes "implicit" from "explicit" racial or gender bias.⁸¹ Implicit bias means psychological schema of which a person is unaware but which influence the person's decisions in matters concerning race, gender, or other areas susceptible of bias.⁸² Among many arresting experiments that establish the presence of implicit bias is one related to mugshots. The experimenters created four variations of a local newscast: "a control version with no crime story, a crime story with no mugshot, a crime story with a [b]lack-suspect mugshot, and a crime story with a [w]hite-suspect mugshot."⁸³ The photos appeared for only five seconds in a ten-minute newscast and the facial features were identical except for skin color.⁸⁴ Having seen the black suspect, white viewers showed 6% greater support for punitive remedies than

77. See Tyler, *supra* note 9, at 1056–63 (indicating that anecdotal accounts of a *CSI* effect are plausible in light of existing juror research); Michael Mann, *Comment, The "CSI Effect:" Better Jurors Through Television and Science*, 24 *Buff. Public Int., L. J.* 211 (2005–06) (citing examples of apparent *CSI* effects in jury verdicts). Tyler points out that an offsetting *CSI* effect may work in the opposite direction: based on watching *CSI*, jurors may overestimate the probative value of the prosecution's scientific evidence. Tyler, *supra* note 9, at 1068–73. *But see* Podlas, *supra* note 67. Podlas surveyed the literature about the alleged *CSI* effect, but her empirical test failed to confirm that the effect existed. *Id.* at 461. Concern with the *CSI* effect predates the current wave of forensic TV shows. See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 *ARIZ. L. REV.* 785, 785–86, 813 (1993). Harris relies on a book by David Simon based on a year riding with the Baltimore police. See DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 456–58 (1991).

78. Tyler, *supra* note 9, at 1060.

79. *Id.* at 1057–60.

80. See generally Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1497–535 (2005) (noting that our vicarious experiences—exposure to news, film, and television—produce implicit biases that alter the nature of our interpersonal interactions).

81. *Id.* at 1508.

82. *Id.* at 1505–06, 1508.

83. *Id.* at 1491.

84. *Id.* at 1492.

did the control group.⁸⁵ Having seen the white photo, white viewers' support for punitive measures increased only 1% (which was not statistically significant).⁸⁶ These experiments clearly show the presence of racial or sexual schema, but where do these schema come from? The schema must be traceable to personal experience or teaching by parents and friends.⁸⁷ An additional source for such schema is probably also vicarious experience—meaning exposure to both news and fictitious stories in television and film.⁸⁸ Researchers tell us:

[I]mages consumed matter. Specifically, consuming positive images can decrease individuals' implicit bias, although they may register no difference on measures of explicit bias. Conversely, it seems reasonable to suppose that consuming negative images can exacerbate implicit bias. . . . And if mental imagery can produce such effects, watching direct portrayals in electronic media may well have an even stronger impact.⁸⁹

B. Perry Mason and His Descendants

I believe that we sit at the feet of that revered teacher of trial advocacy, the greatest lawyer role model who ever lived: the immortal Perry Mason. Mason, played by Raymond Burr, starred in 271 hour-long television shows from 1957 to 1966.⁹⁰ These episodes had high ratings and have remained popular in syndication to this very day. Thirty made-for-television movies between 1985 and 1995 featured the return of Perry Mason (played by an aging Raymond Burr).⁹¹ These movies were also commercially successful and remain available in syndication. Thus many television watchers,

85. *Id.*

86. *Id.*

87. *Id.* at 1539.

88. *Id.* at 1539–40, 1553–67.

89. *Id.* at 1561.

90. *Perry Mason* (CBS television series 1957–1966). For details, see Perry Mason TV Series, <http://www.perrymasontvseries.com> (containing synopses of all of the episodes and numerous links to other sites) (last visited Nov. 7, 2006).

