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THE TROUBLE WITH THE ADVERSARY SYSTEM IN A POST-MODERN, MULTI-CULTURAL WORLD

*Carrie Menkel-Meadow**

I. INTRODUCTION

In this presentation I want to suggest the heretical notion that the adversary system may no longer be the best way for our legal system to deal with all of the matters that come within its purview. If the learning of the late twentieth century has taught us anything it is that truth is illusive, partial, interpretable, dependent on the characteristics of the knowers, as well as the known, and most importantly, complex. In short, there may be more than two sides to every story. Thus, the binary nature of the structure of the adversary system and the particular methods and tactics of its use in the legal system may often thwart some of the essential goals of any legal system. In this paper I will argue that our epistemology has sufficiently changed in this era of post-structural, post-modern knowledge so that we need to reexamine the attributes of the adversary system as the "ideal type," as well as the practice on which our legal system is based. While the adversary system has been justified for the ways in which it satisfies a variety of truth and justice criteria¹, I believe that how we consider those criteria are themselves contingent and must be historicized and reconsidered as our knowledge base changes.

I will argue here that the adversary system is inadequate, indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system. My critique operates at several different levels of the adversary system—epistemological, structural, remedial and behavioral. I would like to suggest that we re-think both the goals that our legal system should serve and the methods we use to achieve those

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1. David Luban, *The Adversary System Excuse in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (D. Luban, ed. 1983)

goals. For those who cleave to the adversary system² I want to shift the burden of proof for them to convince us that the adversary system still does its job better than other methods we might use.

My critiques are briefly as follows (to be further elaborated below): Binary, oppositional presentations of facts in dispute is not the best way for us to learn the truth. Polarized debate distorts truth³, leaves out important information⁴, simplifies complexity and obfuscates where it should clarify.⁵ More significantly, some matters (mostly civil, but occasionally even a criminal case) are not susceptible to a binary (right/wrong, win/lose) conclusion or solution. This may be so because we cannot with any degree of accuracy determine the facts, because conflicting, but legitimate, legal rights give some entitlements to both (or all) parties⁶, or because human or emotional equities cannot be sharply divided (parental rights in child custody, for example.)

Modern life presents us with complex problems⁷ which often require complex and multi-faceted solutions. Courts, with what I have called their "limited remedial imaginations" (limited by statute and common law to the powers of granting monetary damages or injunctions)⁸ may not be the best institutional settings for resolving some of the disputes we continue to put before them.

Even if some form of the adversary system were to be defensible for purposes of adjudication⁹ in particular settings,¹⁰ the "adversary" model

2. Monroe Freedman, *Understanding Lawyers' Ethics* (1990), *Id.* *Lawyers' Ethics in an Adversary System* (1975), Alan Dershowitz, *The Best Defense* (1982).

3. Marvin Frankel, *Partisan Justice* (1980), *Id.* *The Search for Truth: An Umpireal View*, 123 U. Penn. L. Rev. 1031 (1975); Philip Shuchman, *The Question of Lawyers' Deceit*, 53 Conn. B.J. 101 (1979); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 Wm & Mary L. Rev. 1303 (1995).

4. See e.g. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 Duke L. J. 921.

5. Consider how the scientific and circumstantial "evidence" emerged in the OJ Simpson trial.

6. John Coons, *Compromise as Precise Justice in Nomos XXI*, *Compromise in Ethics, Law and Politics* (J. Roland Pennock & John W. Chapman, eds. 1979); *Id.* *Approaches to Court-Imposed Compromise—The Uses of Doubt and Reason*, 58 Nw. L. Rev. 750 (1964).

7. As an example consider how manufacturers of dangerous or toxic products have utilized bankruptcy proceedings to limit damages for their past acts and thus not only limit compensation for the injured but threaten the economic security of present workers and others with whom such companies do business.

8. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. Rev. 754 (1984).

9. Monroe Freedman was among the first to argue that our adversary system is constitutionally mandated, residing in the Bill of Rights, see Freedman, *Professionalism in the American Adversary System*, 41 Emory L. J. 467 (1992) in addition to other works. For other claims that the adversary system is constitutionally mandated, at least in criminal cases, see Charles

of the courtroom has inappropriately bled into and infected many other aspects of lawyering, such as negotiating both "in the shadow of the court"¹¹ and outside of it in lawyers' transactional work¹².

Even where there are simply facts to be determined, the complexities of modern life (such as the strong race¹³ issues implicated in a variety of our more notorious recent cases) make it problematic that even the same "facts" will be interpreted the same way by different people¹⁴. Thus, it is not only the structures of the adversary system that I find wanting, but how we think about the people within them.

Assumptions underlying the use of the adversary system—objectivity, neutrality, argument by opposition and refutation, appeals to common and shared values and fairness—have all been questioned by modern scholars outside of (as well as inside) law and in my view, it is time that we examine how these assumptions, which are often not "true" have affected our legal system. Lay people claim a crisis of legitimacy in the legal system (when the "race card" is deemed more important than any other factor in a trial¹⁵) when jury verdicts are often not trusted and we as scholars must take these critiques seriously.

Multi-culturalism, and all of the controversy it has spawned in the universities¹⁶, has at least reminded us that there is demographic, as well

Wolfram, *Modern Legal Ethics* 564 (1986) and Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 Ohio St. L. Rev. 855 (1994).

10. Many have argued that the criminal justice system demands more adversarialism than the civil justice system and that ethics rules should reflect the differences, see e.g. Murray Schwartz, *The Zeal of the Civil Advocate*, in *The Good Lawyer* (ed. D. Luban, 1983); Id. *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 66 (1978).

11. The phrase is evoked by, but is not the same as, Robert Mnookin's and Lewis Kornhauser's, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L. J. 950 (1979).

12. For discussions of the inappropriateness of extreme forms of adversarialism in negotiation see Menkel-Meadow, *Toward Another View of Legal Negotiation*, 31 UCLA 754 (1984); Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 Iowa L. Rev. 1219 (1990); cf. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiating*, 1980 Am. B. Found. Res. J. 926; Eleanor Holmes Norton, *Bargaining and The Ethics of Process*, 64 NYU L. Rev. 493 (1989).

13. And many of these cases also demonstrate the power of binary thinking in black/white terms, rather than the more complex multi-racial, multi-cultural world in which we live.

14. See e.g. Elizabeth Loftus, *Eyewitness Testimony: Psychological Perspectives* (1984).

15. See trials of Rodney King, Reginald Denny assaulters, OJ Simpson in Los Angeles to name a few. Former District Attorney Ira Reiner opined that if the jury in the OJ Simpson case heard the Mark Fuhrman tapes, their disgust at the racism exhibited therein would lead to an acquittal (with a majority black jury)—in his view indicating that race would become more salient than any of the factual evidence in the case, Interview on KNBC, August 17, 1995.

16. See e.g. *Debating PC* (Paul Berman, ed.1992), Alan Bloom, *The Closing of the American Mind*; Russell Jacoby, *Dogmatic Wisdom: How the Culture Wars Divert Education and Distract America* (1994); Robert Hughes, *The Culture of Complaint* (1993).

as epistemological "positionality"¹⁷ and we do not all see things the same way. Thus, with a healthy respect for the new knowledge about knowledge, we need to examine whether the adversary system helps or hinders the way in which we sort out disputes, differences, misunderstandings and wrongdoing.

Furthermore, the complexity of both modern life and modern lawsuits has shown us that there are often more than two sides to a dispute in the sense that many more than two parties are involved in legal disputes and transactions. Thus, procedures and forms like interpleader, joinder, consolidation and class actions have attempted to allow the voices of more than plaintiffs and defendants in, all the while still structuring the discourse so that parties must ultimately align themselves on one side of the adversarial line or another. Multi-party, multi-plex¹⁸ lawsuits or disputes may be distorted when only two sides are possible. Consider all of the multi-party and complex policy issues before courts in environmental clean-up and siting, labor disputes in the public sector, consumer actions, antitrust actions, mass torts, bankruptcy, school financing and desegregation and other civil rights issues, to name a few examples.

Finally, modern adversarialism has been criticized for the ways in which it teaches people to act toward each other. While I share some of the views of the critics of the incivility of lawyers¹⁹ I am more concerned that the rhetoric and structure of adversarial discourse prevents not just better and nicer behavior,²⁰ but more accurate and open thinking.

A culture of adversarialism, based on our legal system²¹, has infected a wide variety of social institutions. While I will focus primarily

17. See Katherine Bartlett, *Feminist Legal Methods*, 103 *Harvard L. Rev.* 829 (1990); cf. Randall Kennedy, *Racial Critiques of Legal Academia*, 102 *Harvard L. Rev.* 1745 (1989).

18. Lon Fuller's essays on the structure of various legal forms remind us that complex multi-plex, multiple party disputes may belong in forms other than adjudication, see Fuller, *Mediation: Its Form and Its Functions*, 44 *So. Cal. L. Rev.* 305 (1971).

19. See e.g. Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 *Val. U. L. Rev.* 513 (1994).

20. I am on record as being "for" good and nice behavior wherever possible, see Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 *Ga. St. L. Rev.* 385 (1991).

