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The topic that Dean Rabinowitz and the organizers of this conference asked Professor Freedman and myself to discuss is the relative merits of the adversary and inquisitorial systems in the administration of criminal justice.[1] I hope that it will not seem ungracious of me, having accepted the invitation, to say at the outset that there are no such systems. Rather, there are diverse criminal processes, which incorporate a variety of more or less discrete procedures, each of which is more or less adversarial or inquisitorial. By adversarial I mean simply that the conduct and control of a procedure is primarily the responsibility of lawyers representing the state and the defendant. They are committed to opposing sides of the case and, in that sense, are adversaries. By inquisitorial, I mean that the conduct and control of a procedure is primarily the responsibility of a public, magisterial official, a judge who is committed to neither side, but is positioned, as it were, at the center. Nothing more than that. So I shall ask you to put out of your minds the Spanish Inquisition of the fifteenth century, Dostoyevsky's Grand Inquisitor, and all of that, and to put out of your minds also the notion that we have a single choice to make, between two systems: Take one or the other and swallow it whole. Instead, we have to choose a particular procedure for various aspects of the criminal process, according to which best serves our purpose, choices that are not unavoidably bundled together into uniformly adversarial or inquisitorial packages.

As always, when lawyers consider a close question, it is important to know who has the burden of proof. I suspect that, consciously or not, you assign the burden of proof in this instance to those who defend an inquisitorial process. I suggest that you disregard all the hyperbole in praise of the adversary system and place the burden where it reasonably belongs — on those who defend that system. For it is an inescapable fact

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1. To my great regret, Professor Freedman was unable to participate in the Conference. He and I had talked about what we both would say just a few days earlier. No one has done more than he to expose the ethical dilemmas that the excesses of adversariness create.

that no other country has gone nearly as far in that direction as we have. If that does not persuade you, as such references to practices elsewhere usually do not, consider also that we employ procedures like those of criminal cases in no other inquiry that has as its objective a search for truth.[2] The closest analogy is not a fact-finding inquiry of any kind but a sporting contest—and, it might be added, a contest in which the rules of play allow considerable behavior that in other settings would be regarded as grossly improper. It is easy to think otherwise when it is a matter of criminal process, but only because we confound the familiar with the necessary.

We have in a great many instances, I believe, wrongly chosen the adversarial kind of procedure. Too often, we have made the adversarial process an end in itself, as if a procedure were good *because* it is adversarial, or all the better the more adversarial it is, and we have ignored its quite obvious defects.

Those who defend our process, as it is, will tell you that the adversary process is not an end but a means, and, furthermore, that it is a constitutionally required means. Listen to such assertions with a skeptical ear. Do not take the virtues of the adversary process for granted, nor dismiss too readily the virtues of the alternative. Listen carefully to the constitutional arguments to see whether the particular adversarial procedure in question is indeed inherent in the constitutional right and not, in truth, an exaggerated extension or embellishment of the right, favored for no reason except that it is adversarial. Above all, do not suppose that unless this or that extreme manifestation of adversariness is endorsed, the adversary process and all its potential benefits are gone. That is no more true than it is true that you cannot have a real football game unless the players are allowed to kick one another in the head.

The great virtue of adversariness — and I agree that it is a great virtue — is that single-minded pursuit of the arguments for one side of a controversy is more likely to bring out all the arguments for that side than objective pursuit of the truth. Passionate commitment reaches further than dispassionate inquiry. It reaches further in one direction only, of course. But if there is someone committed to each side, that limitation is, in principle, overcome. And if, as we believe, it is of overriding importance that one direction — the defense — be followed to the end, commitment in that direction, at least, is indispensable. Having taken that step, if there is a balancing commitment to the other side as well, we

2. The American civil process is also highly adversarial, so my generalization has to be qualified to that extent; but the criminal process is still more extreme.

have the adversary process. I want to say again that this virtue of adversariness, that it encourages the pursuit to the end of whatever may benefit one side or the other, is of first importance, because it is also true that that is its only virtue. All its other attributes, as we are aware elsewhere throughout our lives, are not virtues but vices, which we recognize collectively as bias.

The same elements that make the adversary process an aid to the discovery of the truth in one respect make it a barrier to the truth in another. Defenders of adversariness seem always to dwell on its capacity to reveal what might otherwise be missed and to disregard its capacity to obscure what would otherwise be clear. All the arts and, be it said, tricks of persuasion, all the available dust that can be thrown in the fact-finders' eyes, all the obfuscation that may tilt the result in one direction or the other are the zealous advocate's stock in trade. That is what adversariness, as we now think of it, means. Only those who accept adversariness as an article of faith would suppose that such tactics in and of themselves further the search for truth. There are limits. But the limits are always being tested, and they come perilously close to deliberate distortion and concealment. We suppose that that is all right, so long as both sides do it. Abstractly that may be so. Concretely, it makes as much sense as to suppose that in a football game, since both teams have eleven players and the rules are the same for both, the score must always be a draw, if, indeed, the ball is not permanently stuck on the 50-yard line. We expect one team to win in the end because one is better than the other. Why do we suppose it is otherwise in a criminal proceeding?