91. Raymond Burr died in 1993. In the last four of the made-for-television movies, Burr was replaced by Paul Sorvino in one film and Hal Holbrook in the other three. J. DENNIS BOUNDS, *PERRY MASON* 156, 158, 191 (1996). These four post-Burr movies pulled much lower ratings than the earlier ones starring Burr. *Id.* at 158–59.

particularly those who are middle-aged and older, have seen the great cross-examiner at work at one time or another.⁹²

The Perry Mason character originated in 82 best-selling novels written by the prolific lawyer-turned-author Erle Stanley Gardner (1889–1970).⁹³ All were titled “The Case of the”⁹⁴ Warner Brothers made seven low-budget Perry Mason films between 1934 and 1937.⁹⁵ Gardner had no involvement in the films, but he did quarrel with Warner Brothers over the studio’s portrayal of his title character.⁹⁶ Gardner restored Mason’s virtue by retaining creative control over the radio version of *Perry Mason*.⁹⁷ The radio show ran as a fifteen-minute daytime serial, six days per week, from 1944 to 1955—an awe-inspiring total of 3,221 episodes.⁹⁸ On the radio, Mason functioned in a variety of legal roles, including as a compassionate counselor and office lawyer. Unlike the Warner Brother movies, the radio show was serious and reflected solid family values.⁹⁹ It was sponsored by Procter & Gamble from beginning to end.¹⁰⁰ In order to maintain creative control over the character’s foray into television, Gardner owned the controlling

92. Older generations are far more likely to have consumed significant numbers of *Perry Mason* episodes. The 2003 UCLA Law School Student Survey indicated that none of the 1Ls watched *Perry Mason* frequently, but 19% watched it rarely. Survey, *supra* note 4. This is a respectable result given that *Perry Mason* is shown only in daytime syndication on cable channels in Los Angeles. More students watched *Perry Mason* than watched *JAG*, which was then shown on network TV (11% watched *JAG* frequently or rarely). *Id.* *Perry Mason* viewership was not too far behind *Judge Judy* (26% watched it frequently or rarely), *id.*, and *Judge Judy* is the highest rated show on daytime television. Thus, significant numbers of young people are exposed to *Perry Mason* at least occasionally. By comparison 54% of the 1Ls watched *Law & Order* frequently or rarely, 33% watched *The Practice* frequently or rarely, and 50% watched *Ally McBeal* frequently or rarely when it was on (*Ally McBeal* was no longer running in 2003). *Id.*

93. See Francis M. Nevins, *Samurai at Law: The World of Erle Stanley Gardner*, 24 LEGAL STUD. F. 43 (2000). Nevins’ article is an excellent literary analysis of all of Gardner’s novels, not just the *Perry Mason* stories. He points out that in his early cases Mason was much less concerned about whether his clients were guilty than in later novels or in the television series, where all of them were innocent. *Id.* at 55–56, 58–59.

94. BOUNDS, *supra* note 91, at 167–71; see also Patricia Kane, *Perry Mason: Modern Culture Hero*, in HEROES OF POPULAR CULTURE 125 (Ray B. Browne et al. eds., 1972).

95. BOUNDS, *supra* note 91, at 3.

96. See *id.* at 57–58. The Warner films tried, not too successfully, to emulate the wisecracking sensibility of William Powell in MGM’s *THE THIN MAN* (Metro-Goldwyn-Mayer 1934). *Id.* at 63–64.

97. *Id.* at 84–85.

98. *Id.*

99. See *id.* at 99.

100. *Id.* at 85–86.

interest in the production company that made the television shows for CBS.¹⁰¹ He supervised and edited every script.

The televised Perry Mason was quite different from the other pop culture heroes of the 1950s, who were mostly cowboys and detectives.¹⁰² Cowboys and detectives were loners who achieved justice at the point of a gun and in spite of the law, which was typically portrayed as corrupt and ineffectual.¹⁰³ But Mason (aided by his trusty investigator Paul Drake and secretary Della Street) always achieved true justice through the legal process and he never relied on gunplay or other vigilante alternatives.¹⁰⁴ The criminal justice system in which Mason worked was inept, but it was never corrupt.

Perry Mason on television was asexual, stolid, and humorless.¹⁰⁵ He was a combination detective and lawyer (and the work thus fits into both the detective story and courtroom genres).¹⁰⁶ Mason seemed completely indifferent to collecting fees or to any aspect of human life other than representing his clients. He *always* represented innocent clients who were wrongly charged by the police and prosecuted by the district attorney. He *always* succeeded, by brilliant detective work plus resourceful cross examination, in disclosing the identity of the real killer who broke down on the stand or confessed in the courtroom. The judicial proceeding (usually a California preliminary hearing, occasionally a jury trial) provided the mechanism for revealing the true killer and thus resolving the mystery story. The formula never varied—never.¹⁰⁷

101. Nevins, *supra* note 93, at 69.

102. Norman Rosenberg, *Perry Mason*, in *PRIME TIME LAW* 115, 117–18 (Robert Jarvis & Paul Joseph eds., 1998).

103. Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 235–42 (1987).