21. While I do not have time or space in the present essay to discuss the sources of adversarialism it is important to note here that the legal system cannot be blamed for all adversarialism. For some review of the history of American adversarialism see Lawrence Friedman, *A History of American Law* (2d ed. 1985); Stephan Landsman, *The Adversary System: A Description and Defense* (1984). Formal rules of logic, Aristotelian and classic philosophy have long favored argument, dialectics and debate as an ideal way of learning the truth. Marxism and other isms are based on the dialectics of reasoning of Hegel. At another level, competition in athletic and military achievement has long been valued by a wide variety of cultures. Indeed, I am not the first to argue that legal advocacy has borrowed too much from the practices and language of sports and war, see Menkel-Meadow, *Can A Law Teacher Avoid Teaching Legal Ethics?* 41 *J. Leg. Ed.* 3 (1991). Judge Frankel notes the phrase "sporting theory" of justice was probably cliched when Roscoe

on the legal system and legal ethics here, consider how debate, argument and adversarialism have, in recent years, dominated journalism, both print and electronic media, political campaigns, educational discourse, race relations, gender relations, labor and management relations, to name only a few examples.

After I complete my critique of the adversary system, you will wonder what I seek to substitute in its place. It should be obvious that as a post-modern, multi-cultural thinker I have no one panacea, solution or process to offer—instead, I think we should think about a variety of different ways of structuring process in our legal system when our goals and objectives are multiple. The determination of guilt may not require the same process as allocating human, parental or civil rights or money. There are situations where mediation, inquisitorial-bureaucratic investigation, public fora or conversations, “intermediate sites of discourse,”²² private problem-solving (negotiation) or group negotiation and coalition and consensus building²³ would better resolve the legal and other issues involved. Thus, I am suggesting variety and diversity in our legal process which will, in turn, require more diverse and complex thinking about what legal ethics would be appropriate in different settings²⁴. Some might prefer to reform the adversary system to keep it protean enough to remain inclusive, as a model, for all of our legal system. In my own view this will not be adequate and we need to explore alternative models of legal process and ethics that will better meet the needs of more complex post-modern, multi-cultural disputes and issues.

Pound used it in his famous address in 1906, Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA Rep. 395, 404 (1906), Frankel, *The Search for Truth*, *supra* note 3 at 1033. See also Elizabeth Thornburg, *Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System*, 10 *Wis. Women's L.J.* 225 (1995). With the growing importance of computers in our lives we may be entering a new age of mandated binarism.

22. See Lani Guinier and Susan Sturm, *Reflections on Race Talk* (mms. 1995) for an eloquent description of how different forms and structures of process and conversation (such as within legal education) can produce different levels of revelation, honest discussion and engagement and ultimately, “truth” and understanding.

23. See Daniel Bussel, *Coalition Formation in Bankruptcy by Creditor Committees*, UCLA L.Rev. (1996).

24. I am currently engaged in this project as I look at what ethics are required in alternative dispute resolution settings that may differ from legal ethics in the adversary setting. See Menkel-Meadow, *Ancillary Practice and Conflicts of Interests: When Lawyer Ethics are Not Enough*, 13(2) *Alternatives* 15 (1995); cf. Geoffrey Hazard, *When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, 12 (12) *Alternatives* 147 (1994). I currently chair the CPR Commission on Ethics and Standards in Alternative Dispute Resolution.

II. THE PITFALLS OF ADVERSARIAL/BINARY THINKING IN A POST-MODERN WORLD

While I cannot in this limited time or space review the full history and sources of our particular approach to adversarialism, we should note that the Anglo-American legal system did not originate the idea of oppositional presentations of "facts." Whether located in classical philosophical discourse²⁵ or medieval scholastic disputations²⁶, the notion is that truth will best be realized by contested, oppositional presentations of "facts." At this point we should quickly note one important flaw or error in the defense of the legal adversary system drawn from this tradition. Whatever the flaws of oppositional thinking discussed below, philosophers and others using this form of logic are at least theoretically committed to a genuine search for the truth. This is not the motivating ideal when the adversary system is harnessed to the legal system with an ethics regime that places duty to the client at least as high, if not higher than, the duty to truth²⁷. While philosophers may seek the truth, lawyers seek to achieve their client's interests and "win," which may entail simply obfuscating the other side's case (as in the "creation" of reasonable doubt in the criminal case) or leaving out important facts if they are deemed harmful (in either civil or criminal cases). Thus, even if it can be defended as a procedure of knowledge and truth-finding in other settings, the particular use of the oppositional/adversary model in legal disputes lacks this important quality—the genuine search for truth.

Despite the longevity and robustness of adversarialism as a mode of human discourse²⁸, even some philosophers and epistemologists have

25. As my colleague philosopher Stephen Munzer points out, however, the dialogues of Plato or Socrates were not "real" but staged efforts to canvass and dispute particular ideas. Nevertheless, philosophers thought that we would best arrive at the truth by setting forth ideas in opposition to each other to be refuted. See Janice Moulton, *A Paradigm of Philosophy: The Adversary Method in Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science* (Sandra Harding & Merrill Hintikka, eds. 1983).

26. The medieval universities sought knowledge by public "disputations" and debates. Consider that our modern "defense" of the dissertation derives from this tradition.

27. Many scholars, judges and practitioners have discussed whether truth or other goals are the primary rationale for our adversary system, see e.g. Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031 (1975); Jerome Frank, *Courts on Trial* (1961); John Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966); Morley R. Gorsky, *The Adversary System in Philosophical Law* (ed. Richard Brunaugh, 1978). While some argue that our system values "justice" or human and individual freedom and dignity over truth; others suggest that winning and victory are the real goals that compete with truth and justice; see also Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 Vand. L. Rev. 697 (1988).

28. There are other modes of human discourse from which we could choose—the scientific method, for example, which while it needs to "falsify" propositions with contrary data does not set

come to question its value as the best way to understand the world. It is this feature of post-modernism that I want to critically apply to the adversary system as we know it in the legal system.

Expressed in most general terms, the works of a variety of philosophers, literary critics, art and architecture critics, social scientists and legal scholars, have come to question whether there is any "truth" out there that is knowable and stable. Post-modernism expresses some skepticism, if not cynicism, in the belief that there are facts or interpretations of facts which are immutable, universal, global and discoverable.²⁹ Whether by literary deconstruction (uncovering the suppressed meanings of a text that render texts indeterminate), feminist epistemology (seeking to uncover the biases of the scientist in the science³⁰), philosophical or linguistic decompositions of language, or in our own field, critical legal studies' exposure of the indeterminacies of our laws³¹, the legacy of post-modernism is that truth is not fixed, meanings are "located" provisionally, not "discovered"³² and that people who "find" truth (whether judges, juries, critics and yes, even scientists) have interests (social, economic, political, racial, gender) that affect how they see the world.

out to prove something by juxtaposing its opposite. There is conversation, storytelling, mediation, and consciousness-raising—all of which are more circular and less structured in method. There are also dangerous monologic (or false adversarial) forms like inquisitions and Star Chambers. And there are other legal systems—civil, mediational, bureaucratic.

29. For an excellent summary of the major contributions of postmodernism to social science from which much of the above discussion is drawn see Pauline Rosenau, *Post-Modernism in the Social Sciences: Insights, Inroads, Intrusions* (1992).

30. See e.g. Sandra Harding, *Whose Knowledge? Whose Science?* (1991).

31. As one useful summary among many, see Mark Kelman, *A Guide to Critical Legal Studies* (1987).

32. These phrases are Rosenau's. Thus, even though there is "truth" in many cases—ie. OJ Simpson did or did not kill his ex-wife and Ronald Goldman, since we have only circumstantial evidence, jurors must "interpret" and give meaning to the evidence—thus there will be variability in how they determine the facts. See Albert J. Moore, *Inferential Streams: The Articulation and Illustration of The Trial Advocate's Evidentiary Intuitions*, 34 *UCLA L. Rev.* 611 (1987) In my view, and as part of my critique of the adversary system, most trial advocacy texts (and I am a former Trial Advocacy teacher) still assume far too rational a fact-finding process, see Thomas Mauet, *Fundamentals of Trial Techniques* (3d ed. 1992); J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* (2d ed 1993). Practical lawyer guides are much more likely to attempt to deal with the emotional or "arational" (note this is not irrational) aspects of fact finding and interpretation. For one attempt to deal with some aspects of "emotional" arguments see Albert Moore, Paul Bergman, David Binder, *Trial Advocacy: Inferences, Arguments and Trial Techniques* (1996) (see especially chapter 9 on "silent argument.") Too many of the trial texts also treat all jurors as the same, fungible or "the average juror," instead of recognizing the clear reality of widely disparate reactions to the same facts by different people who may process "facts" through very different "filters" or "generalizations." Despite all of the wonderful empirical jury studies (see e.g. Valerie Hans & Neil Vidmar, *Judging the Jury* (1986); Steven Penrod and Reid Hastie, *Inside the Jury*, 1983) we have little that focuses on the "interpretative acts" of jurors, as analogous to the interpretative acts of readers in literature.

In addition to interpretations of texts, meanings and facts, post-modernists have questioned the very notion of a unified self who has a stable set of characteristics, values and attributes with which to process information. Since we occupy so many multiple roles in modern society, being powerful in some (father) but subordinated in others (worker), our knowledge is structured and filtered through the multiplicity of our social roles and deeply affected by the context—both present and our own personal and group histories. Thus, if we buy any of this (and I buy enough of it to consider what effects it might have on the finding of facts, the interpretation of law and the production of “legal knowledge”) we must ask how the legal system can confidently assess truth and assign remedies.