Adversariness harmfully distorts all the relevant relationships at a trial. We are accustomed to the rhetoric that defense counsel is the defendant's champion. The rhetoric is nonsense. Defense counsel learns that early, when, after a trial, his client walks away without a thanks, even if he has not been convicted. Defense counsel is a professional exercising his profession; any relationship with the defendant is ordinarily beside the point. Even if defense counsel were the defendant's champion, why should all eyes be on him? Because the adversaries in a trial and, in a less formal way, the proceedings before trial or in place of a trial are the lawyers, everything and everyone who might inhibit the contest *between them* is relegated to the sidelines. The staging of a criminal trial is a remarkable metaphor for the theory behind it. Everyone else, including the defendant himself, is kept out of the way: up on a bench, behind a railing, in his seat, lest the lawyers' performance be interrupted. So the courtroom becomes an arena in which the lawyers,

like gladiators, roam about, posturing in their fashion, attracting all the attention to themselves, winning or losing.

We take all that for granted. But why should it be? Is there anything about it that ought to be preserved? In a French proceeding, in which the lawyers are on the sidelines, the confrontations and even shouting matches that sometimes occur directly between witnesses or between the defendant and a witness are powerful aids to comprehending what happened. It is far from obvious that our arrangement is conducive to an accurate outcome. In addition, the pervasive atmosphere of a contest too often defeats any sense among the participants — the defendant most of all — and among the rest of us as observers, that the ends of justice have been done. To which our only response is, once again, it is the same for both sides. That is to say, it is a fair contest.

Adversariness contributes greatly to the perception and the fact that justice is a commodity available, like others, for cash. (I say cash advisedly. Defense lawyers rarely accept IOUs.) Because the lawyers are in control, the quality of one's lawyer is crucial. And, so it is assumed at any rate, the higher the quality, the higher the cost. That feature of our adversary system is not limited to the bizarre excess of the O. J. Simpson trial. It lurks in the shadows, for better or worse, of every trial. The Supreme Court has, to its discredit I believe, accepted with apparent equanimity the fact that the rich fare better than those less well off, with respect to criminal justice as with most things.[3] Yet, which of us would say that a person's wealth ought generally to be one of the factors that determines whether he will be found guilty and, if he is, how severely he will be punished? If we accept that, it can only be as a regrettable incident of a value that we are unwilling to sacrifice.

A private bar that constantly questions and challenges the government's decisions is critical to the preservation of a fundamental value of our polity: that the individual, not the community, is the relevant entity and the public good not separate from, but composed of, the good of individuals. No corps of government functionaries, however professional, could adequately perform that role. But it is one thing to accept, perforce, some wealth-based disparity even in criminal justice, because it is an inevitable concomitant of a private defense bar. It is quite another thing to let the decisions of lawyers privately retained and compensated so overwhelm the criminal process that the influence of wealth is palpable and pervasive.

3. *See* Ross v. Moffitt, 417 U.S. 600, 616 (1974) (6-3).

I have said a good deal about adversarial procedures and very little about the inquisitorial — or better, magisterial —procedures that might replace them. The defense can be briefly stated. For the virtues of the inquisitorial process are all the virtues that attach to a neutral, objective inquiry not committed in advance to a particular outcome. That is to say, they are the virtues on which we insist for other important public and private determinations. The great doubt about such process — once one is past the misleading connotations attached to its label — is not whether it is preferable but whether it is possible. Public officials will not remain truly uncommitted. The government that they serve has as its purpose to convict the guilty, which too easily becomes a purpose to convict, so that a failure to convict is in some sense simply a failure. There is good reason to guard against such official bias. Once again, however, the appropriate response is not to abandon the goal of objective inquiry altogether and replace it with indiscriminate, if two-sided, bias, but to retain it and to adopt measures responsive to the particular danger.

The conclusion to which I am led is simple, if its implementation is complex. The adversary system, as we call our criminal process, is far too adversarial. We should not regard it as in the nature of things and not to be altered. Nor should we suppose that the Constitution requires the extreme, destructive manifestations of adversariness that are now common. Rather, at each stage in the process, we should ask, with no presumption either way, "Ought we entrust this to the lawyers?" Unless we can reasonably conclude that the outcome overall is likely to be better if lawyers of varying ability, committed only to one side, and employing all the arts and tricks of their profession have control, we ought to displace them and adapt a more neutral procedure. So, for example, we ought to retain the practice of cross-examination — the probing, critical testing of a witness's account — but without the assumption that only lawyers, advocates for one side, ought to do it or, indeed, are capable of doing it. We ought not bar the lawyers; but we ought, so far as we can, prevent the perversion of cross-examination from a powerful means of verifying the truth to a means of falsifying it. So also, to mention a simpler measure, we ought to tell the lawyers, like everyone else in the courtroom, to sit down. That simple measure, which by no stretch of the imagination can be thought to violate a constitutional right, would, I expect, considerably reduce the adversarial histrionics that subvert the purpose of a trial.

Unsurprisingly, the greatest resistance to such change comes from the lawyers. For all their praise of the adversary system, it serves no one so much as the lawyers, whom it glorifies. It is as well to recall that lawyers are there to aid the process, rather than the other way around. I

recommend that you examine with great skepticism the lawyers' arguments and also their code of professional ethics, which is their response to the sort of criticisms that I have made. In most instances, the canons of ethics provide a shelter of euphemisms that allow lawyers to evade the hard questions with which adversary process confronts them. The questions are so hard because the process imposes on lawyers a standard of behavior that is certainly not right and only with blinkered vision appears to be good. The professional dilemmas that the canons address are simply a reflection of the unethical and socially unjustifiable conduct that our criminal process too often permits and, by permitting, finally requires. Surely it is obvious that no process that creates so great a divide between ethics and professional ethics is one that we ought to approve.