104. *See id.* at 249.

105. For analysis of Mason's character, see Michael M. Epstein, *From Willy to Perry Mason: The Hegemony of the Lawyer Statesman in 1950s Television*, 53 SYRACUSE L. REV. 1201, 1213–24 (2003).

106. For differing treatments of the courtroom genre, see PAUL BERGMAN & MICHAEL ASIMOW, *REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES* (2d ed. 2006); ANTHONY CHASE, *MOVIES ON TRIAL* (2002); STEVE GREENFIELD, GUY OSBORN & PETER ROBSON, *FILM AND THE LAW* (2001); LEGAL REELISM (J. Denvir ed., 1996).

107. BOUNDS, *supra* note 91, at 109.

Although modern viewers might view *Perry Mason* as campy¹⁰⁸ and lawyers groan at the mention of his name, I believe that the show has cemented the myth of the lawyer as truth-discoverer.¹⁰⁹ Television, after all, stands alone in its ability to shape the opinions of mass audiences. An extremely popular, long-running, successfully syndicated, tenaciously formulaic television series like *Perry Mason*, starring a beloved and respected actor, surely must be among the most powerful opinion-makers and ideology-entrenchers in human history.¹¹⁰

Anyone who learned the law from Perry Mason knows that you can never rely on the police, the prosecutor, or the judge for justice. Although these functionaries are honest and hard working, they are none too bright. They *always* go off in the wrong direction and prosecute the wrong person. Only through the noble lawyer/detective's adversarial fact investigation and inspired cross examination can the

108. Rosenberg, *supra* note 102, at 115–18.

109. Burr himself considered the show and its central character as a “public trust” with the actor serving as “chief executor.” BOUNDS, *supra* note 91, at 1. When Burr died, *People Magazine* noted that Burr and Mason “had become not only America’s Lawyer but the world’s.” *Id.* at 157. Asked to name a lawyer they admired, 52% of respondents to a 1993 National Law Journal poll could not name one. Randall Samborn, *Who’s Most Admired Lawyer?*, NAT’L L.J. 1, Aug. 9, 1993, at 24. The few respected lawyers cited more than once included Perry Mason and Matlock, along with Thurgood Marshall, Janet Reno, Abraham Lincoln, and F. Lee Bailey. *Id.*

110. Dennis Bounds concluded his study of Perry Mason as follows:

Mason’s activities are a confirmation of the culture. Here the collective ideal of justice within the American culture, embodied in the American judicial system, is identified, examined, and vindicated with every novel, film, episode, or made-for-television movie. Crimes are committed, but the guilty are punished. The innocent client may be charged with the heinous crime of murder, but because of the adversarial system of law in this country the defense attorney stands ready to prove the innocence of his/her client. This is done in the most idealistic, and ultimately sure, way by not only proving innocence but by catching the truly guilty. Inferred from every version of Perry Mason is the idea that though the system may seem out of control, the presence of the defense attorney celebrates justices—only when a hero such as Mason is involved. . . . As a system of ritual mythmaking and of contemporary ideology, Perry Mason supports, even when it appears to prove the injustice of, the American judicial system. Mason is the ultimate lawyer—a defender who never rests. From this the audience can infer that the established system of law is fundamentally just—as long as a Perry Mason takes the case.

BOUNDS, *supra* note 91, at 163–64. Mezey and Niles contend that Perry Mason went far toward legitimating the American justice system. Mezey & Niles, *supra* note 69, at 117. Steven Stark believes that Perry Mason, and the image of the bumbling police, helped pave the way for *Miranda*. Stark, *supra* note 103, at 229–30. Michael Epstein contends that Mason served the role of both defense lawyer and prosecutor by always identifying the guilty party. Michael M. Epstein, *For and Against the People. Television’s Prosecutor Image and the Cultural Power of the Legal Profession*, 34 U. TOL. L. REV. 817, 826 (2003).