In an important book³³ describing the significance of post-modernism for how we know what we know in the social sciences, Pauline Rosenau has distinguished between more skeptical, nihilistic post-moderns who believe that “truth” is always partial, transitory and uncertain and affirmative post-moderns who seek instead to broaden and increase the methods of knowledge acquisition that we use. Thus, affirmative post-moderns would include the recent spate of narrative writers in legal scholarship³⁴ who seek to increase the stories that are told and heard³⁵ in our legal system and to appeal to empathy³⁶ and affective, as well as rational,³⁷ ways of knowing.

Both groups of post-moderns share a skepticism that truth can accurately be “represented.” This claim, which originates in art and literary criticism, has some dangerous teaching for our rules of evidence and trial procedure. While our various exclusionary rules are designed to protect against some distortions (such as in the over-probative and prejudicial forms of evidence which are often excluded) in representation of “the facts,” oppositional fact presentation may be criticized for necessarily

33. See note 29 *supra*.

34. See e.g. Symposium: Narrative and Storytelling, 87 Mich. L. Rev. 2073 (1989); Robin West, Narrative, Authority and Law (1994); Patricia Williams, The Alchemy of Race and Rights (1991); Toni Massaro, Empathy, Legal Storytelling and The Rule of Law: New Words, Old Wounds?, 87 Mich. L. Rev. 2099 (1987).

35. For the vigorous debate about how these stories can be “validated” see Suzanna Sherry & Daniel Farber, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan L. Rev. 807 (1993); Kathryn Abrams, Hearing The Call of Stories, 79 Cal. L. Rev. 971 (1991).

36. Lynn Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987); Menkel-Meadow, The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law, 2 UCLA L. Rev. 287 (1992).

37. For an evocative argument that there are many ways (some of them gendered) of learning and “knowing” see Belenky et. al. Women’s Ways of Knowing (1985).

involving extreme or distorted "representations" of the past acts and motives which may be impossible to "re-present" in a courtroom.³⁸

Let me illustrate the particular dilemma of oppositional, binary thinking at trial when linked with recent work in cognitive psychology and trial practice. If we take seriously the recent teaching that facts presented to fact-finders are processed through "schemas," "filters" or common narratives³⁹ then the presentation of two oppositional stories or conclusions may color how all facts are heard. Consider how the framing of a story by both sides then colors how each piece of evidence is interpreted. The oppositional story may work well when there is an off/on, guilt/innocence determination to be made⁴⁰ (though it still carries the danger that all incremental facts will be processed through a pre-existing frame⁴¹) but will not work as well when factual findings, legal conclusions and mixed fact/law questions are at issue: comparative negligence, business necessity defenses, excuse and justification in criminal law, best interest of the child, to name a few examples. Thus, my argument here is that the "false" or "exaggerated" representation⁴² of oppositional stories may oversimplify the facts⁴³ and not permit adequate consideration of fact interpretations or conclusions that either fall somewhere in between or are totally outside of the range of the presentations of the lawyers.⁴⁴ Indeed, in one version of post-modernism we could read the adversary system as a totally arbitrary system for imposing order (binary) where

38. At this point, some readers will realize that some of the post-modern attack on knowledge would reject any legal system. If the truth is unknowable, inquisitorial, bureaucratic and "alternative" systems of dispute resolution would fare no better in discerning facts.

39. See e.g. O'Barr and Conley, *Rules vs Relationships* (1990); Lance Bennett and Martha Feldman, *Reconstructing Reality in the Courtroom* (1981).

40. Consider how you "filter" each of the individual facts in the OJ Simpson case given your current "conclusion" about whether he is guilty or innocent. What would it take to change your mind? Consider this same question in light of more complicated issues—does Microsoft have too large a share of the software market and what should be done if you think it does?

41. Here is my *de rigueur* cite to Thomas Kuhn's *The Structure of Scientific Revolutions* (1970) that tells us we can understand reality only through historically contingent paradigms (like the lawyer's oppositional stories) which do, on occasion, shift.

42. What post-modernists call constructivism is the advocate's stock in trade.

43. Stanley Fish has gone so far as to say that all knowledge claims are merely the result of contextual and artificial agreements among professional communities. Fish, *Doing What Comes Naturally* (1989). So, if we cannot adequately justify the adversary system and most philosophers have agreed that we cannot not (see Luban, *supra* note 1) then the adversary system itself is the product of our professional "conspiracy" to perpetuate its existence. It has not been even weakly empirically validated. Luban, *supra* note 1; cf. Thibaut and Walker, *Procedural Justice* (1975); Tyler and Lind, *The Social Psychology of Procedure* (1988).

44. Jury nullification may represent one effort to escape not only the law but the need for binary fact determinations—maybe somebody was a "little bit guilty." (ie. entrapped but guilty or guilty but not responsible). Obviously, the more varied possibilities in equity also represent an effort to avoid the draconian effects of law's oppositional possibilities.

none exists at all, where everything is related to everything else and we can not rationally determine relevance.⁴⁵

An implicit, but sometimes explicit, aspect of all post-modernism is a skepticism about both objectivity and neutrality. This has serious implications for our adversary system, not only for the advocate's role, but for the "neutral, passive" judge as well. This argument of post-modernism has most explicitly been made in law by the work of critical legal scholars who have demonstrated both the linguistic contingency of law (its indeterminacy) and then its manipulation by particular interests (economic or class based in critical legal studies, race-based in critical race theory and gender based in feminist legal thought⁴⁶). Most of the work of critical legal scholars has focused on the law and rules—the "texts" of the legal system. But the attacks on certainty, legal knowledge and neutrality have clear and dangerous implications for legal process and the adversary system as well.⁴⁷

Thus, "neutral" judges, either as passive umpires of a trial process or more active fact-finders will likely have predispositions to one side of the story or their own interpretation⁴⁸ which might not be uncovered by party-initiated presentation of evidence where the lawyers cannot learn what the judges' own story is. While some use this post-modern strategy to critique the false claims of objectivity and neutrality, others suggest we should simply acknowledge that values are different and we may not have total unanimity over "fundamental interests," but rather should

45. This view is also consistent with chaos theory—that causality is not linear as we modern science romanticists believe. Consider the arguments about what is relevant in the ever expanding soap opera of the OJ Simpson case (is what Detective Fuhrman said about Judge Ito's wife relevant to the guilt or innocence of Simpson?) Where does the seamless web of the facts end?

46. In feminist epistemology more generally, philosophers of science have argued that even the construction of questions of "truth" in science have been dependent on the "bias" of the masculinist view of reality. Consider the metaphors of competition and survival of the fittest and the struggle of the cell as examples, Harding, *The Science Question in Feminism* (1986) and Evelyn Fox Keller, *A Feeling for the Organism: The Life and Work of Barbara McClintock* (1987).

47. I am reminded of the article in *Time* magazine a few years ago which attempted to describe the tenets of critical legal studies for a lay readership. The article concluded, if I remember correctly, with a statement by the reporter that there was nothing so dramatic in critical legal studies teaching—"even the man in the street knows that law is the tool of the powerful." One could ask whether the laity retained more of a loyalty or belief in the adversary system and its process than law itself, until recently. Have years of TV shows like *Perry Mason* and *Law and Order* persuaded the public that the adversary system does find the truth and punish the guilty? Does the "person in the street" now have as much skepticism about the process of the adversary system, after a few well televised "miscarriages of justice"? (Or, maybe it is just Los Angeles. Why are all the bizarre trials here—Rodney King, Reginald Denny, the Menendez brothers, OJ Simpson? Is LA the ultimate post-modern city? See Mike Davis, *Los Angeles: City Of Quartz*, (1991).)

48. For evidence of this see *Gender and Race Bias Task Force Reports* completed in many state and several federal jurisdictions.

make explicit the appeal to different values, beliefs or emotions that are held by fact-finders.⁴⁹ Thus, there may be more than “two stories” in the courtroom if litigants attempt to deal with the great varieties of values or emotional “frames” that could influence a fact-finder⁵⁰. In my view, this reflects the reality of life in a post-modern, multi-cultural world (the recognition that if “truth” is to be arrived at, it is best done through a multiplicity of stories and deliberations, rather than only two (see below) but how this will be structured into a litigation system, which is still based on oppositional evidence presentation, remains to be seen.

There is one other element of post-modernism that I want to address briefly here and that is the explicit recognition that we do reason in binary oppositions⁵¹ with a hierarchy of values usually subordinating one side of the opposition as in male/female, white/black, rule/discretion, law/equity, market/family, etc.⁵² In post-modernism this is the method of deconstruction—the recognition that every “text” has its ambiguity, its negation, its opposition, its “silence.” In some versions the idea is to reverse or resituate the oppositions, which, of course preserves them.⁵³ But in some forms the purpose of deconstruction is to make clear that binary oppositions do not explain the world. Hierarchies of claims hide more than they reveal. Thus, many in Los Angeles hoped that the beaters of Rodney King would be convicted because of their acts rather than because it was “a white or black thing.”⁵⁴

49. Indeed, some have argued that the split between emotion and rationality is itself a “false dichotomy.” See Joan Cocks, *Wordless Emotions: Some Critical Reflections on Radical Feminism*, 13 *Politics and Society* 27 (1984); Menkel-Meadow, *Women as Law Teachers: Toward The Feminization of Legal Education*, in *Humanistic Education in Law* (Columbia Univ. 1981).

