THE ADVERSARY SYSTEM: WHO NEEDS IT?

*by Edmund Byrne**

According to common folklore, what is most characteristic of the American legal system is its reliance on the adversary system. And this, the legend goes, is as it should be. There are two sides to every question, so the best way to get to an answer is by arguing each side before an impartial and enlightened arbiter of fact and law. This model applies strictly, of course, only to cases that go to litigation. And it is generally recognized that the vast majority of cases never do, because they are withdrawn, dismissed, settled out of court, submitted to arbitration, plea-bargained, discovered to death, or on occasion just plain lost in the shuffle of crowded court calendars. Nonetheless, the legend continues, even these alternative dispositions are made possible precisely because of the burdensome threat of courtroom battle. In a word, we are asked to believe that social justice, like success, is a by-product of the very same competitiveness that underlies our capitalist approach to economic well-being.

If justice is indeed a by-product of competition, then justice is not likely to be any more "equal" than are the competitors who participate in the process. But sociobiology will have its say, and Rawls and others will try to explain why what often seems patently unfair turns out to be contractually fair after all. If we are prenatally ordained to do combat in the courts, then achieving justice must be understood as requiring no more than minor adjustments. The system itself must be saved because it is all that stands between us and the jungle.

Past and recent folklore notwithstanding, the system does not seem to be working. Or, if it is working, it is working in spite of and not because of any virtue inherent in trial by confrontation. So one is not likely now to hear someone assert, as did evidence authority John H. Wigmore in 1923, that the adversary system is "the greatest legal engine ever invented for the discovery of truth."[1]

The best one is likely to hear these days is the sort of backhanded compliment to the inevitable that Geoffrey C. Hazard, Jr., recently put into print:

> If it is possible that the adversary system can work satisfactorily, and necessary that it must do so because no other system of adjudication is likely to be any better, it remains true that the system in its present form is pretty sick.[2]

In Wigmore's day such a negative assessment would have bordered on the treasonous. But today it is hardly disputed. What is disputed is the gravity of the complaint. Some would contend that current difficulties with the adversary system are primarily procedural and can be solved by modifying the procedures at some point or points along the way. Others are convinced that the system itself is the source of the difficulties, either because wrongly applied to some kinds of cases or because it is structurally flawed in its original design. I tend to the latter view, but will propound it only after first considering the more favored theory of incidental or procedural inadequacies.

What is said to be only incidentally flawed is a system in which the parties, through their attorneys, investigate the facts, frame the legal issues, and present the evidence to a hopefully impartial tribunal that then arrives at a decision.[3] Thus is our system set apart from the court-conducted "inquisitorial" system that prevails in countries committed to the civil law tradition. The latter, which has its counterpart in our administrative agencies, is seldom proposed as a viable alternative because of our heritage of distrust for government controlled adjudication.

It is this same heritage of distrust otherwise knows as a love for freedom—that causes us to worry about the process whereby our judges are selected and about the products of such selection.[4] Of course, one's assessment of a judge's qualifications can easily be influenced by the outcome of cases heard by that judge. Such partisan bias is somewhat neutralized by the recognition that the comparatively low salaries paid to judges tends to select out those whose brilliance is better rewarded in private practice. But not even brilliance can guarantee the sort of omnicompetence that random case assignment requires. Thus Judge David Bazelon, who had become something on an expert on mental illness law, wrote in his decision on an auto pollution case:

> I do not know enough about dynamometer extrapolations, deterioration factor adjustments and the like to decide whether or not the government's approach was statistically valid.[5]

Similarly, the federal judge assigned to the AT&T antitrust case, one of the most important cases in our nation's history, is considered marginal at best; and John Sirica of Watergate fame is not often thought of as a particularly outstanding judge. And the groundbreaking Century City case involving patent claims, to be considered later, was initially in the hands of a judge unfamiliar with patent law. It is not likely that mismatches of this sort can be eliminated simply by upgrading judicial salaries, unless in fact it is possible, after all, to buy wisdom without tainting it in the very transaction.

A second incidental flaw is found in the process of jury selection. In the case of a jury, our ideal of impartial adjudication requires us to screen out anyone who has any familiarity either with the subject matter of the case or with legal procedures as such. Nor is ignorance deemed a virtue only at the outset of a trial but throughout, as jurors are systematically prohibited from availing themselves of even the most ordinary means of recording what has been presented before them as evidence. Thus can it happen, as in Trans America Computer Corporation v. IBM, that after listening to technical details for seven long months, the jury wound up in a 50/50 split on a verdict. Proposals to abolish the jury entirely face seemingly insurmountable constitutional obstacles, but the constitution is no longer held to require either twelve members or unanimity. More to the point would be a switch to the English practice in which jurors in cases involving technical matters are drawn from among persons most knowledgeable about the subject matter. An alternative and perhaps better solution to the problem of ignorance, be it that of judge or jury, is American Bar Association President Leonard S. Janotsky's recommendation that special masters be employed in complex cases. This is now being done in California.[6] Chief Justice Warren Burger has been pointing to a third incidental flaw in the adversary system, namely, the inadequate skills of litigating attorneys. Burger's rash of recent complaints coincide with a proposal for more "trial advocacy" instruction in the law schools. If, on the other hand, attorneys are, as often as not, just the sort of rascals that their post-Watergate image would suggest, then it would seem to be the heights of folly to hone up their technical skills without simultaneously encouraging a more

publicly responsible professional ethic.[7] Of late there has been movement on this front but all of this will come to nought if the Vince Lombardi philosophy that "winning is everything" continues to provide the criterion for sorting out good lawyers from bad.