legal system achieve justice. Most importantly, Mason always finds out *the truth*. His clients do not weasel out under reasonable doubt. Instead, they are proved affirmatively innocent because the real killer *always* confesses. The seductive over-simplification of the Perry Mason narrative may have sold to American television consumers a way of thinking and believing that they have never deserted. Indeed, that narrative undoubtedly served to legitimate the existing adversary system by constantly repeating the message that adversarialism is the only true path to justice.¹¹¹

Countless television shows have reinforced the idea that only a lawyer-champion can lead us to justice through aggressive use of the adversary system. *The Defenders* ran during the *Perry Mason* era (130 episodes, spanning the years 1961–65).¹¹² Indeed, the show followed *Perry Mason* on CBS on Saturday nights. *The Defenders* won thirteen Emmys (compared to four for *Perry Mason*) and consistently maintained high levels of writing, acting, and production.¹¹³ Unfortunately, this superb series has never gone into syndication. *The Defenders* portrayed a very different world from *Perry Mason*. The father-son team of Lawrence and Kenneth Preston attacked a different legal or social problem every week and always from a politically liberal point of view.¹¹⁴ Like Mason, they never thought about being paid and seemed to have no lives outside the office. Despite its vast superiority to the formulaic nonsense of *Perry Mason*, *The Defenders* also championed the adversary system by reinforcing the message that ordinary people could confront the legal system only with the aid of noble lawyers.¹¹⁵ *Matlock* ran from 1986 to 1995 and continues to thrive in syndication.¹¹⁶ Starring the

111. The role of popular culture in legitimizing the status quo is a longtime subject of cultural studies, dating back to the Frankfort School. See Mezey & Niles, *supra* note 69, at 101–05. Mezey and Niles argue that the repetitious nature of legal pop culture on television serves to legitimize the American justice system. See *id.* at 114–33. However, they believe that the more diverse portrayals of law in film may subvert the existing legal order, thus allowing for more oppositional readings by consumers. See *id.* at 133–66.

112. See David Ray Papke, *The Defenders*, in PRIME TIME LAW, *supra* note 102, at 3, 5.

113. *Id.* at 5–6.

114. *Id.* at 3.

115. See *id.* at 13–19; see also Papke, *supra* note 112, at 3, 6.

116. Gail Richmond, *Matlock*, in PRIME TIME LAW, *supra* note 102, at 55, 55. Unlike Perry Mason, Ben Matlock had a personal life. His daughters were his associate attorneys at different times and he had an unresolved relationship with prosecutor Julie March. *Id.* at 63–64.

beloved Andy Griffith, *Matlock* reinvented the *Perry Mason* cliché in Southern drag.¹¹⁷

The stale message of *Perry Mason* resonates down to the present day. Truth and justice cannot exist apart from the work of a dedicated, committed, zealous lawyer (usually a criminal defense lawyer). If you are in trouble, you need to have a lawyer by your side. You might hate lawyers in general, but when you need one, you'd better get the best.

Some modern television shows focusing on criminal defense have blessedly departed from the *Perry Mason* storyline. On these shows, particularly *The Practice*,¹¹⁸ *L.A. Law*,¹¹⁹ *Ally McBeal*,¹²⁰ *Boston Legal*,¹²¹ and *Justice*¹²² (not to mention *The Simpsons*¹²³), the adversary system is fallible and does not necessarily produce truth and justice.¹²⁴ On these shows, innocent people are sometimes convicted and the guilty sometimes walk free or plea bargain serious crimes down to light sentences.¹²⁵ The lawyers deliberately blame people they know are innocent to create reasonable doubt ("Plan B"). Their ethical practices are situational.¹²⁶ Unlike *Perry Mason*, the lawyers have personal and relationship problems, and they are trying to earn big bucks (or at least a decent living).¹²⁷ Perhaps, after a few more years of anti-*Perry-Mason* lawyer shows, people's confidence in adversarial criminal defense will begin to falter.

In my view, that has not yet happened. I believe we have learned the lesson well from our master, *Perry Mason*, and his television progeny. We carry his teachings down to the present day. In our bones, we know that only a system that empowers lawyers can discover the *real truth* about what actually happened when the crime was committed—who done it and why. Perhaps for that reason,

117. *Id.* at 63.

118. *The Practice* (ABC television series 1997–2004).

119. *L.A. Law* (NBC television series 1986–1994).

120. *Ally McBeal* (FOX television series 1997–2002).

121. *Boston Legal* (ABC television series 2004–current).