50. For an eloquent description of how the categories of law and the structure of legal process often suppress other “stories” and the truth see Lucie White, *Subordination, Survival Skills and Sunday Shoes: Notes On the Hearing of Mrs. G*, 38 *Buffalo L. Rev.* 1 (1990) (describing how a client in a welfare hearing refuses to use the advocates’ suggested arguments to fit existing categories of law and instead insists on telling her own story (of truth) which demands justice from the heart, where the law will not recognize her claim).

51. The post-moderns most associated with this observation are Saussure in linguistics, Jacques Derrida in literary criticism and Jacques Lacan in psychoanalytic theory.

52. My personal favorite explication of the effects of this binary opposition in law is Fran Olsen’s *The Sex of Law in The Politics of Law* (D. Kairys, ed., 2d. 1991).

53. This is the argument that some feminists claim women are different and better than men which preserves gender difference. One story is still better than another. See Joan Williams, *Dissolving the Sameness-Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 *Duke L. J.* 296.

54. And similarly, many hoped the beaters of Reginald Denny would be convicted too because of what they did, not because of a need to set an “oppositional” verdict to the travesty of the original acquittal in the King beating case. (Note how these cases are known by the victims rather than by the perpetrators—neither Rodney King nor Reginald Denny were “on trial.”)

Taken out of its post-modern context, deconstruction is useful for critics of the adversary system because it exposes how the "text" of adversarial argument distorts⁵⁵ as do the literary texts analyzed by deconstructionists. In concrete legal terms (and none of these claims are new or original to my argument) oppositional presentation often (not always⁵⁶) distorts the truth⁵⁷ by making extreme claims⁵⁸, by avoiding any potentially "harmful" facts, by refusing to acknowledge any truth in the opposition⁵⁹, by only permitting two, rather than a multiplicity of stories to be

55. As someone who serves in a third party neutral capacity, as an arbitrator and mediator, I am often frustrated (as was Judge Frankel) with the distortions and exaggerations made by counsel in pursuing their claims.

56. Consider the contrary informing principles of baseball arbitration which asks two sides to make offers which are intended to be less extreme because the arbitrator must choose one without any modification. The theory, if not the practice, is that this principle of dispute resolution will encourage reasonableness. Some would argue that good advocates do this as well—if they are hoping to have a fact finder buy their whole story they will try to tell the least extreme, most reasonable story.

57. For a nice catalogue of the distortions in presented evidence through the adversarial method see Morley Gorsky (a practicing lawyer), *The Adversary System in Bronaugh*, supra note 27, listing as sources of incorrect or inequality of evidence production where 1)there is a reluctant witness (whom both parties may be afraid to call; 2)there is a lack of awareness of a potential witness because of the lack of independent investigation; 3)there are inequalities in expert witness production as a result of economics; 4)witnesses are coached or "over-prepared"; 5) counsel is more inept than his opponent; and 6)a witness is inept (ie. may be truthful but fearful and therefore very vulnerable on cross-examination). For my own arguments about how lawyers have to transform their clients' stories to meet the needs and requirements of the legal system, see Menkel-Meadow, *The Transformation of Disputes By Lawyers: What the Dispute Paradigm Does and Doesn't Tell Us*, 2 Mo. J. Disp. Res. 25 (1985).

58. Many justify the adversary system as human evolution from trial by real combat to modern "bloodless" combat in the courtroom. Perhaps the distortions of modern verbal combat have outlived their usefulness and we are ready to evolve to the next level of a legal system without combat. For an interesting description of variations in lawyer aggressiveness (even outside of litigation) see Neil Lewis, *At the Bar: Wherein a New York Style Litigator is cast as the heavy in the Whitewater affair*, N.Y. Times, July 28, 1995, B-18 (describing the variations in the New York lawyer who "fights at all costs for a client" versus the Washington lawyer who is more concerned about "how things look." (remarks attributed to Bernard Nussbaum, former counsel to the President). Lewis suggests that advice not to turn over documents to the investigators might be successful in defending a corporate wrongdoer but is not an appropriate tactic for a public official who must inspire trust and higher moral standards.

59. Cognitive psychologists have named this phenomenon "reactive devaluation." We do not hear the validity of a claim or argument or offer made by "the other side" simply because it comes from the other side. This particular distortion of adversary approaches to dispute resolution has become the focus of those studying negotiation and mediation. If we can't hear the truth of what our opposition has to tell us then a third party mediator can often reduce this distortion by being a more "neutral" bearer of offers or information. See Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution* in Kenneth Arrow et al. (eds.) *Barriers to Conflict Resolution* (1995); Robert Mnookin, Introduction at 22-23, Id.; Mnookin, *Why Negotiations Fail: An Exploration of the Barriers to Resolution of Conflict*, 8 (2) Ohio St. J. of Dispute Res. 235 (1993).

told, by refusing to share information⁶⁰ or ironically by strategically giving or demanding too much information,⁶¹ by manipulating information (as in the "battle of experts,") by making the true look false (cross-examining a truthful witness) or the false look true (by offering false or misleading evidence or active "coaching" of witnesses).⁶²

Another common complaint about the adversary system demonstrates one of the claims made by deconstructionists. In litigation, the hierarchy of opposition will often be determined by the unequal resources of the parties. In its ideal and abstracted form the adversary system clearly contemplates adversaries of equal skill and economic support—the result should not depend on the resources, or "skill" of the argument's representative, but on the merits of the argument,⁶³ yet we all know "the haves come out ahead."⁶⁴

Whatever the persuasiveness or merits of post-modernism's attack on truth or knowledge generally, its teachings are extremely problematic for the legal system⁶⁵. Whatever the problems with only two stories, or the unknowability of what really happened, the legal system must find facts and make decisions if any semblance of order is to be maintained. The legal system's problem with post-modernism is the same as epistemology's—how can we evaluate anything; by what standards are we to

60. See Stuart Taylor, *Sleazy in Seattle*, *American Lawyer*, April 1994 (describing sanctions assessed against Bogle & Gates for failing to turn over in discovery documents indicating medical warnings for drug causing serious injury to plaintiff child). Many legal ethicists, including the distinguished Geoffrey Hazard, opined that our discovery system and our rules of legal ethics did not require the disclosure of these documents.

61. John Setear, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 *Yale L. J.* 352 (1982); *Id.* *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence and Discovery Abuse*, 69 *B.U. L. Rev.* 569 (1989) (applying the analysis of game theory and the Prisoner's Dilemma to discovery abuse, based on oppositional strategic behavior by opposing litigants).

62. Murray Schwartz, *Making the True Look False and the False Look True*, 41 *Sw. Law Review* 1135 (1988).

63. This is what happens when the fault lies with the man and not with the art (i.e. the quality of representation), see Martin Golding, *On the Adversary System and Justice in Bronaugh*, *supra* note 27 at 112. See also Plato's *Gorgias* for arguments about the morality of the "bought" or partisan rhetorician. In post-modern parlance, the case will turn on the performance or "performativity" of the advocate, rather than on the "facts," thereby demonstrating once again that "truth" in the legal system is not objective or necessarily rational.

64. Marc Galanter, *Why The Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974).

65. Indeed, one might suggest that the label of "nihilism" attached to the critical legal scholars by Paul Carrington and others (see Carrington, *Of Law and the River*, 34 *J. of Leg. Ed.* 222 (1984)) represents the very fear of the validity of some of these arguments—if they are persuasive they deal very significant blows to the entire structure of law and the legal system.

judge anything? Thus, even critical scholars like Joel Handler⁶⁶ who acknowledge that even if no one "procedure has access to truth or reality, including science,"⁶⁷ we must use some measure for assessing facts and acting. For Handler, as for others, that something else is a non-foundational pragmatism—"the test of knowledge is efficacy."⁶⁸ But Handler, like other pragmatists (and I include myself in this group⁶⁹), envision a greater multiplicity of stories being told, of more open, participatory and democratic processes, yielding truths that are concrete, but contextualized, explicitly focusing on who finds "truth" for whose benefit. The feminist epistemologist, Sandra Harding, has called this "strong objectivity," when the interests of truth finders and the questions they ask and answer are part of the description of the "truth"⁷⁰. In the final section of this paper I will explore how these observations may help us both reform some of the defects of the adversary system as well as open up and more radically transform our whole legal process, with obvious implications (requiring further exploration) for our core concepts of legal ethics. But first—some more complaints. . .

III. THE LIMITED REMEDIAL POWER OF ADVERSARIALISM

The structure of adversary argument that limits cases to two "sides" (or a limited set of other party arguments with joinder, interpleader and sub-classes) is made more problematic by what our adversary system (as exemplified by courts) permits as resolutions to disputes that come before it. I have argued at length elsewhere that courts that are empowered to grant money damages, guilty or not-guilty verdicts and injunctions (which are more often negative than positive) greatly limit what results an adversary argument can achieve.⁷¹ While I am mindful of the

66. Joel Handler, *Postmodernism, Protest and the New Social Movements*; Presidential Address, 26 *Law & Society Review* 697 (1992)

67. *Id.* at 703.

