

THE AMERICAN “ADVERSARY SYSTEM”?^{*}

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I am a bit conflicted in speaking to you today. On the one hand, I know that Carl Selinger, the chair of the Comparative Law Section, would like me to extol the benefits of comparative criminal procedure. But I can only do so in a qualified way. I do use comparative materials in my courses and find these materials to be tremendous teaching tools. They open students up to a range of possibilities they would not have been willing to consider if they did not know that there was actually a country, or sometimes several countries, where such procedures were followed. This breaks down preconceptions and makes class discussion far more productive.

But I cannot wholeheartedly endorse the study of comparative criminal procedure. While there are definite benefits to such study, not the least being occasional stays in beautiful places around the world, there is a significant downside risk to comparative study of which I am afraid I am a prime example: you can become disoriented so that you start to lose your way within your own legal system. I want to talk today about one aspect of my own personal disorientation in the hopes that perhaps you can help me find my way again.

Here is my problem: though I teach in an American law school and have at this point taught many students who have gone on to become excellent prosecutors and public defenders – even quite a few judges as the years have gone by – I no longer seem to understand the distinction that is being drawn when American lawyers and judges proclaim insistently and proudly that “we have an adversary system.” I have until this point in time covered up my ignorance pretty well. When some respected judge or trial attorney gives a lecture at my law school and announces with fervor that “ours is an adversary system,” confident that he or she has expressed some obvious and basic truth about our American legal system, I nod in agreement like the rest of the audience. But deep down I do not understand the distinction being drawn and what is supposed to separate the American trial system, and presumably the English system, from other western trial systems. The world that seems black and white to others seems to be only gradations of gray to me: some dark, some light, but all shades of gray.

^{*} The thesis of this essay – that there is no line that can be easily drawn between adversary and inquisitorial trial systems – is a greatly condensed version of chapter five of *TRIALS WITHOUT TRUTH* (New York University Press) which will be published later in 1998.

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It is usually thought that the distinguishing feature of an adversary system is the fact that the evidence for the state and the evidence for the defense is presented by the lawyers, not the judge, with the judge playing a more passive role in the development of evidence at trial. But the problem I have with this test is that while there are traditional continental systems where judges decide who the witnesses will be and do most of the questioning of witnesses, sometimes in these same systems the judges cede the power to call witnesses and do the initial questioning to the parties. What does that say about whether the system on the whole is an adversary system or not? Can a system be an adversary system on some days of the week but not others?

And why is the calling of witnesses by the parties, not the judge, the true distinguishing characteristic of what denotes an adversary system in any event? At a couple of rape trials I saw in Germany, even though the judges controlled the production of evidence for the most part and did most of the questioning, issues at the trial were sometimes very sharply contested. At one of the trials, the rape victim was brought back to the court to testify on three separate occasions as the defense continued to bring forward witnesses who insisted that the victim routinely prostituted herself to support her drug habit. The two defense lawyers put very tough questions to the victim, impugning both her character and her credibility. The trial seemed very adversarial, even bitterly adversarial to me.¹ Yet, this was presumably not an adversary system – why is that?

What is further confusing to me about the adversary-inquisitorial distinction are those non-common law countries that have the audacity to insist that they have adversary systems. Despite being self-professed adversarial systems, those systems seem to have trial features that make trials seem unlike any I have seen in the United States, or England for that matter. Italy purports to have an adversary system – the two sides are assigned the obligation of presenting the evidence – yet crime victims or their families have broad rights of participation at trial and the judges often exercise the power – which exists in the United States in theory but is never used – of calling additional witnesses on their own.²

Norway is another puzzler to me. It looks like an adversary system in many

¹ While the treatment of crime victims at trial in Germany is in some respects similar to the way crime victims are treated in the American criminal justice system, crime victims in Germany have many procedural advantages denied to victims in the American criminal justice system, such as a much broader right to participation in the trial when the crime is a serious one, such as a serious assault or rape. See generally William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L. L. 37 (1996).