122. *Justice* (FOX television series 2006).

123. *The Simpsons* (FOX television series 1989–current).

124. See Mezey & Niles, *supra* note 69, at 127–33.

125. See William H. Simon, *Moral Pluck*, 101 COLUM. L. REV. 421, 431–32, 445–46 (2001) (analyzing the ethics of lawyers on *L.A. Law* and *The Practice*).

126. *Id.* at 445–46.

127. *Id.* at 428; Mezey & Niles, *supra* note 69, at 128.

Americans react with horror to proposals to de-center the lawyer, particularly the criminal defense lawyer. The public probably fears that such reforms would devalue the truth-seeking function of the law.

C. Heroic Prosecutors

Sometimes pop culture glorifies heroic and dedicated prosecutors. The phenomenally successful *Law & Order* provides a weekly seminar about the role of prosecutors in the criminal justice system. *Law & Order* teaches us that dedicated, selfless, and resourceful lawyers like Jack McCoy (and his numerous female sidekicks) protect us from predatory criminals.¹²⁸ In most episodes, the prosecutors unmask perjury and conspiracy in the courtroom and trounce slithery defense lawyers.¹²⁹ Often the judges seem cynical and burned out; they have heard it all and just want to get through the calendar. The prosecutors, however, seek substantive, not procedural, justice. They want the truth (not just a conviction or a plea bargain) and they find and reveal it.¹³⁰ Often, they will not accept a plea bargain unless the defendant “allocutes,” meaning confesses his criminal conduct in open court. *Law & Order* has probably done more to burnish the image of prosecutors than just about any pop-culture product in history, but its message is really the familiar *Perry Mason* narrative from the prosecutor’s side of the courtroom: only dedicated, zealous, lawyers, working in an adversary system, can get at the truth. The model is repeated in other prosecutor shows like *Close to Home*¹³¹ and *Shark*¹³² as well as in the vast universe of cop and forensic shows.

Justice-seeking prosecutors are rarer in the movies than on television, but a few stand out. In *Ghosts of Mississippi*,¹³³ heroic prosecutor Bobbi DeLaughter sacrifices his personal life to convict Byron De La Beckwith for assassinating civil rights leader Medgar

128. See Wikipedia.org, Law & Order, http://en.wikipedia.org/wiki/Law_&_Order (last visited Nov. 3, 2006).

129. See *id.*

130. Virtually all of the nearly 400 *Law & Order* episodes presented to date follow this model. For episode summaries, see Law & Order, http://www.nbc.com/Law_&_Order (last visited Jan. 12, 2007). For a thorough treatment, see Wikipedia.com, *supra* note 128.

131. *Close to Home* (CBS television series 2005–current).

132. *Shark* (CBS television series 2006–current).

133. *GHOSTS OF MISSISSIPPI* (Castle Rock Entertainment & Columbia Pictures Corp. 1996).

Evers twenty years earlier. *The Accused*¹³⁴ showcases heroic prosecutor Kathryn Murphy.¹³⁵ Sarah Tobias was gang-raped in a bar and Murphy plea bargains the case against the rapists down to “reckless endangerment.” Tobias thinks Murphy sold her out, but regains her faith in the justice system when Murphy prosecutes the barflies who cheered on the rapists for “solicitation.” The message of both films is clear: a courageous prosecutor can buck the bureaucracy, reveal the truth, and achieve justice.

D. *The Adversary System in the Movies*

Countless movies have valorized the adversarial lawyer. Often (especially in recent films) the lawyers are personally flawed and their ethics are dubious. Despite their efforts, the adversarial system sometimes fails to convict the guilty or acquit the innocent. Nevertheless, without lawyer-champions, there would be no hope of justice, no way to uncover the truth.¹³⁶ Needless to say, this picture is wildly out of synch with the reality of legal practice, in which the work of lawyers (civil or criminal) has little to do with securing justice or revealing truth and everything to do with using craft to serve the interests of clients (usually through a civil settlement or a criminal plea bargain). Here it is possible only to suggest a few examples, but readers of this symposium could instantly name many more.