68. *Id.* at 702

69. For explorations of the John Deweyian sources of this modern legal pragmatism see such sources as Thomas Grey, *Holmes and Legal Pragmatism*, 41 *Stanford L. Rev.* 787 (1989); Margaret Radin, *The Pragmatist and the Feminist*, 63 *So. Cal. L. Rev.* 1699 (1991); Joseph Singer, *Should Lawyers Care About Philosophy?* 1989 *Duke L. J.* 1752; Cornel West, *The American Evasion of Philosophy* (1989).

70. Harding, *Whose Science? Whose Knowledge?* (1991), *Id.* (ed.) *The Racial Economy of Science: Toward A Democratic Future* (1993) at 17-19. "Democratic values, ones that prioritize seeking out criticisms of dominant beliefs from the perspective of the lives of the least advantaged groups, tend to increase the objectivity of the results of research." at 18. Note the structural parallel in this argument to John Rawls' "veil of ignorance" in political philosophy. John Rawls, *A Theory of Justice* (1973).

71. Menkel-Meadow, *supra* note 8.

fact that parties are always free to exit the system and settle for their own more tailored solutions, the truth is settlements are often constrained by the limited remedial imagination of lawyers who bargain "in the shadow of both the court and the law." Thus, without rehearsing my earlier arguments here, I want to suggest that we should think carefully about what cases require binary solutions (and I believe there are many cases that do) and which do not. At the same time, we need to examine why this one mode of dispute resolution still so dominates our thinking about legal problem solving⁷². Whatever efforts have been made to act on expanding the scope of processes and remedies recognized by courts,⁷³ there continues to be a co-optation of these processes by determined advocates.⁷⁴ As I have argued before, expanding the stories, the interests, the issues and the things at stake actually enhances the likelihood of finding "trades" and other creative solutions to problems so that contentious argument can be minimized and more party needs can be satisfied.⁷⁵ This will require a great deal of re-education and reorientation to accomplish⁷⁶—indeed, major cultural, not just ethical, change among lawyers. To think creatively is not necessarily the same as thinking critically or analytically and the negative and reactive thinking produced by adversarial argument may limit more open ways of conceiving of solutions to problems⁷⁷.

72. And business, and interpersonal relationships and life in general. See for example the interesting but depressing example of application of competitive thinking, derived from game theory, to a wide range of problem solving in Avinash K. Dixit and Barry J. Nalebuff, *Thinking Strategically: The Competitive Edge in Business, Politics and Everyday Life* (1991).

73. Such as multi-door courthouses and other efforts to enact Frank Sander's ideas about multiple processes. See *Varieties of Dispute Processing*, 70 FRD 111 (1976); see also Susan Sturm, *The Promise of Participation*, 78 Iowa L. Rev. 981 (1993); see also Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 Geo. L.J. 1355 (1991).

74. See Menkel-Meadow, *Pursuing Settlement in An Adversary Culture*, 19 Fla. St. L. Rev. 1 (1990). My personal favorites include one advocate who wrote a letter to his adversary stating, "I have filed an ADR against you," and a recent continuing education program for defense lawyers which offers advice on "winning in ADR and negotiation", *ADR For the Defense*, Defense Research Inc. (Program held in San Francisco, Sept. 21-23, 1995).

75. My favorite illustration of this comes from a UCLA faculty cocktail hour in which several of my colleagues picked at the same bowl of cocktail mix. None of us were in competition as some chose pretzels, others nuts and others wheatchex—we wore down the bowl cooperatively and with all of our needs being met. We value different things and the more "stories" and interests we get on the table, the more likely we can arrive at a mutually agreeable solution, by finding complementary, rather than competitive, interests.

76. See Menkel-Meadow, *To Solve Problems: Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. Rev. 801 (1993).

77. See e.g. James J. Adams, *Conceptual Blockbusting: A Guide to Better Ideas* (1986); Martin Gardner, *Aha! Insight* (1978).

I will be so heretical as to suggest that even some criminal matters (most often thought to be the paradigm case for requiring binary solutions, followed by punishment) might be susceptible to other processes and remedies such as Victim-Offender Mediation⁷⁸ which attempts to create (a guilt-imposing) relationship between offenders and victims of some small crimes to encourage restitutionary remedies rather than punishment. If we are to defeat the hold that crime has on us we must broaden and increase our responses (not to mention look for remedies, treatments and processes to deal with the crushing caseloads) and searches for solutions, especially where there is not enough room for all at the inn (the prison).⁷⁹

In the civil arena, where I have done most of my work, we must consider those cases which do not easily lend themselves to right or wrong answers⁸⁰ or to more binary solutions. Often, imposed solutions by third parties, like courts, do not deal with underlying causes of ongoing conflicts or disputes, especially if personal or relationship issues are at stake (and this includes commercial as well as civil rights matters) and they may therefore, not be enduring solutions. The courts, to their credit, have realized this (and equity has always been a place of more diverse remedies), though not without a vast outpouring of scholarship and criticism of the difficult road courts take when they attempt to order more complex remedial measures.⁸¹ Most recently, courts have supervised other kinds of dispute resolution, particularly in class action settlements of consumer and anti-trust cases⁸² and mass torts.⁸³ We must look to

78. See e.g. Robert Coates & John Gehm, *Victim Meets Offender: An Evaluation of Victim-Offender Reconciliation Programs* (1985); cf. Jennifer Gerarda Brown, *The Use of Mediation in Criminal Cases: A Procedural Critique*, 43 *Emory L. J.* 1247 (1994).

79. Obviously, this implicates more important and complex questions of criminal law and policy. Learning who will benefit from such perceived more "lenient schemes" will be difficult.

80. Winning may not be everything and often a short term win is followed by long term resentment and efforts to execute a judgment or monitor an injunction. Segregation is wrong but we now wonder whether busing was the only or best solution. Some tried to look for other solutions earlier (like equality of financing, see Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L. J.* 470 (1976)).

81. Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976); Stephen Yeazell & Theodore Eisenberg, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 *Harv. L. Rev.* 465 (1980).

82. Here my personal favorite is the books I received from Harcourt, Brace & Jovanovich, instead of cash, in settlement of an anti-trust overcharge in bar review courses case. (Not unlike the coupons for air fare discounts we have recently received in settlement of airline anti-trust action). These are illustrations of how "in-kind" or other forms of compensation are not zero-sum—the books and coupons give some benefit to the defendants, decreasing their cost for our recompense.

83. As in the Virginia bankruptcy court's supervision of the Dalkon Shield Claimants' Trust ADR program and the proposed (now shaky) settlement of the breast implant litigation in claims facilities.

ways to preserve limited funds for fair distribution to all deserving claimants as well as look for opportunities where people may desire things other than or in addition to monetary relief.⁸⁴ Thus, choice of remedy and more "remedial" imagination should affect the choices we make about what processes to use and how adversarialism may greatly restrict what can be accomplished.

IV. HOW MULTI-CULTURALISM (OR PLURALISM) CHALLENGES THE ADVERSARY SYSTEM

Recall that when we speak of the adversary system we say the "Anglo-American" adversary system. The inquisitorial system of civil law countries, the mediation of Asian countries, the dispute resolution processes of Native Americans⁸⁵ and the "moots" of some African cultures remind us that our legal process is culturally specific and chosen, not given. Here I want to explore, very controversially I am sure, the cultural assumptions of our adversary system as they operate both at the national and international level. Again, while I do not have the time or space to do a complete review of comparative legal systems,⁸⁶ it is important to recognize that other systems may still have something to teach us. With our increased participation in international treaties and tribunals such as GATT and the Law of the Sea Treaty, dealing with multiple parties with different cultures and legal regimes, has revealed that we will have to participate in alternative (to us) forms of dispute resolution and culturally complex international cooperation.

Within our own borders multicultural concerns make themselves felt when immigrants from other systems either fear or will not use our system because they do not understand or trust it,⁸⁷ or when it is alien to

84. Both Judge Jack Weinstein and I have noted that in addition to cash, claimants in mass tort matters do seek some cathartic value in the process they desire, Weinstein, *Individual Justice in Mass Tort Litigation* (1995); Menkel-Meadow, *Ethics in Mass Tort Settlements: When the Rules Meet the Road*, 80 *Cornell L. Rev.* 1159 (1995).

85. See *Mediation Quarterly*, Special Issue Native American Dispute Resolution, 1993.

86. See e.g. John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (1969); Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *Yale L. J.* 480 (1975); Id. *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study* 121 *U. Pa. L. Rev.* 506 (1973); John Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L. Rev.* 823 (1985); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 *Cal L. Rev.* 1284 (1967) as a few examples.

87. Lawyers working with immigrant groups in communities like Los Angeles have reported to me that some national groups, like some South and Central Americans will not use the adversary system because it is unfamiliar to them (and they often carry with them distrust of official courts from perceptions about corrupt regimes in their native lands—are we less corrupt?). Obviously, access to courts and lawyers plays a large role in this. But some lawyers and community groups

what they know. While our melting pot and assimilationist ideology would suggest that such recent newcomers to our shores should simply acculturate themselves to one of the few "all-American" institutions, instead I think we might take the opportunity of reexamining our system for ethnocentric bias and try to imagine other dispute resolution institutions we might create. The very premises of our system, that "winning" is all and that harms suffered are monetized may not be culturally congruent with all members of our society.