² See William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

respects: the lawyers for the state or for the defense have the responsibility of presenting the evidence. There is even an occasional jury trial, which ought to please us Americans since our trial system is tied heavily to juries. Yet Norway's trials seem to have features that American lawyers and judges have told me would be inconsistent with an adversary system: relaxed rules of evidence, a strong preference for narrative testimony, mixed panels of judges and citizens for the vast majority of cases, considerable authority vested in the judges to intervene or even take over the questioning of witnesses, and broad appellate review of both convictions and acquittals. In addition, the defendant, as is generally true on the continent, is always asked to respond to the charges at the start of the trial before any witnesses are called. In the end, does Norway qualify as an adversary system? I do not know.

Lately, it has occurred to me that maybe I am taking the wrong approach in concentrating so heavily on what happens at trial in my attempt to distinguish true adversary systems from the impostors. I have started to wonder if the distinction is not the trial itself, but rather the way the police are conceptualized in different legal systems. Here I do find a meaningful distinction between the United States and England on the one hand and continental countries on the other hand. In England and the United States, the police are unhesitatingly viewed as aligned on the side of the prosecution from the moment the crime is committed until the prosecution ends. Trials are about "the state" – by which we mean the prosecutor and all police agencies – aligned against the lone defendant. To that end, the police share openly the results of their investigation with the prosecution but lots of information from the police investigation is never disclosed to the defense because, of course, the defense is "on the other side." We need a specialized set of rules – discovery rules – to tell the police and prosecutor what information has to be turned over to the defense and when such disclosure should take place.

By contrast, the police in continental countries tend to be seen as investigators for both the prosecution and the defense and thus everyone at trial – the state's attorney, the defense attorney, and the judge – tends to work out of the same file and to have roughly the same body of information with which to prepare for trial.

But if this adversary alignment of the police and the prosecutor is what marks out systems that are truly adversary systems from those that are inquisitorial, I cannot understand why we would be so proud of an alignment of forces against the suspect that seems so unbalanced in terms of resources and so likely to produce police investigations that are biased, slanted, or even distorted to favor conviction. I have to wonder if it is not a direct result of the way investigations are conceptualized as adversary undertakings that has resulted in the Guildford Four, the Birmingham Six, and other highly publicized miscarriages of justice in England or the serious distortions and worse that have been uncovered in the Federal Bureau

of Investigation's laboratory in the United States. Instead of conceptualizing the police and prosecutor as one entity as we do, it would seem to me that strong trial systems would try to encourage the police and prosecutor to see their responsibilities as different and distinct. Continental systems seem to do that better than so-called adversary systems.

When it comes to trial, I have to concede that if we were to place western trial systems along a spectrum ranging from those that were the most adversarial to those that were the least adversarial, which is the way I prefer to view trial systems, there are many features of our trial system that would place the United States at the extreme end of the adversarial spectrum. American lawyers have the freedom to mold evidence for adversary advantage in advance of trial that would be unethical in other western trial systems, and advocacy in the United States knows few bounds. At the same time, American trial judges are more passive than judges in other systems, including even other common law countries, and prefer to see themselves as detached and somewhat removed from the fray.

But despite this concession to our system's extreme adversarial tendencies, I remain hesitant to describe our system as an adversary system. First, because that label implies that systems are defined as either adversary or non-adversary. As I suggested, I do not think that is accurate. But perhaps more important is the fact that as adversarial as our system can be, it often seems to me to be at different times highly inquisitorial. I do not know what label to apply to a system that is at times extremely adversarial and at other times extremely inquisitorial. A case that nicely illustrates the dual personalities battling within our system is the Louise Woodward case. As I am sure you recall, at the end of the trial, the defense asked that manslaughter not be given to the jury so that the jury would be left with the choice of either returning a verdict of second degree murder or an acquittal. In no other trial system that I know of, either common law or continental, would this have been considered a matter to be controlled by the defense. But the judge gave the instruction desired by the defense. If you want to understand how extremely adversarial our trial system can be, there could hardly be a better example. The trial judge did not see it as his responsibility to put to the jury the option that seemed most likely to fit the facts.