1. Cross-Examination

A staple of lawyer movies is the brilliant cross-examination that destroys a lying, deceptive or mistaken witness and reveals the truth. Although many such movies are instantly forgettable, some are exceptionally vivid. Just to name a couple, take the immortal *My*

134. THE ACCUSED (Paramount Pictures 1988).

135. EmanuelLevy.com, Film Review: The Accused, <http://www.emmanuellevy.com/article.php?articleID=656> (last visited Jan. 26, 2006).

136. Sometimes, as in ...*And Justice for All*, the lawyer must attack the adversary system itself in order to reveal the truth about his all-too-guilty client. ...AND JUSTICE FOR ALL (Columbia Pictures Corp. 1979). For a discussion of films in which a lawyer betrays the guilty client to protect the public from the possibility that a depraved criminal might be acquitted, see Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client is Guilty: David Mellinkoff's The Conscience of a Lawyer, Legal Ethics, Literature, and Popular Culture* 26–28 (UCLA School of Law Research Paper No. 06-44, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948291.

Cousin Vinny.¹³⁷ Vinny Gambini has recently passed the New York bar exam (after numerous failures) before traveling to Alabama to defend his young cousin and a friend in a murder trial. Vinny is clueless about Alabama culture and criminal procedure, but he nevertheless morphs into a brilliant trial lawyer. Thus, an eye-witness claims he saw the two “utes” enter the Sack o’ Suds grocery store and exit five minutes later in a green car. He knows it was five minutes because he looked up just as he started and just as he finished cooking his morning grits. Vinny points out that in the rest of the grit-eating world, it takes twenty minutes to cook grits. The witness is destroyed. Vinny also deploys his girlfriend Mona Lisa Vitto, an unemployed hairdresser, as an expert witness on auto mechanics to devastating effect. This scene effectively validates the existing system of partisan expert witnesses.

In *A Few Good Men*,¹³⁸ Lieutenant Kaffee’s very high-risk cross-examination of Colonel Jessep rips away the tissue of lies surrounding the death of Pfc. Santiago. And who could forget *Legally Blonde*,¹³⁹ in which law student Elle Woods utilizes her knowledge of hair care and fashion to demolish a lying witness on the stand and free her innocent client? In these three films and many others, innocent people would surely have been convicted without the assistance of zealous cinematic lawyers utilizing crafty cross-examination in very adversarial trials.

2. Advocates in Civil Cases

Numerous films have involved civil litigation. These films almost invariably pit a noble plaintiff’s lawyer against a vicious corporation and its unethical and ignoble big-firm defense lawyer.¹⁴⁰

137. MY COUSIN VINNY (20th Century Fox 1992).

138. A FEW GOOD MEN (Manhattan Project & Castle Rock Entertainment 1992); see Robert Eli Rosen, *A Few Good (and Angry) Men (and Woman)*, in SCREENING JUSTICE—THE CINEMA OF LAW: SIGNIFICANT FILMS OF LAW, ORDER AND SOCIAL JUSTICE 607 (Rennard Strickland, Teree E. Foster & Taunya Lovell Banks eds., 2006).

139. LEGALLY BLONDE (Mark Platt Productions 2001).

140. See CHASE, *supra* note 106, at 108–13 (arguing that in film, corporate America looks like a branch of organized crime). In general, big law firms and big business are portrayed with extreme negativity in film. See Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1341 (2001). One exception to this generalization stands out: THE SWEET HEREAFTER (Alliance Communications Corp. et al. 1997) portrays a predatory plaintiff’s lawyer and does not demonize corporate defendants or their lawyers.

Take, for example, *The Rainmaker*.¹⁴¹ Novice lawyer Rudy Baylor finds himself locked in litigation with a major defense firm in an insurance bad faith case. It seems that Great Benefit sold medical insurance door to door. It collected premiums but seldom paid any claims. As a result, Donny Ray Black failed to receive a bone marrow transplant in time to save his life.