At its most disturbing and controversial we have the question of what commitment our own citizens have to a system that some perceive delivers them nothing but injustice. Many would argue that it is not the structure of the adversary system itself, but the inequalities of resource distribution and access within it that has caused many disempowered groups to feel less committed to the legal system. Others would suggest that the adversary system itself and the expensive details of its use exacerbate whatever social power differentials there already are.⁸⁸

I think the issue goes beyond access and resources within the process. As Patricia Williams has so eloquently reminded us in her book *Alchemy of Race and Rights*, some in our society (African-Americans) have been the "acted upon" in law (as objects of law as property in slave legacy) and did not historically participate in the creation of our legal process. As some have criticized our "science" for its exclusion of particular voices⁸⁹ we must wonder what a more multi-cultural and integrated group of framers might have chosen for a process if it had been informed by a full representation of our varieties of immigrant cultures. While it seems true that many cultures think in binary terms (i.e. ying/yang), it is not so clear that the dichotomies or binarisms are hierarchically arranged in the same manner or that binary thinking must necessarily structure legal culture. Chinese mediation, derived from Confucian principles, is designed to seek "harmony, not truth."⁹⁰ What would it mean if we

report that some national groups prefer to create their own community dispute resolution processes (a continuation of American immigrant community dispute development as chronicled by Jerold Auerbach in *Justice Without Law?* (1983). It is also true that some cultures reject our American commodification and monetization of disputing. In another recent example, an elderly Japanese man learned that he had been paid less than many of his inferiors. His Americanized children urged him to sue but he said he valued his dignity and the respect he had had in the workplace more than his desire for money or to make trouble. (Jan Dizard to Howard Gadlin, personal communication.)

88. Did the "playing of the race card" cause a majority black jury to acquit OJ Simpson as a "pay back" for the majority white jury in the Rodney King beating case?

89. See Harding, *supra* note 70.

90. A value that is strongly criticized by those who seek to preserve our adversarial system in the face of encroachment by dangerous ADR methods. See e.g. Laura Nader, *Controlling Processes in The Practice of Law: Hierarchy and Pacification in the Movement to Reform Disputing Ideology*,

redefined our legal system to seek "problem-solving" as its one of its goals rather than "truth?"⁹¹ While we remain committed to third party "neutrals" who are detached and unbiased, other cultures value decision-makers who are enmeshed in the community and understand it and have "wisdom" from experience.⁹²

I fear the adversary system itself and what it has contributed to the larger culture has hindered rather than helped race and ethnic relations⁹³ by polarizing discussion and by continuing to perpetuate its own form of bi-polar thinking. Third party impositions of solutions seldom get at root causes of conflicts or provide enduring solutions. Black-white relations, as another binary construct, remain the paradigm for thinking about race, despite the growing multiplicity of race and ethnicities and diversification of our society and slowly, the legal profession itself⁹⁴. In my view, we need to rethink ways to permit more voices, more stories, more complex versions of reality to inform us and to allow all people to have views that are not fully determined by their "given" identities in our culture. To that end let me turn to some proposals for reform of the adversary system.

9 Ohio St. J. Disp. Res. 1046 (1993); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi.L.Rev. 494 (1986). I call these critics "litigation romanticists," see Menkel-Meadow, *supra* note 84.

91. I can imagine huge outpourings of objections here—where is justice, punishment, deterrence—all of the articulated current goals of our legal system. I offer this example as simply an illustration of how we select our goals and could select others. I am not suggesting that we solve problems by ignoring justice. Or, as Rodney King put it, why shouldn't our legal system be constructed to "help us all just get along" in such a diverse world?

92. As a feminist, I am not endorsing the "wise elder" form of mediation found in many cultures in the world, because they do tend to be paternalistic and exclusive of women, but I am suggesting that the principles informing such choices are different than ours and might be worth examining in some areas. The use of "substantive expertise" in some forms of ADR (mini-trials, arbitration and mediation) reflects this desire for a knowledgeable (and perhaps "interested" or "biased") third party neutral and further complicates the questions of ethics and conflicts of interest. See e.g. *Poly-Software Int'l, Inc. v. Su*, 880 F. Supp 1487 (D.Utah, 1995) discussing complications of applying conflicts rules when small group of skilled lawyers (specializing in computer industry in a relatively small area) act as both litigators and mediators.

93. So do Lani Guinier and Susan Sturm, by looking for other ways to facilitate the study of and conversations about race.

94. I have, in other contexts, talked about the importance of diversifying the profession for purposes of broadening how we think about law and its solutions, as well as its practice. Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U.Miami L. Rev. 29 (1987) *Id.* *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 Case Western Reserve L. Rev. 621 (1994).

V. REFORMING THE ADVERSARY SYSTEM

I am torn at this point between choosing from among the most incremental of changes to reform the adversary system to keep it in its place and keep most of my audience and beginning with the most radical of proposals so you will happily adopt all of my more modest suggestions.

A. *Adversarialism Where It Is Appropriate*

Being something of a provocateur, I will start with a radical, yet benign suggestion. Since the adversary system has not been empirically validated as the most effective legal system⁹⁵, let us think about what it does best and attempt to cabin its influence to those cases which need the "full-court press" of adversarialism. Then, let's move on to think about what other processes are appropriate to serve other goals⁹⁶. Many of you will think that all criminal cases belong in the former category, where the state faces a lone individual's potential loss of freedom—I do not think all criminal cases belong there⁹⁷. Others think that all disputes that involve some "public question" belong in open court with fully contested arguments and rules designed to create fairness of process and result.⁹⁸ Still others would include cases that involve large numbers of people, like the mass tort, consumer and securities cases we face. Still others suggest that we need adversarial, conventional processes precisely when the parties are unequal so that the court may police resource and "performativity" imbalances.⁹⁹ For me the operative principles are party choice and use of the adversary system where it is most appropriate and always available, literally as a "court of last resort."¹⁰⁰

95. See discussion in Luban, *supra* note 1; Thibaut & Walker, *supra* note 43 and critiques thereof in Damaska, *supra* note 86.

96. So much of the writing on the adversary system is done by those who imagine either a criminal or civil paradigm and then attempt to impose some universal system applicable to both. Call me a post-modern, but I think there is enough variation in our case types, that neither process rules nor ethics rules can continue to be totally global and transsubstantive, see Menkel-Meadow, *supra* note 84.

97. As William Simon has controversially suggested it is not always true that state powers are superior to criminal defendants. See Simon, *The Ethics of Criminal Defense*, 91 U. Mich. L. Rev. 1703 (1993).

98. See e.g. Judith Resnik, *Many Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Res. 211 (1995); David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619 (1995).

99. Richard Delgado et. al. *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wisc. L. J. 1359; Owen Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984).

100. Lest you think I am an ADR romanticist, last month I was involved as a plaintiff and counsel (with my husband) in three lawsuits (all after other forms of dispute resolution failed). After

B. Other Possible Forms of Dispute/Conflict Resolution

But what I most want to think about are other forms of legal dispute resolution. In what circumstances could we safely begin to experiment with other forms of process, through which we could explore other forms of interaction and ethics? Many scholars in the dispute resolution field have called on us to provide both "thick description" and analysis of different modes of conflict resolution that have been successful, even in perceived intractable disputes.¹⁰¹ Mindful of the post-modern and multi-cultural critiques of legal knowledge, could we imagine a forum where more than two voices could be heard? Here I will sketch some possible alternative modes of dispute resolution to consider.

Where more than two sides to a dispute are involved could we imagine processes with more than plaintiffs and defendants? In a modification to old historical forms, could we imagine a tri-partite criminal proceeding with state interests, victim interests and defendants interests all represented? Or, as has occurred in a variety of environmental siting, community block grants and other multi-party situations, could we utilize a multi-party mediation-like process in which a single dispute is used to broaden community and democratic participation in a single issue that affects more than two parties and establishes a process for greater participation?¹⁰² Reg-neg (negotiated rule-making or regulatory negotiation) represents another example of current recognition that other than conventional adversarial processes may more effectively involve more than two parties and lend greater legitimacy to the result if people are involved in the construction of rules before they take effect.¹⁰³ Could we further adapt our current forms of sub-classes, multi-party, multi-district litiga-

filing, two of the three settled. (For the case typologists among you, the collection and copyright infringement cases settled, the landlord-tenant (damages, not eviction) did not. By the way, we "won" the damage case, in the sense of getting a judgment; we have yet to collect a dime. Thus, the full trial that we had did nothing to increase the justice or efficacy of our claim.

101. See e.g. Deborah Kolb and Associates, *When Talk Works: Profiles of Mediators* (1994); Donald Schon & Martin Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (1994); Marc Howard Ross, *The Management of Conflict: Interpretations and Interests in Comparative Perspective* (1993) (arguing that it is particularly important to study the psychocultural specifics of both successful and failed efforts); *Conflict, Cooperation and Justice: Essays Inspired by the work of Morton Deutsch*, (Barbara Benedict Bunker, Jeffrey Rubin and Associates, eds. 1995).

102. See Lawrence Susskind and Jeffrey Cruikshank, *Breaking The Impasse* (1989); Kolb, *supra* note 101, Profile of Larry Susskind, 309-54.