Well, we all know the result. The gamble did not work for the defense: the prosecutor gave a hell of a summation and the defendant "lost," receiving a life sentence as she knew she would if she were to be convicted. When a system emphasizes winning and losing so heavily and openly permits such an audacious gamble, this sort of result is possible. But it is at this point that things start to get very confusing for me. A few days later, the same judge but with very different judicial responsibilities enters the courtroom and this judge is now concerned about "justice" in this case. But where does this judge come from in an adversary system and where was he at trial? Having permitted excellent defense attorneys to gamble

at trial, having made sure that the defendant was fully informed of the consequences of her gamble with the jury, where in an adversary system does this judge get the authority to impose an involuntary manslaughter verdict out of the blue? I do not dispute the justice of the verdict; I do dispute the way we got there in our supposedly adversary system.

Later in the day, the inquisitorial judge had even more clearly emerged from the ashes of the trial when it came time to sentence the defendant on the judge's verdict of involuntary manslaughter. Like many American judges at sentencing, the neutral and detached referee at trial turns out to have very broad discretion at sentencing. In the *Woodward* case, the judge could have given the defendant a sentence of two, ten, twelve, or even twenty years. And, very surprising considering that we have an adversary system, this judge who had no responsibility to put manslaughter to the jury, is going to make this very important decision all alone: no tempering influence of citizens, not even the sort of collegial restraints one would find in such a decision in systems that are supposedly highly inquisitorial, such as The Netherlands. Nor will this decision be subject to broad appellate review as you would find in any continental system given the importance of this decision. Again, as we all know, this judge sentenced Ms. Woodward to time served on the basis of his own personal conclusions as to Ms. Woodward's criminal liability and the punishment she therefore deserved. Again, my concern is not the outcome but rather the naked inquisitorial power exercised by a single judge in our so-called adversary system.

I close with one more example of our so-called adversary system in which the trial judge has the power to undo the jury's verdict. The case I have in mind is *United States v. Watts*,³ a Supreme Court case from early last year.⁴ Watts was convicted at trial of possessing 500 grams of crack found in his apartment, but was acquitted by the same jury of using a firearm in the course of a drug crime. When it came time for sentencing, the judge added four years to Watts' sentence because he concluded – based on guns and ammunition found in a bedroom closet – that Watts had used a firearm in connection with the drug possession crime. The United States Supreme Court said that this was perfectly all right in a *per curiam* opinion issued without having been preceded by oral argument. This is the same sort of institutional inconsistency that is present in *Woodward*. On the one hand, the Supreme Court has tied our trial system completely to juries in opinions full of soaring rhetoric about the wisdom of juries and the importance of the jury as a buffer between the power of the government and the liberty of individual citizens. The Court has told us, for example, that when juries reach different conclusions

³ 117 S. Ct. 633 (1997).

⁴ See William T. Pizzi, *Watts: The Decline of the Jury*, 9 FED. SENTENCE REP. 303 (1997).

from those judges would have reached, it is usually because juries “are serving some of the very purposes for which they were created and for which they are now employed.”⁵ Yet, a sentencing judge now has the last word and is free to reject the jury’s acquittal (indeed in the federal system the sentencing judge by statute must reject the jury’s acquittal in a situation like that presented in *Watts*) and add years to the defendant’s sentence if the judge decides that the defendant was responsible for the crime despite the acquittal.

I think it is time to put aside the labels and the slogans that dominate our descriptions of our system: that “we have an adversary system”; that “we don’t trust strong government officials”; that “judges must be detached and neutral referees”; that “juries protect us from the power of the government”; and so on. Instead, we need to look at what we actually have and what we actually do in our system. Comparative study is a way of cutting through these labels and slogans to help us see our system more clearly. What I see is a system that does not know what it wants to happen at trial and does not know itself very well. It swings from extremely adversarial to extremely inquisitorial, from vesting incredible power in juries to permitting judges to undo some jury verdicts with which they disagree, from incredibly weak judges at times to judges vested with tremendous power over the liberty of citizens at sentencing. I don’t think any of these extremes are healthy.

There is no disputing that European trial systems have been heavily influenced by the American legal system, especially by the rights accorded suspects in our system and by our tradition of an open examination of the evidence at trial. But we are at a point in time when we could learn some things from their systems as well.

⁵ *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968).