A fourth incidental flaw might be traced to court reporters and clerks whose inability to process paperwork beyond human bounds ties them to the cry that slow justice is no justice. Few would advocate anything as simplistic as five finger exercises as a remedy for this problem, but the technological fix being suggested by the ABA's Action Commission to Reduce Court Costs and Delay, i.e., computer-assisted transcription ("C.A.T."), may actually be as promising as the merchants of C.A.T. like to claim.[8] Gadgetry by itself, however, does not respond to the finding by the National Center for State Courts that "the comity that exists between lawyers and judges in a jurisdiction can be the single most powerful cause of cost to the client and delay in the work of the courts."[9]

The problem of delay and delay-generated cost is somewhat paradoxical in view of a fifth flaw incidental to the adversary system, namely, the mounting litigiousness of the American people together with an ever mounting list of harms for which legal remedies are provided.[10] The expansion of the repertoire of causes of action represents prima facie an expansion of people's rights before the law. In the absence of adequate staff and/or mechanisms for processing complaints, as in the case of the E.E.O.C. and other agencies charged with enforcing affirmative action legislation, such a right may be worth little more than a lottery ticket. Nor is this situation likely to improve under policies espoused by the Reagan Administration.

So there are indeed flaws in the adversary system that can be traced to inadequacies or at least limitations in the human beings who participate in one capacity or another in that system. Lurking behind the foregoing analysis, however, is a most serious suggestion that these qualitative problems are in fact quantitative in origin. The system, so this argument would run, simply was not designed to handle the volume of cases that are now winding up in court. From the time of its origins in English law, our system controlled the numbers through a variety of technical devices, most notably such threshold questions as jurisdiction, standing, and proper statement of a cause of action. As determined by stringent rules regarding the form' of pleadings, the latter was an excellent device for keeping "careless" (read: poorly represented) folks off a court's docket. But since the demise of formal pleading and the rise of statutory causes of action, court dockets grow ever more

voluminous in spite of such restrictions as minimum damages requirements.[11]

In the federal system, for example, there are only about 400 judges for every 600 cases and every 1000 attorneys that come before the federal bench. Ninety-one percent of all federal cases are never heard, at least indirectly because of court congestion. State courts similarly "streamline" their dockets by prematurely terminating "weak" (read: more difficult?) cases thereby in effect rationing justice.[12] Appellate judges also control their case loads by routinely upholding whatever decision has been reached at the trial level or by avoiding mandatory jurisdiction as much as possible.[13]

Nor is this problem of docket clogging made any less severe by relying on administrative agencies. Backlog at the E.E.O.C. is a case in point. Consider also the problem at the Social Security Administration. Largely because of unemployment and disability claims, this agency was hearing 200,000 cases a year by 1979. About half of these were successful; and of the unsuccessful ones 10,000 appeals led to 3,500 second hearings. In the face of this kind of volume administrative law judges were told, according to Jack Anderson, to dispose of 26 cases per month. To meet this quota they tended to approve weak cases just to avoid having to hear them again after appeal, and to rule against good, i.e., time consuming, cases. The end result was an overall increase in payments, expected (prior to Mr. Reagan's election) to reach $27 billion just for disability cases by 1985.[14]

What to do about docket clogging? A number of experiments have been tried, and these are well worth discussing; but their results to date are mixed at best. The development of small claims courts, or some variation thereof, is well known and needs no elaboration here. Also pertinent in this regard are the so-called Neighborhood Justice Centers, which were started experimentally by then Attorney-General Griffin Bell in Atlanta, Kansas City, and Los Angeles and then given statutory status when Jimmy Carter signed into law the Dispute Resolution Act of 1980. Better known, of course, is the Legal Services Corporation, whose state affiliates have attempted to stretch the national budget of $321 million (FY 1981) through lobbying and class action suits.[15] These tactics are likely to be prohibited under legislation now pending before Congress; and the Legal Services Corporation will continue, if at all, with substantially less funding than before. Aside from the obvious impact of such retrenchment on poor people's right to redress of grievances, it is difficult to assess just how it will affect court

clogging. A little appreciated side effect of the LSO is its function as screener of poor people's complaints, the vast majority of which never reach a courtroom. It is unlikely, however, that the legal profession will fill with pro bono service.[16]