103. See e.g. Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *Geo. L. J.* 1 (1982); Lawrence Susskind and Gerald McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *Yale J. Reg.* 133 (1985).

tion, and other forms of consolidation to allow for more than "two sides" to civil cases with a variety of private and public issues at stake.¹⁰⁴

In the Center in which I work at UCLA (the Center for Inter-racial/Inter-ethnic Conflict Resolution) we have begun to develop formats and fora for discussion of divisive issues that attempt to alter the debate mode and focus instead on structured, reframed, multi-party "representational" and diverse conversation. In a recent forum on affirmative action, for example, (a very disputed issue on my campus and in my state) we organized a forum designed to avoid adversarial and debate-like presentations. The process involved four diverse presenters (both in views and issues and demographics¹⁰⁵) who gave brief statements of their views on the subject which included statements about how their personal and individual histories have affected their views, and who were then asked a series of probative questions by a moderator-facilitator. (These questions were designed to probe more than adversarial stated extreme positions, such as "what are the grey areas in your thinking?. What evidence would you need to change your mind? What did you learn from hearing the other presenters?") These questions were followed by presenters questioning each other (facilitated by a question-reframer who attempted to dislodge the personal attacks or hostility in questions and responses), followed by audience questioning, and concluding with an attempt to draft a statement that reflected commonalities and differences of thinking and where more information was required. All of this was followed by a process critique session by the audience.

I recognize that such a procedure might not work where civil damages have to be assessed or guilt determined (though I wonder), but it certainly could be used for policy deliberations and in the negotiation and settlement of large multi-party lawsuits.¹⁰⁶ Lani Guinier and Susan

104. For my argument that cases are not so easily denominated "public" or "private" see Menkel-Meadow, *Whose Dispute Is It, Anyway? A Democratic and Philosophical Defense of Settlement* (In Some Cases), 83 *Geo. L. J.* 2663 (1995).

105. Thus, illustrating both demographic and positional diversity. There were ranges of view on what kind of affirmative action was appropriate in the educational arena (differences in admissions, educational programs, employment and contracting) and what groups should be part of such plans as well as the view that there should be no affirmative action at all. (In a very "PC" environment, the latter view is not easy to openly express and was accomplished because of the process protections offered.)

106. Indeed, with the exception of representative-advocates of each "party" this structure is not that dissimilar from a multi-party private mini-trial, where the principals are intended to complete the negotiation and resolution. CPR, *The Mini-Trial: Practice Guide* (1988). If the audience participated in drafting the statement or agreement, we might have something that looked like a summary jury trial. See Thomas Lambros, *A Summary Jury Trial Primer*, in Donovan Leisure Newton & Irvine, *ADR Practice Guide* (John Wilkerson, ed. 1990).

Sturm at the University of Pennsylvania have experimented with similar and other formats in their class on race and gender theory, with similar purposes, to reduce the distortions of adversary dialogue and the hope that individuals would be empowered to fully confront their own and others' views without attachment to "side" or "identity." They label their class an "intermediate space" for discussion, conversation and dialogue, rather than debate. Similarly, I have called mediation an "intermediate space"¹⁰⁷ where individual disputants can meet outside of both more informal (family or workplace) and formal (court or formal grievance) settings. Intermediate spaces,¹⁰⁸ even without formal or complexly facilitated rules, may allow for more authentic grappling with issues and differences¹⁰⁹ and the stakes may be lowered.¹¹⁰ In such environments, as with privately negotiated settlements, we may arrive at contingent agreements, promises to meet and confer again, contingent performances, plans for the future without adjudication of the past—all illustrations of post-modern acceptance of some uncertainty and the need to combine past disputes with present and future action.

More conventionally, we might examine the circumstances under which some forms of the civil inquisitorial/investigative procedures make sense, its major advantage being that a non-partisan investigation leads to (at least in theory) a "genuine search for truth." Some governmental and regulatory questions may be handled this way, and as long as no individual liberty may be at issue even the most confirmed adversarialist might acknowledge it is likely to be both more effective and likely cheaper¹¹¹. Even the United Kingdom, with its commitment to the adversary system, employs governmental investigatory commissions and procedures far more than we do.¹¹²

107. Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 *Neg. J.* 217 (1995).

108. Another personal favorite of mine is the bookstore reading. In a recent reading in Washington DC, Derrick Bell demonstrated the democratic power of such sites by engaging in conversation, (after reading) with a very diverse audience of young and old, black and white, who both supported and challenged his views (and his own position) on race relations treated in *Faces At the Bottom of the Well: The Persistence of Racism* (1992).

109. And perhaps come closer to achieving Jurgen Habermas' "ideal speech conditions," see Jurgen Habermas, *The Theory of Communicative Action*, Vol. 2 (1987).

110. How much would the OJ Simpson trial be different without the press coverage and play by play sports commentary?

111. Note I am not suggesting this in some circumstances as now used when a "neutral" court officer investigates something like parental fitness and makes recommendations to the court without adversary contestation.

112. See examples of Royal Commission on Criminal Justice (following investigation of several cases of "miscarriages" and false convictions in political trials), and white papers and green papers on important legal issues affecting public policy.

I strongly believe that we are on the right track in experimenting with and using a variety of forms of "alternative dispute resolution"—I prefer the new term—"appropriate dispute resolution." Yet, as I have stated elsewhere, I fear many of these forms (mediation, mini-trials, settlement conferences, early neutral evaluations, reg-neg) are becoming corrupted by the persistence of adversarial values. (Other forms of "ADR" like arbitration, summary jury and bench trials are intended to be more conventionally adversarial.) It is clear that lawyers and third party neutrals will have to learn new ways of being in mediation and programs for teaching people to be effective problem-solvers and (heaven forbid, advocates) within the ADR process are beginning to crop up. This is a good thing because if the weaknesses of adversarialism are to be dealt with, new mind-sets about law practice will be necessary.¹¹³

Fact-finding, third party neutraling and judging might need to be considered as well. Some years ago I suggested that if there was any merit to gender differences in judging and fact-finding we might consider male-female judge teams, instead of one judge, who had to decide together.¹¹⁴ Consider how both our judge and jury roles and selection would have to be changed to fully reflect "multi-cultural" considerations in decision-making and process facilitation.

Related to this is a concern close to my heart and that is whether different forms of process will require different ethical requirements?¹¹⁵ Should lawyers attending an in-office early neutral evaluation session with volunteer lawyers appointed by the court¹¹⁶ have a duty of candor to the tribunal (under MRPC 3.3)? What conflicts of interests rules should be applied to those who both mediate and work with litigators?¹¹⁷

113. See Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 *Neg.J.* 29 (1987); *Id.* *Gladiators and Conciliators: ADR—A Law Firm Staple*, 14 *Bar Leader* 20 (1988).

114. See Menkel-Meadow, *Portia In A Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley W. L. J.* 39, 59 (1985); see also Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 *So. Cal. L. Rev.* 1877 (1988).

115. See Robert McKay, *Ethical Considerations in ADR*, in Donovan Leisure, Newton & Irvine, *ADR Practice Book* (John Wilkerson, ed.1990); Menkel-Meadow, *Professional Responsibility for Third Party Neutrals*, 11 (9) *Alternatives* (1993); Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, National Institute for Dispute Resolution (1992).

116. This is the practice in the Northern District of California.

117. See G. Hazard, *When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, 12(2) *Alternatives* 147 (1994); Menkel-Meadow, *Ancillary Practice and Conflicts of Interests: When the Lawyer Ethics Rules Are Not Enough*, 13 (2) *Alternatives* 15 (1995); *Poly-Software Int'l, Inc. v. Su*, 880 F. Supp. 1487 (D.Utah, 1995); Menkel-Meadow, *conflicts and Mediation Practice*, *Dispute Resolution Magazine* (Spring, 1996) at 5.

C. *Reforming the Adversary System and Legal Ethics*

For those who think that it is not the structure of the adversary system, but the extremes of behavior within it that are the problem, I offer a not original list of potential procedural and ethical reforms, though I must admit I am both cynical about policing efforts and skeptical that reforms won't themselves become the victims of the adversarial process as we have seen with Rule 11 reforms¹¹⁸ and are beginning to see with recent disclosure reforms¹¹⁹.

So, if we are concerned about the excesses of adversarial behavior we could prohibit the coaching of witnesses,¹²⁰ require earlier and more forthright disclosure of adverse, as well as favorable facts and witnesses¹²¹ and adverse legal authority¹²² in both civil and criminal cases, require all lawyers, not just prosecutors to "do justice"¹²³ in lieu of only serving their clients' interests, prohibit the cross-examination of witnesses "known" to the lawyer to be telling the truth and prohibit the presentation of any evidence at all "known" to be false by the attorney¹²⁴ and impose serious sanctions for violations of these rules. We could more radically require equalization of resources of the advocates (either taxing the wealthier litigant or providing more public subsidies for poorer litigants) but given our current reluctance to pay for free legal services for the poor and to enter into real fee shifting arrangements (not to mention the socialist nature of this proposal), I doubt we will ever come close to realizing this. Furthermore, I suspect even if economic resources were equalized there might still be an inequality in raw, legal talent in many cases (it is the man/(sic) and not the art, remember who makes arguments). Should we assign lawyers to cases on a random or

118. See e.g. Richard Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 Brooklyn L. Rev. 761 (1993).

119. Charles Sorenson, *Disclosure Under the Federal Rule of Civil Procedure 26 (a)*—"Much Ado About Nothing," 46 Hastings L. J. 679 (1995).