The defense firm, led by Leo Drummond, engages in all sorts of tricky and unethical behavior. It stalls the case, hoping the plaintiff will die. It taps Baylor's phone. Key witnesses are fired before Baylor can take their depositions. Great Benefit produces its claims manual, but only after removing the part that instructed employees to deny all benefit claims. Baylor personifies grit, tenacity, and client loyalty. He wangles a \$50 million punitive damage award from the jury. Unfortunately, by that time, the insiders have looted Great Benefit, and the company files for bankruptcy. Disillusioned, Baylor retires from the practice of law after winning his first case. Still, the message is clear: if you get sick or hurt, you have no chance without a tenacious and self-sacrificing plaintiff's lawyer to champion your cause. (Even then, because of the flawed system, you may get little or nothing.) The same message is transmitted in *The Verdict*,¹⁴² *Class Action*,¹⁴³ *A Civil Action*,¹⁴⁴ *Regarding Henry*,¹⁴⁵ *Philadelphia*,¹⁴⁶ *Runaway Jury*,¹⁴⁷ and *Erin Brockovich*¹⁴⁸ (which features a heroic paralegal). Episodes of *L.A. Law*, *The Practice*, *Ally McBeal*,

141. THE RAINMAKER (Douglas/Reutner Productions, Constellation Films, American Zoetrope 1997); see Asimow, *supra* note 140, at 1354; BERGMAN & ASIMOW, *supra* note 103, at 187–90. *The Rainmaker* is based on a novel by John Grisham who was the best selling author in the world in the 1990's. John B. Owens, *Grisham's Legal Tales: A Moral Compass for the Young Lawyer*, 48 UCLA L. REV. 1431, 1432 (2001). Grisham trashes all practicing lawyers and many judges but reserves his most deadly venom for big firms that represent corporate defendants. Only new lawyers, law students, pro bono lawyers, and "street lawyers" get a good rap in Grisham's books. See *id.* at 1435–42.

142. THE VERDICT (20th Century Fox 1982); see Richard D. Parker, *The Good Lawyer: The Verdict (1982)*, in SCREENING JUSTICE, *supra* note 138, at 455; Richard Weisberg, *'The Verdict' Is In: The Civic Implications of Civil Trials*, 50 DEPAUL L. REV. 525, 527 (2000); Mezey & Niles, *supra* note 69, at 153–60, 184–85.

143. CLASS ACTION (20th Century Fox 1991).

144. A CIVIL ACTION (Touchstone Pictures et al. 1998).

145. REGARDING HENRY (Paramount Pictures 1991).

146. PHILADELPHIA (TriStar Pictures 1992).

147. RUNAWAY JURY (New Regency Productions 2003).

148. ERIN BROCKOVICH (Jersey Films 2000).

Justice, and *Boston Legal Practice* include numerous civil cases that drive home the identical message.

E. When Judges Get in the Way

In most popular-culture trial portrayals, the trial is in front of a jury, and judges are relegated to minor roles. Once the trial begins, the judges pound their gavels, threaten to clear the courtroom if the spectators do not behave, and rule on evidence objections, but otherwise try to stay awake and out of the way. Normally movie and television judges are as uninteresting and undramatic as baseball umpires.¹⁴⁹

Occasionally, we find trial judges who do get into the action. When this happens, judicial intervention usually thwarts the search for justice. Thus in *The Verdict*, it is clear that Judge Hoyle is firmly in the defense's pocket. At one point, the judge takes over the questioning of plaintiff's not very qualified expert witness and destroys him. Spluttering in rage, plaintiff's lawyer Frank Galvin tells the judge, "If you're gonna try my case for me, I wish you wouldn't lose it."¹⁵⁰ In *A Civil Action*, another judge, who seems to be extremely pro-defendant, makes procedural rulings requiring a bifurcated trial. This puts true justice out of reach for the sick and dying victims of the defendant who callously poisoned the town's drinking water.¹⁵¹

149. See GREENFIELD, OSBORN & ROBSON, *supra* note 106, at 141–68 (referring to the "invisible judge" in film). Of course, the daytime television judge genre, starring Judge Judy and her clones, are exceptions to the generalization in the text. They are inquisitorial judges who are out to discover the truth and administer rough justice on the spot.

150. *THE VERDICT*, *supra* note 142.

151. *A CIVIL ACTION* (Paramount Pictures et al. 1998). Other judges who go badly wrong include those in *LOSING ISAIAH* (Paramount Pictures 1995), *THE GOOD MOTHER* (Touchstone Pictures 1888), and *KRAMER VS. KRAMER* (Columbia Pictures Corporation 1979). A few judges seem, somehow, to do right: Judge Simmons in *ERIN BROCKOVICH*, *supra* note 148, halts PG&E's delaying tactics, and Judge Roosevelt in *THE CLIENT* (Warner Bros. Pictures et al. 1994) restrains prosecutorial misconduct. Additionally, Judge Sarokin frees the wrongly convicted Ruben Carter in *THE HURRICANE* (Universal Pictures et al. 1999). See GREENFIELD, OSBORN & ROBSON, *supra* note 106, at 141–68.