Also viewed as an anti-clogging device is court-ordered pre-trial arbitration of cases involving comparatively low damages. Eight states have authorized this approach for cases involving $7500 or less. Since July, 1979, California superior courts have been required to shift cases involving $15,000 to arbitration. Local courts may do so at their option, as may the plaintiff in a case at any court level. The arbitrator's award may be appealed, but appellant pays both court costs and arbitrator's fees if the trial does not result in a better outcome. In the first year of the program, some 24,000 cases were processed by arbitration, but these were small-value damage suits that are usually settled anyway. Additional delays have resulted from a shortage of arbitrators. This problem may soon be alleviated by the appearance of a number of independent organizations offering arbitration services; and Los Angeles County, anticipating statutory authorization, has raised the ceiling for arbitration cases to $25,000.[17]

A timely response to such statutorily mandated arbitration is Carl Person's "free-enterprise court system."[18] What Person offers is a "National Private Court" that, he claims, will complete a case within three months through use of low cost, specialized judges, selected from a panel of over a hundred, who will function essentially as arbitrators and be paid an hourly "Judicial fee." Person's NPC would follow federal rules of procedure, provide a written decision giving facts and conclusions, and appellate briefs based on the entire record.

Another, and to some extent overlapping, quantitative problem is the monetary cost of litigation. This factor, sometimes in combination with concern about clogging, has led to various experiments aimed at disposing of cases with little or no litigation.

One such approach is the so-called summary jury trial, devised by Thomas D. Lambros, a U.S. district court judge in Cleveland. Each side is allowed one hour for an opening statement, a summary of evidence, and a closing statement before a sixmember jury, which renders its non-binding decision at once. The parties then have two weeks to think about the decision. In 33 of 37 cases submitted to such a "mini-trial" settlement was arrived at without a full trial.

The Lambros approach, which involves the court directly in

the process of trying to divert litigants from going to court, is comparable to a variety of experiments begun two years ago in California to foster settlement through court-monitored pre-trial conferences. These settlement conferences, according to an early report by a participating judge, are aimed at resolving "the crisis of impossible caseloads in our courts."[20] In San Diego the Superior Court declared a week-long "trial holiday," put judges on conference panels, and achieved settlement of 70% of 115 cases. Comparable results were reported in San Bernadino and Riverside County. In the Superior Court of Los Angeles 50% of cases assigned to either voluntary or mandatory pre-trial conference were settled.[21]

Compared to the foregoing, the already famous California Century City experiment arose, not in response to court congestion, but to the high cost of litigation. This approach which involves what amounts to tripartite arbitration was developed to resolve a patent case after "more than two years of increasingly rancorous pretrial maneuvering and outlay of more than $500,000 (by) each (side), most of it spent on lawyers."[22] What this approach involved, according to one participant, was an alternative to arbitration and negotiation, called a "mini-trial."[23] The mini-trial was carried out in July 1977, before a neutral adviser and one executive from each company involved (TRW Inc. and Telecredit Inc.), with nine lawyers and six technical experts participating. The result, according to Ronald A. Katz, originator of the mini-trial, was a savings of a million dollars in lawyers' fees and a resolution of the controversy acceptable to both parties without being subjected to what Katz calls "the Russian-roulette quality of the federal system" in patent cases.[24] Much has been written about this experiment, but nothing that is more significant than Katz's own statement of its purpose: "We have to remove lawyers from their pugilistic environment and bring in the problem-solving abilities of businessmen."[25] Byard G. Nilsson, on the other hand, who participated as co-counsel for plaintiff, sees the mini-trial as needing just the right amount of pugilism:

> A powerful psychological consequence of the mini-trial results from the adverse proceeding before the neutral adviser. Within critical limits, expressions of adversity are creative in developing an atmosphere that is conducive to settlement. Some expression of adversity is therapeutic both in relieving the source and impacting the target, but if it exceeds the critical limits, the rapport for settlement will be destroyed and the slugfest of full-scale

litigation will resume. Participation in a mini-trial invites careful planning that will create an atmosphere of settlement.[26]

Adverseralism has been giving way in corporate circles to an even greater need to economize by various means. To encourage adoption by others of the mini-trial approach, Katz's Center for Public Resources (CPR) has published a manual on how to avoid lawsuits as a way of cutting costs.[27] So attractive is this new corporate interest in cutting legal costs that many companies are bringing all but the most specialized legal work in-house. And consultants, including Ralph Nader, are offering to show them just how to do so.[28]

What these various anti-clogging and/or cost-cutting maneuvers call to our attention is the incontrovertible fact that our courts are not able to handle all the cases that are or could be brought to them. By identifying the problem, however, as an incidental (qualitative or quantitative) limitation they disregard the very real possibility that the adversary system itself is ill-designed for some kinds of cases, even in the best of circumstances. This criticism of the system has been made with regard to cases involving intercorporate (especially patent) matters, consumer complaints, employee grievances, and family law expecially divorce.