120. Who would police such a private activity? See J.J. White *supra* note 12 for similar arguments about regulating private negotiation activity.

121. As we are trying, somewhat unsuccessfully, to do with reforms to Rule 26(a) of the Rules of Civil Procedure.

122. See MRPC 3.3 (a) (3).

123. See MRPC Rule 3.8.

124. These latter examples make adversarialists cringe. They raise the important issue of deciding when it is appropriate for the lawyer to judge his own client, See David Mellinkoff, *The Conscience of A Lawyer* (1973) and raises important epistemological concerns about how we "know" the truth. See *Nix v. Whiteside*, 475 U.S. 157 (1986). If my post-modernist critiques apply to the truth finding process of the adversary system, they would apply a fortiori to a client's own lawyer who often has nothing more than a client or witness interview to go on.

lottery basis?¹²⁵ Could we ever equalize advocacy skills¹²⁶ so that it was really the “merits” (whatever that might be in a post-modern world) and not the performance that drove the result?

Thus, while I would like to see abuses of adversarial behavior curbed (and I still think professional reputation does more to police this than anything else, interspersed with a few very public scandals, like Kay, Scholer in Lincoln Savings¹²⁷, that cause us once in a while to re-examine our loyalties and rules¹²⁸), I am skeptical that the adversary system can really be reformed by ethics rules changes. Adversarialism is so powerful a heuristic and organizing framework for our culture, that like a great whale, it seems to swallow up any effort to modify it or transform it. Some have made more of the change in language in the Model Rules from “zealous” advocacy¹²⁹ to diligence.¹³⁰ I still see the loophole in the language of the comments (where zeal continues to rear its dragon-like smoke), but none can point to any change of behavior that has resulted from that language change (remember the deconstructionists’ view about indeterminate language with no meaning!).

D. Objections and Responses: Conclusion

Although I seem to have come to bury the adversary system I do think it has its value and there are likely to be a number of objections to my criticisms and proposals. As a former trial lawyer and continuing reluctant adversarialist¹³¹ I will canvas a few objections and attempt to respond.

125. Although in principle our system is based on client choice of lawyer we know there are many exceptions to this in assignment of public defenders and criminal and civil court appointed lawyers, in assignment to lawyers in pre-paid legal plans and even, for most of us, when our liability insurance carriers provide our defense. With increasing use of managed care and health maintenance organizations in health delivery, many of us no longer have choice of our doctors—should lawyers be allocated any differently? When a lottery system of legal services was proposed some years ago for legal indigents, see Marshall Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. Rev. 281 (1980) I strongly opposed it, on class terms, but it might be different if it were applied to all litigants.

126. Asking some lawyers to be “dumb and dumber” while we try to make others smart and smarter?

127. See e.g. Dennis Curtis, *Old Knights and New Champions*: Kay, Scholer, The Office of Thrift Supervision and the Pursuit of the Dollar, 66 So. Cal. L. Rev. 985 (1993); George Brown, *Financial Institutions Lawyers As Quasi-Public Enforcers*, 7 Geo. J. Leg. Eth. 637 (1994).

128. Others in this program will explore the specific issues entailed in whistleblowing on one’s own client and implications for client confidentiality and loyalty.

129. CPR 7-101

130. MRPC 1.3

131. I usually refuse speaking engagements styled in debate mode; I refuse all offers to be an expert witness in legal malpractice or professional responsibility cases; I no longer teach Trial

Some will say the lady doth protest too much—indeed there is not enough of an adversary system left today—an argument I suspect Monroe Freedman will make. With the high settlement rates and large number of plea bargains¹³² too few cases ever see the full test of the adversary system at its best. At another level, critics like Gary Bellow and Judith Resnik suggest that a hybrid form of process—a bureaucratic form of process—exists, both in and out of courts, where there is an increase of judicial and administrative management of cases¹³³ or where, even in court, judges apply more discretionary, bureaucratic rules and continue to push the parties toward settlement. Others suggest that all the attempts to cure the ills of civil litigation (with ADR, Rule 11, disclosure rules, civility rules) will destroy the criminal justice system where the client needs a fully armed advocate¹³⁴. Most telling (to me) is the fear that if we tame the adversarial dragon too much, even in civil cases, our famous expensive and tedious discovery process will not be able to turn out the occasional jewel of achievement in locating that famous “smoking memo” that informs the rest of us of serious wrong doing.¹³⁵

In addition, while I have labored long and hard to canvas the faults of the adversary system, we know that any system we would substitute for it would have other flaws, perhaps worse, for those who fear the power of state investigators, or the absence of clear standards or governing rules in private dispute resolution processes. I often teach about the role of the lawyer in the adversary system by looking at the historical cycles in which the juvenile justice system has turned.¹³⁶ What began as a more private, benevolent, but paternalistic, system (without adversary protections) was converted during the Due Process revolution to virtually the full panoply of adult adversarial adjudication techniques and protection. Most recently, with the advent of ADR and more sophisticated (or

Advocacy, and I mediate and arbitrate but as anyone who knows me will say, I can still argue and become quite adversarial.

132. These are rapidly decreasing in states like California with “three strikes and you’re out” laws. It is estimated that soon all of the 591 courts in the county of Los Angeles will be occupied with criminal cases where third time offenders will no longer plea bargain. There may be no civil adversary system left (if full trial is contemplated). See Stephanie Simon, *Civil Courts Also Feel Squeeze of ‘3 Strikes’ Cases*, Los Angeles Times, August 13, 1995, A-1.

133. Judith Resnik, *Managerial Judges*, 96 Harvard L. Rev. 76 (1982).

134. See Silver, *supra* note 9.

135. The Pinto case, the asbestos litigation. Paul Brodeur, *Outrageous Misconduct* (1985); Richard Sobel, *Bending the Law* (1991). Now the tobacco cases are examples of these triumphs of our adversary system.

136. My text is my colleague’s Murray Schwartz’ *Lawyers and the Legal Profession*, 2d ed. (1985) which raises questions about the value of the adversary system by starting with the Gault (*In re Gault*, 387 U.S. 1 (1967) decision.

simply different psychological) models we have moved closer again to more flexible, private, individualized settlements and treatment programs (although now the juvenile at least has a lawyer). A similar story can be told with respect to some government benefit programs and adjudicatory and administrative decision-making. Thus, process itself is subject to the same "paradigm shifts" (or trends or fads) as other intellectual frameworks. (You can see this is coming to a post-modern conclusion.)

Thus, though I am not happy with the structural, epistemological, remedial and behavioral aspects of the adversarial system, I am skeptical that we can reform it by changing some ethical or procedural rules. What is required is cultural change and that is not so easy to legislate. What I urge instead, is the cabining of the adversarial system to where it can do its best work, with all the limitations I have described. I would prefer that we take the teachings of post-modernism and multi-culturalism seriously enough to consider other forms and formats of conflict and dispute resolution (many personed and sided presentations of facts and disputes with more deliberative and participatory party and fact-finding processes) and begin to evaluate their strengths and weaknesses as we come to develop something of a typology for assessing which cases belong in which ADR process.¹³⁷

I believe that each process will need to carry its own ethics—the zeal of the advocate does not play well in mediation and the mediator is both more active and more complex a third party neutral than the judge to be governed by the Judicial Code of Conduct.¹³⁸ Thus, to take up a more radical strain of post-modernism—our legal processes and ethics are "in play" (or in the French, "at play").

Our experimentation with ADR and other forms of legal process reflects our collective dissatisfaction (for a wide diversity of reasons) with the traditional adversary model and our current post-modern penchant for "many methods," when one will not suffice. I firmly believe that the only way to reform the adversary model is to successfully "oppose" it with other modes and processes and see if we can create a more varied legal system, more post-modernly sensitive to the particular needs of parties and the particularities of cases. I do not think any one micro reform or any single process will successfully supplant and replace the adversary system, but I hope that the post-post modern legal system

137. See e.g. Frank Sander and Stephen Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, 10 *Neg. J.* 49 (1994).

138. At least one judge thus far has applied the conflict standards of the Judicial Code of Conduct to a court-appointed mediator-special master, see *In re Asbestos Litigation* 737 F. Supp. 735 (E.D. N.Y., 1990) (Judge Weinstein on ethics of Ken Feinberg).

will give parties a greater choice about how they want to resolve their disputes. That will allow lawyers who want to be "moral activists,"¹³⁹ "problem-solvers"¹⁴⁰, lawyers for the situation¹⁴¹ or the community¹⁴², discretionary lawyers,¹⁴³ civic republicans¹⁴⁴ or statesmen¹⁴⁵ to have greater flexibility in the models they choose and not everyone will have to be a "hired gun" in an epistemological system that is crumbling as we speak.

139. Luban, *Lawyers and Justice: An Ethical Study* (1988).

140. Menkel-Meadow, *supra* note 8.

141. Hazard, *Ethics in the Practice of Law* (1978); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 *Yale L.J.* 1445 (1996).

142. Thomas L. Shaffer (with Mary L. Shaffer) *American Lawyers and Their Communities* (1991).

143. William Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083 (1988).

144. Robert Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1 (1988); Robert Gordon & William Simon, *The Redemption of Professionalism*, in *Lawyers' Ideals/Lawyers' Practices* (R. Solomon, D. Trubek and R. Nelson, eds, 1992).

145. Anthony Kronman, *The Lost Lawyer*, (1994).