Occasionally, pop culture judges are vicious¹⁵² or crooked¹⁵³ and sometimes they prove to be the real criminals.¹⁵⁴ In *Judgment at Nuremberg*,¹⁵⁵ the defendants are Nazi judges who used their positions to enforce the laws of the Third Reich. The judges are responsible for various horrible misdeeds, such as falsely convicting a Jew of having sexual relations with an Aryan (a capital offense) or requiring sterilization of retarded people. On *The Practice*, a recurring character was a nymphomaniac judge who tried to have sex with everybody in the courthouse.¹⁵⁶ In the ultimate anti-judge film, *The Star Chamber*,¹⁵⁷ we find a group of judges who are fed up with freeing vicious criminals on legal technicalities. The judges investigate these cases and hire hit men to assassinate the criminals. But the judges' plan goes terribly wrong; the criminals whose deaths they have ordered are actually innocent of the crimes they are accused of committing. Thus, the judges prove to be inept even as vigilantes, unlike the successful police vigilante we have grudgingly admired in *Magnum Force*¹⁵⁸ and *Dirty Harry*.¹⁵⁹ In short, if you have learned your law from pop culture, you surely would not want to give judges any more responsibility than they already have.

III. CONCLUSION

Americans could have many reasons to resist proposals for tinkering with the adversarial justice system by enhancing judicial

152. For example, there were the vindictive judges in *THE PARADINE CASE* (Vanguard Films 1947) and *LET HIM HAVE IT* (British Screen Productions et al. 1991).

153. See, e.g., *NIGHT FALLS ON MANHATTAN* (Paramount Pictures & Spelling Films 1997) (judge backdates warrant); *THE PENALTY PHASE* (New World Television 1986) (judge backdates warrant and appoints lawyer who will not raise the warrant issue); *PRESUMED INNOCENT* (Warner Bros. Pictures 1990) (judge covers up his own involvement in bribery scheme).

154. See, e.g., *SUSPECT* (ML Delphi Premier Productions 1987); ...AND JUSTICE FOR ALL, *supra* note 136 (a second judge is a suicidal nut).

155. *JUDGMENT AT NUREMBERG* (Roxlom Films Inc. 1961). Judge Haywood is the chief judge in the war crimes trial of the Nazi judges. Haywood, a washed up state court judge who was defeated for election, turns out to be a heroic character. He insists on the personal responsibility of the Nazi judges and resists calls by American authorities to go easy on them in order to avoid antagonizing the German public at the time of the Berlin blockade.

156. See, e.g., *The Practice: Judge and Jury* (ABC television broadcast Jan. 17, 1999). For an episode summary, see TV.com, *The Practice: Judge and Jury*, http://www.tv.com/the-practice/judge-and-jury/episode/16932/summary.html?tag=ep_list;title;12 (last visited Jan. 29, 2007).

157. *THE STAR CHAMBER* (Frank Yablans Presentations & 20th Century Fox 1983).

158. *MAGNUM FORCE* (The Malpas Company & Warner Bros. Pictures 1973).

159. *DIRTY HARRY* (The Malpas Company & Warner Bros. Pictures 1971).

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powers during the pre-trial or trial phases. Of course, they know little or nothing of alternative systems, and they are rationally dubious about the costs and unintended consequences of replacing a familiar system with an unfamiliar and untried one. Moreover, many Americans believe strongly in individual autonomy and distrust government officials in general and judges in particular. Thus, people may believe that adversarialism, like democracy, is the worst possible system except for the alternatives. We despise and distrust our lawyers, yet we depend on them to uncover the truth and lead us to justice. When trouble strikes, we want a junkyard dog lawyer by our side. When the police catch a vicious criminal, we trust zealous prosecutors to put them away.

Although there are many valid reasons why Americans might be devoted to the adversary system, its dominance may owe something to its glorification in television and film. Pop culture has taught generations of Americans that lawyer-controlled trials are the only way to uncover truth and attain substantive justice (even though lawyers deny that their function has much to do with finding the truth or attaining substantive justice). The timeless story of Perry Mason lives on as myth and supports this deeply rooted and usually unquestioned belief system.