The Century City mini-trial was developed precisely to by-pass a judge who was not able to deal with the complexities of a patent dispute. And problems no less severe tend to arise in intercorporate battle over contracts, unfair competition and antitrust law. Sherman antitrust cases, for example, must be heard and decided by one judge, who typically has to work through multitudinous documents on his way to a just decision. No wonder then, that decisions in these cases are hard to come by. The U.S. case against IBM, for example, began in its more recent version in 1969. (An earlier case started in 1952 produced a consent decree in 1956.) The judge who came on the case in 1972 took over while carrying 300 other cases. He had some 27 million documents to assess with the help of 3 law clerks. The total cost of the case was estimated to have gone beyond $100 million by 1976. A similar case against AT&T made slow progress since after it was filed in 1972, in large part because the phone company spent $2 million a year in legal fees while working elsewhere for more congenial legislation.[29]

At the other end of the economic spectrum (usually) are consumer complaints. But these too are unlikely candidates for full-fledged litigation, not only from the viewpoint of a cost—

benefit analysis but because of psychological and public relations considerations. Various alternative models have been developed in this area, including the small claims court. Perhaps the most interesting approach is the use of optional arbitration in Washington to handle complaints such as that against Glenn W. Turner's "Dare To Be Great" Company (filed in 1971). The simplified procedure includes presentation of the case, questions from parties and from the arbitrator, closing statements, and the arbitrator's award within 10 days. Under this procedure, cases come up within 60.5 days from date of filing (compared to 1 year in the Superior Court of King County, Washington) and are completed in an average of 1.5 hours. The award is final except on a showing of corruption, fraud, misconduct or gross partiality.[30] Nationwide, a comparable arbitration service is available through most of the offices of the Better Business Bureau and has also been built into consent decrees by the Federal Trade Commission.[31]

Arbitration is also being used as a more appropriate way of arriving at a separation agreement in divorce cases. And this is as it should be, according to Stephen Gillers, because it is too costly "in terms of money, time and human pain" to apply to such matters "adversarial skills that are fundamentally inconsistent with empathic ones . . . Rather than solving the problem (of resolving family dissolution issues") legal adversariness contributes to it.[32]

"Adversariness can't be totally omitted from the resolution process," Gillers acknowledges, "but it can be changed, eased, and directed constructively."[33] This is being done through a new instrumentality known as a family dissolution unit, which consists of the two separating spouses, one lawyer, one therapist, and two laypersons (a man and a woman). The unit meets 2-3 times a week for 4-6 weeks, with a view to arriving at a majority agreement, provision being made for breaking ties. Activation of the unit may be (1) mandatory but non-binding, (2) discretionary on the part of either the parties or the trial judge, or (3) voluntary but binding absent substantial injustice. The latter would be most likely to succeed because it presupposes well disposed divorcing spouses.

Arbitration has long been recognized as the preferred method of resolving workplace disputes, especially with regard to settling or interpreting the terms of a bargained contract.[34]

Perhaps the extreme example of a type of case that is illsuited to full-scale litigation is the case of 83-year-old Brother Joseph Clark, who, it was ruled, could be removed from a respirator only on the basis of a court order.[35] "This," notes

Jethro Lieberman, "seems more process than is due and the form unsuited to the problem." For, he continues, "(n)ot every inquiry needs to be adversary in nature, nor does every serious discussion need to be made in an adversary proceeding."[36]

The suggestion here is that above and beyond the problem of clogged calendars, there is a variety of types of cases that do not ordinarily lend themselves well to the litigiousness of the adversary system. The adversary system may yet fall of its own weight. Such seems to be the economics of the situation, at least in the opinion of Marvin E. Frankel:

> The scale and intensity of adversary legal proceedings, with their attendant risks and uncertainties, have brought us to a pass in which the 'American way' in court survives at all by virtue of being used only in truncated and abbreviated forms. While Americans continue to litigate on a grand scale, full-scale lawsuits become increasingly impossible on economic grounds for all but the rich fighting over big stakes.[37]

Then, too, to add to the confusion of it all, it has been suggested that all these alternative approaches to case resolution may actually result in even worse clogging by diminishing the incentive to settle more complicated cases.[38]

What all of these expressions of concern about adversary justice have in common is an awareness that the system is clearly not working and that, in fact, it may never work again. It takes only the slightest shift in perspective to arrive at the general proposition that it may not have worked any better in the past. This in turn supports the thesis that it is, in the final analysis, a misconceived and misbegotten monster that ought never have seen the light of day. This global condemnation, which found expression often enough in the past, has recently been articulated by Anne Strick, who is appalled by how little the adversary system has to do with the search for truth.[39]

Strick's disenchantment with the battlefield mentality that underlies standard courtroom strategy, especially in the fine art of cross-examination, is echoed by Priscilla Fox, who gave up her career in law because she did not choose to play by what she considers male rules. According to her:

> If women enter the courtroom, we must adopt existing (male) models of behavior, and play the game by men's rules. It is a game, and many people, men and women both, apparently enjoy it for that reason. The skills

> that one needs to win are what I think of as typically male ways of behaving: puffing and bluffing (overstating one's case), strutting around self-importantly, and finding ways to throw the other side off guard by subtle verbal put-downs.[40]

But for all her concerns about sex-specific behavior, Fox decides that the root of the problem is the "linear thinking" which she says is taught in law schools to the detriment of holistic thinking more appropriate to complex social problems.[41]

There is, I think, a significant grain of truth to Fox's thesis, but for reasons quite unrelated to her analysis. She is correct in her contention that a certain style of thinking is presupposed in the adversary system. The style in question, however, is not linear but dialectical. The dialectical model, which dates back at least as far as the ancient Greek philosophers, was used by medieval and Renaissance thinkers to settle questions subject to uncertainty and was elevated to the status of a metaphysical principle by the German philosopher Hegel, whose methodology Karl Marx applied to explain human progress in terms of economic conflict between opposing classes.[42]

A constant theme in the tradition of dialectics was the assumption that positive benefits can be obtained from some sort of confrontation of opposites. From the time of Plato to Hegel the benefits were viewed as essentially epistemological, that is, a knowledge of truth superior to that of either of two competing opinions on a given subject. For idealists such as Plato and Hegel, superior knowledge was definitive truth. For realists of various persuasions, including for example Aristotle and Thomas Aquinas, truth attained dialectically is reliable only under conditions of endemic uncertainty because not methodologically tied to the unquestionable verities of demonstrative science. With Marx, however, the nature and purpose of the dialectic shifts from theory to practice is understood not as a limited assault on debated questions but as a scientific instrument for transforming the world of one's experience. Nature itself, as revealed by Darwin's biology of competitive forces, is thought of as progressing dialectically, and culture is accordingly treated as being bipolar and as such susceptible to a deliberate manipulation of opposing interests.

How this dialectical view of nature and culture influenced the development of the adversary system in law has not, to my knowledge, been carefully studied. It is clear that the model of stylized debate can be traced directly to medieval scholastic

disputation and its modified descendant, Renaissance rhetoric.[43] Moreover, there are rather close connections between social Darwinism, which is a kind of bourgeois response to Marx, and nineteenth century reform of the British legal system under the aegis of utilitarian doctrine. Especially important to an assessment of the adversary system is its historical ideology rather than its historical consequences. And, as the preceding review of flaws in this system suggest, it is far from obvious that the system is any more productive of truth than any other actual or imagined system. Indeed, few contemporary analysts of the system think that it is. They tend to reject it as counter-productive or else defend it on non-epistemological grounds. Fairly common, for example, is the belief that the system helps participants work through their aggression and hostility in a comparatively civilized manner.

Yet another defense, articulated recently by Geoffrey C. Hazard, Jr., is that, unlike the inquisitorial system, ours keeps inter-party conflict resolution free of government control.[44] However accurate this explanation may be historically, another critic of the system, Marvin E. Frankel, views this independence of direct government control as a principal cause of its problems. He proposes the establishment of a National Legal Service available to all citizens as a corrective. His reasoning:

> If a substantially larger proportion of the legal profession were comprised of public servants rather than private entrepeneurs, some of the incentives for all-out warfare would be lessened. The interest in the system as social arrangement rather than manipulative occasion . . . would tend to be enhanced.[45]

The views of Hazard and Frankel certainly seem to be diametrically opposed and hence good candidates for dialectical treatment. But one's imagination is sorely taxed to come up with a workable synthesis that both would and would not involve direct government control. Except for the unbending ideologies, of whom there are indeed a few these days, few sensitive analysts of the issue would favor exclusive disjunction of the alternatives. What's called for is reasoned consideration of all important factors, toward the construction of an imperfect but broadly acceptable accommodation. The model for such a process of decision-making, however, will be found not in hostile confrontations but in sensitive concilation of respectively legitimate but vulnerable claims. The institutional equivalent of this latter model will be found not so much in litigation as in

negotiation and arbitration, with regard to both civil and criminal matters. This being the case, the only question that remains is whether the availability of litigation, like that of capital punishment, exercises some constraining influence on choices we make prior to and in lieu of that event. If not, then though the adversary system may yet be our adjudicative emperor, it truly has no clothes.

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FOOTNOTES

1. Wigmore, Evidence in Trials of Common Law, vol. 3 (Boston: Little, Brown, 1923), p. 1367, as quoted by Jethro K. Liebermann, The Litigious Society New York: Basic Books, 1981, p. 168.

2. Hazard, Jr., Ethics in the Practice of Law, New Haven and London: Yale University Press, 1978, p. 133.

3. See Hazard, Jr., ibid., p. 120.

4. See Joseph C. Goulden, The Benchwarmers: The Private World of the Powerful Federal Judges, New York: Weybright and Talley, 1974; Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court, New York: Simon and Schuster, 1979; Jerold S. Auerbach, Unequal Justice, New York: Oxford Univ. Press, 1975; John R. Schmidt, "Lawyers on Judges: Competence and Selection," in Ralph Nader and Mark Green, eds., Verdicts on Lawyers, New York: Thomas Y. Crowell, 1976, pp. 285-294; Jack Newfield, "The Ten Worst Judges," in Nader and Green, op. cit., pp. 169-184.

5. As quoted by Margaret Gentry, Associated Press release, Indianapolis Star, Dec. 6, 1979, p. 43.

6. Janotsky, "The 'Big Case': A 'Big Burden' on Our Courts," 66 American Bar Assoc. J. 848, 850 (July 1980).

7. The wiles and craft of various attorneys are duly recorded in such works as Murray Teigh Bloom, The Trouble with Lawyers, New York: Pocket Books, 1970; Joseph C. Goulden, The Superlawyers, New York: David McKay, 1971. Burton Marks and Gerald Goldfarb, on the other hand, invite client exploitation of same in Winning with Your Lawyer, New York: McGraw-Hill, 1980.

8. See Ralph N. Kleps, "Transcripts by Minicomputer: A Solution for Court Delay," 67 American Bar Assoc. J. 224 (Feb. 1981).

9. Leonard S. Janofsky, "A.B.A. Attacks Delay and the High Cost of Litigation," 65 American Bar Assoc. J. 1323, 1324 (Sept. 1979).

10. See Jethro K. Leibermann, op. cit.

11. Ibid., pp. 17-18. See also Richard H. Field and Benjamin Kaplan, Civil Procedure, 3rd ed., Mineola, N.Y.: Foundation Press, 1973, pp. 243-336.

12. Carl Person, "Justice, Inc." Juris Doctor, March 1978, 32+.

13. Ibid., p. 32. See also Eugene Gressman, "Requiem for the Supreme Court's Obligatory Jurisdiction," 65 American Bar Assoc. J. 1325 (Sept. 1979). The latter argues, at 1327, that the comparatively small number of obligatory appeals "continued to clog the argument calendar and to force the Court to resolve the merits of many issues of less than national import."

14. Jack Anderson column, The Indianapolis Star, March 19, 1979, p. 15.

15. For the history and rationale of Neighborhood Justice Centers, see U.S. House Judiciary Committee Report 96-492, pt. 2, 96th Cong., 1st session, Oct. 23, 1979. With regard to LSC, as this is being written the future of legal services hangs in the balance before a budget-conscious Congress that will almost certaintly reduce LSC's funding to no more than $241 million and possibly even to zero. Abundant documentation in support of LSC was compiled by the ABA Standing Committee on Legal Aid and Indigent Defendants and released August, 1981. For a balanced assessment of an LSO program see Samuel Jan Brakel, "Judicare in West Virginia," 65 American Bar Assoc. J. 1346 (Sept. 1979).

16. For an assessment of the future of pro bono legal work, see Ralph Nader, "Pro Bono: Going, Going, Gone?" Barrister, Summer 1981, pp. 4-8+. The screening function of an LSO can be discerned from even a casual glance at an annual report. In Indiana, for example, from 3/1/80 to 2/28/81 LSO rejected 19,118 cases and opened only 12,077. During the same period 11,626 cases were closed, and of that number 78% involved family, income maintenance, consumer/finance of housing.

17. "Mandatory Arbitration on Trial," Business Week, Sept. 21, 1981, pp. 136, 141. This article is a report of Deborah R. Hensler's first-year study of the California program for the Rand Corporation's Institute for Civil Justice. A comparable program has been mounted on the federal level: "Unclogging the Federal Courts." Business Week, March 27, 1978, p. 77.

18. Person, op. cit., 34+.

19. "Jury Trials That Can Save Time and Money," Business Week, July 20, 1981, p. 166.

20. Julius M. Title, "The Lawyers's Role in Settlement Conferences," 67 American Bar Assoc. J. 593, 594 (May 1981).

21. Ibid.

22. "Business Saves Big Money with the 'Mini-trial'" Business Week, Oct. 13, 1980, 168.

23. Byard G. Nilsson, "A Litigation Settling Experiment," 65 American Bar Assoc. J., 1818 (Dec. 1979).

24. Business Week, ibid.

25. Ibid.

26. Nilsson, op. cit., 1820. Just such an "atmosphere of settlement" prevailed in another patent mini-trial involving Shell Oil Corporation and Intel Corporation. Intel lost but its management was satisfied because, according to its corporate secretary and counsel," even though we thought we were right, the case was disposed of rationally and in a fair way." Business Week, ibid., 169.

27. Business Week, ibid.

28. See "A Corporate Campaign to Slash Legal Costs," Business Week, May 24, 1981, 90+.

29. "The Need for Faster Action on Antitrust Suits," Business Week, October 4, 1976, p. 78+.

30. Robert Wexler, "Consumer Arbitration: A Compromising Position," Juris Doctor, December, 1977, pp. 38+.

31. Ibid., pp. 41-42.

32. Gillers, "Breaking Up Is Hard to Do," Juris Doctor, May 1978, p. 8.

33. Ibid.

34. See Russell A. Smith et al., Collective Bargaining and Labor Arbitration, Indianapolis: Bobs-Merrill, 1970, pp. 103-106, 205-240.

35. See Lieberman, op. cit., p. 170.

36. Ibid. See, in general, Lieberman's eloquent summary of all the bad effects of litigation, op. cit., p. 171. See also Marvin E. Frankel, Partisan Justice, New York: Hill and Wang, 1978, p. 86.

37. Frankel, op. cit., p. 19.

38. Lieberman, op. cit., pp. 174-175.

39. Strick, Injustice for All, New York: G.P. Putnam's Sons, 1977.

40. Fox, "Good-bye to Gameplaying," Juris Doctor, January 1978, p. 39.

41. Ibid. p. 40.

42. See in this regard Edmund F. Byrne, Probability and Opinion, The Hague: Martinus Nijhoff, 1968, pp. 139-187, 278305.

43. See Neal W. Gilbert, Renaissance Concepts of Method, New York: Columbia University Press, 1960; Chaim Perelman and L. Olbrechts-Tyteca, Rhetorique et Philosophie: Pour une Theorie de l'Argumentation en Philosophie, Paris: PUF, 1952.

44. Hazard, Jr., op. cit., p. 129.

45. Frankel, op. cit., pp. 123-127.

THE ADVERSARY SYSTEM: WHO NEEDS IT?

A Response to Edmund Byrne

*by Thomas D. Barton**

Mr. Byrne describes with admirable detail and clarity the gradual consignment of adjudication to shuffling anachronism. His premise seems unquestionable: Litigation does increasingly seem the exclusive province of the rich, the risk—preferring, and the very, very patient. In accounting for this trend, Mr. Byrne identifies three flaws in the adversary system. The first flaw is found in various adjudicative procedures that cause both delays and inaccuracies in decision making. The second flaw is that certain problems submitted for adjudication are ill-suited to resolution in the adversary system, leading to fearsome litigation costs or unpleasant psychological side-effects on the participants. The third flaw identified by Byrne goes to the very structure of a system based on adversity: the notion that truth emerges from the strife of opposites.

Byrne's catalog of procedural difficulties is both comprehensive and compelling. There can be little doubt that the effectiveness of Anglo-American adjudication is contingent on the competence, open-mindedness, and sincerity of its judges, jurys, and attorneys. There can be little further doubt that the substantial increase in both the volume and complexity of cases being heard strains very badly the capacities of all concerned. The various proposals described by Byrne to deal more efficaciously with disputes are intriguing and hopefully will bear fruit.

I would principally like to address, however, Byrne's second and third explanations of the declining effectiveness of the adversary system. The second flaw is summarized in Byrne's quotation of Jethro Leiberman: "Not every inquiry needs to be adversary in nature, nor does every serious discussion need to be made in an adversary proceeding." Or, to paraphrase an insight of Lon Fuller's: Not all problems are alike, hence not all problems are equally suitable to resolution by a given procedure.[1] Byrne recognizes this point by his description of problems that are not well suited to the adversary system. Disputes over patents and anticompetitive trade practices, Byrne suggests, often present problems of such complexity that it is

perhaps unrealistic to expect them to be accurately or efficiently solved by a single generalist judge. Consumer complaints, continues Byrne, are equally difficult for the adversary system, although for "psychological and public relations" reasons rather than reasons of cost of complexity. Any attorney who has experienced a contested child custody battle knpws well the severe emotional impacts suffered by the parties as a result of their litigation.

Byrne's identification of this second flaw is insightful, but the discussion of its significance is at the same time too broad and too narrow. It is too broad because there exist certain problems of enormous complexity that quite commonly are adjudicated, and adjudicated well. Such problems range from those requiring intricate statutory interpretation, to problems that require the assessment of the appropriate compensation for the tortious injury to life or limb, to problems relating to abortion and the opposing interests of mother, father, state, and unborn itself. On the other hand, Byrne's point is too narrow in that certain other problems exist that are not particularly complex, yet are nonetheless difficult to resolve by an adversary process. One such sort of problem is where the decisional criteria are unknown or disputed. A common example occurs when problem resolution requires a judging of "the whole person" before the court, as where a judge must determine an appropriate rehabilitative criminal sentence, or where a judge must determine whether to ascribe some label to a person, such as "unruly child" or "insane." Such determinations are not in themselves complex. Yet the disturbing lack of decisional criteria nonetheless make the problem extremely difficult, and arguably unsuitable, for the adversary process.

A second sort of non-complex, yet troublesome, problem are those in which the decisional information must be based on predictions of future events. For example, decisions to enjoin some activity for fear of ultimate harm to environment or public health require a present assessment of risks, the accuracy of which sometimes cannot be determined until the occurrence of one or more future events. In making such decisions, judges must often rely on the most tenuous sorts of predictions, based on probabilities calculated from insufficient data bases. A related sort of problem is one that involves "planning." The resolution of a "planning" problem requires the setting of a goal more or less extended into the future, and then further requires the more or less frequent manipulation of the environment such that at a specified time, the goal will have been met. As bluntly stated by Charles Reich, "Adjudicative procedure is made

ridiculous when it is enlisted in an attempt to prove planning by evidence."[2]

Problems arising out of nontraditional norms are often also inappropriate for adversarial decisionmaking, even though such problems may be neither particularly complex nor involve emotional side effects on participants. Such problems include, for example, ones arising out of group-based norms. It would be difficult, for example, to adjudicate the affirmative action responsibilities of a particular employer towards a particular prospective employee. Identifying inclusion or exclusion of employer and prospective employee into the groups intending to be, respectively, burdened and benefited by affirmative action is simple. But determining the responsibility and justness of any particular interactions within the appropriate groups finds no guidance. Problems stemming from interactions involving personal norms often present similar difficulties. Such interactions occur constantly in everyday living; we as private persons continually judge one another in terms of overall moral, social or spiritual worth. Observable behavior only partially informs such judgments, however, and adversarial adjudication of such matters would undoubtedly be inaccurate, and most likely be offensive.

Byrne's third explanation arises from what Byrne sees as the underlying epistemological assumption of adjudication: namely, that truth emerges from the strife of opposites. His discussion of this point is interesting and thoughtful. Ultimately, however, it rests on Byrne's assumption that the adversary form is in the service of forging some higher synthesis of thesis and antithesis. This is, perhaps unfortunately, not the primary goal of Anglo-American adjudication. Rather, our adversary system is designed to vindicate totally either the thesis or the antithesis, not to transcend both. My difference with Byrne on this is tied to the relative importance in Western thought of process versus materialism. It is my view that materialism is the stronger influence, and it would, therefore, be surprising to find the legal system ultimately grounded in notions of process.

Byrne traces the idea of progress through the strife of opposites to Plato; actually the idea was formulated even earlier by Heraclites. Heraclites perceived the world as pure process, in which no "thing" exists. What we take to be things are merely freeze-frames of an equilibrium between the constant war of some quality and its opposite. The equilibrium constantly changes, develops according to the prevailing strengths of the opposed forces. As Karl Popper has observed,[3] the Heraclitean notion of progress through the strife of opposites is a recurring alternative view of reality in Western thought. It is, however, a

dissenting theory. Mainstream Western notions about the composition of the universe and our knowledge of it are decidedly atomistic, steming from Demosthenes and Aristotle. This materialism is the basis of our inherited Newtonian, scientific world-view. As evidence for his position, Byrne notes Marx's embracing of the Hegelian dialectic, a modern refinement of the Heraclitean world-view. In fact, however, Marx's larger concern was to develop a theory of "dialectical materialism" in which the two contending strands of Western thought were transcended into a higher theory. In any event, the case has been eloquently made by Lon Fuller in his early work Legal Fictions[4] that the Anglo-American legal system is very heavily influenced not by notions of process, but by atomistic, Newtonian principles: that everything simply is, or is not; that people are standardized, faceless, strangers charging about randomly in the universe, for whom the proper legal role is that of traffic cop, untangling the collisions so that the atoms may once again be free to move without constraint, and free to produce without regulation. There is in our adjudication no strife between opposites in the Hereaclitean sense. The purpose of law is not to synthesize higher relationships. Quite the contrary, it is to avoid them. The key to our adversary system is not in its process of institutionalized adversity; it is rather in the raw materials with which such a legal system works. Such raw materials are our binary notions of right or wrong, the all-or nothing norms which either support or do not, that one either has transgressed or has not. That there is in the adversary system a contention between opposites is not be denied. It is a symptom, however, not a cause. The end to be achieved in our adjudication is not a tolerable equilibrium state between qualities that are forever poised in opposition. Rather, it is the vindication of one stranger against another, an unambiguous signal that will in the future allow people to interact more freely, or not to interact at all.

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FOOTNOTES

1. Fuller, "Irrigation and Tyranny," 17 Stan. Law Rev. 1021 (1965) at 1026.

2. Reich, "The Law of the Planned Society," 75 Yale L. J. 1227 (1966) at 1241.

3. K. Popper, 1 The Open Society and Its Enemies 11-18 (5th ed. 1966).

4. L. Fuller, Legal Fictions (1966) at 124-137.