The Trouble With the Adversary System in a Postmodern, Multicultural World

Carrie Menkel-Meadow
Georgetown University Law Center, meadow@law.georgetown.edu

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THE TROUBLE WITH THE ADVERSARY SYSTEM IN A POSTMODERN, MULTICULTURAL WORLD

CARRIE MENKEL-MEADOW*

I. INTRODUCTION

In this Essay I suggest the heretical notion that the adversary system may no longer be the best method for our legal system to deal with all of the matters that come within its purview. If late-twentieth century learning 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 just two sides to every story. The binary nature of the adversary system and its particular methods and tactics often may thwart some of the essential goals of any legal system. This Essay argues that our epistemology has changed sufficiently in this era of poststructural, postmodern knowledge so that we need to reexamine the attributes of the adversary system as the "ideal type" of a legal system, and also reexamine the practice based on the premises of that system. Although some scholars justify the adversary system on the grounds that it satisfies a variety of truth and justice criteria,¹ I believe that consideration of those crite-

* Professor of Law, Georgetown and UCLA Law Schools and Co-Director, UCLA Center for Conflict Resolution. Versions of this Essay were delivered to the W.M. Keck Foundation Forum on the Teaching of Legal Ethics, held at the College of William & Mary School of Law, March 23, 1996; the Hofstra University Conference on Legal Ethics: The Core Issues, March 10, 1996; and the 1996 Annual Law and Society Meeting in Glasgow, Scotland, July 13, 1996. The Author expresses her appreciation to the College of William & Mary School of Law for her invitation to be the Keck Lecturer in Legal Ethics and for the warm hospitality of its faculty, students, administration, and staff. Thanks are also due to the UCLA Faculty Colloquium and to Mitt Regan, Robin West, Susan Carle, Thomas Shaffer, and John Dzienkowski for useful comments, reminders, and suggestions.

ria is, itself, contingent and must be historicized and reconsidered as our knowledge base changes.

In this Essay I argue 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 suggest that we should rethink both the goals our legal system should serve and the methods we use to achieve those goals. For those who cleave to the adversary system, I want to shift the burden of proof to them to convince us that the adversary system continues to do its job better than other methods we might use.

My critiques, to be further elaborated below, are briefly as follows: Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies. More significantly, some matters—mostly civil, but occasionally even criminal, cases—are not susceptible to a binary (i.e., right/wrong, win/lose) conclusion or solution. The inability to reach a binary resolution of these disputes may result because in some cases we cannot determine the facts with any degree of accuracy. In other cases the law may bestow conflicting, though legitimate, legal rights giving some entitlements to both, or all, parties. And, in

2. See, e.g., ALAN M. DERSHOWITZ, THE BEST DEFENSE (1982) (defining the lawyer's goals in competitive terms, such as winning); MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) (exploring the impact of the conflict between moral obligations and duties to the client); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990) (expressing a traditional view of the lawyer's role in the adversary system).


6. See generally John E. Coons, Approaches to Court Imposed Compromise—The
yet another category of cases, human or emotional equities cannot be divided sharply.7

Modern life presents us with complex problems,8 often requiring complex and multifaceted solutions. Courts, with what I have called their "limited remedial imaginations,"9 may not be the best institutional settings for resolving some of the disputes that we continue to put before them.

Even if some form of the adversary system was defensible in particular settings10 for purposes of adjudication,11 the "adversary" model employed in the courtroom has bled inappropriately into and infected other aspects of lawyering, including negotiations carried on both "in the shadow of the court"12 and outside

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Uses of Doubt and Reason, 58 NW. U. L. REV. 750, 753-54 (1964) (describing situations in which compromise is preferable to "winner-take-all" results); John E. Coons, Compromise as Precise Justice, in COMPROMISE IN ETHICS, LAW, AND POLITICS 190, 199 (J. Roland Pennock & John W. Chapman eds., 1979) (explaining how a system of apportionment is preferable when conflicting policy values should be recognized in the outcome of litigation).

7. For example, in custody cases both parents may have equally valid legal and emotional claims.

8. 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. See RICHARD B. SOBEL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991).


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 L. Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669 (1978) (distinguishing the ethical responsibilities of advocates from nonadvocate attorneys); Murray L. Schwartz, The Zeal of the Civil Advocate, in THE GOOD LAWYER, supra note 1, at 150, 155-56 (discussing the adversary system in the context of criminal trials).

11. Monroe Freedman was among the first to argue that our adversary system is constitutionally mandated, residing in the Bill of Rights. See Monroe H. Freedman, Professionalism in the American Adversary System, 41 EMORY L.J. 467 (1992). For other claims that the adversary system is constitutionally mandated, at least in criminal cases, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 564 (1986); Jay S. Silver, Professionalism and the Hidden Assault on the Adversarial Process, 55 OHIO ST. L.J. 855, 857-66, 886 (1994).

12. The phrase is evoked by, but is different from, that used by Mnookin and Kornhauser. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow
of it in lawyers' transactional work.\textsuperscript{13}

Even in situations that call simply for factual determinations, the complexities of modern life—for example, the strong race issues implicated in several recent, notorious American cases\textsuperscript{14}—contribute to the problematic result that different people will interpret the same "fact" in different ways.\textsuperscript{15} Because of such interpretive differences, therefore, I find not only the structures of the adversary system wanting, but also how we think about the people within those structures.

Modern scholars outside of, as well as within, law have questioned each of the following assumptions underlying the use of the adversary system—objectivity, neutrality, argument by opposition and refutation, appeals to common and shared values, and fairness.\textsuperscript{16} In my view, it is time for us to examine how these...
assumptions, which often are not "true," have affected our legal system. Lay people claim a crisis of legitimacy in the legal system, especially, for example, when the "race card" is deemed more important than any other factor in a trial,\textsuperscript{17} often not trusting jury verdicts. As scholars, we must take these criticisms seriously.

Multiculturalism, and all of the controversy that it has spawned in the universities,\textsuperscript{18} has at least reminded us that there is demographic, as well as epistemological, "positionality"\textsuperscript{19} and we do not all see things the same way. With a healthy respect for the new knowledge about knowledge, we need to examine whether the adversary system helps or hinders the way we sort out disputes, differences, misunderstandings, and wrongdoings.

Furthermore, the complexities of both modern life and modern lawsuits have shown us that disputes often have more than two sides in the sense that legal disputes and transactions involve

\textsuperscript{17} The trials of Rodney King, Reginald Denny's assailters, and O.J. Simpson all illustrate the use of the "race card." See supra note 14 and accompanying text. Former Los Angeles District Attorney Ira Reiner, during the O.J. Simpson trial, opined that if the majority-black jury heard the Mark Fuhrman tapes their disgust at the racism exhibited therein could lead to an acquittal, indicating that he believed race would become more salient than any of the factual evidence heard in the case. Jessica Seigel, A Tough Decision for Judge: Relevant or Red Herring? Tapes Ruling May Decide Simpson Case, CHI. TRIB., Aug. 31, 1995, at 1.


\textsuperscript{19} See Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829 (1990) (advocating positionality as an explanation of what it means to be "right" in the law); cf. Randall L. Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745 (1989) (criticizing the "essentialism" of "positionality" from particular demographic characteristics).
many more than two parties. Procedures and forms like interpleader, joinder, consolidation, and class actions have attempted to allow more than just plaintiffs' and defendants' voices to be heard, all the while structuring the discourse so that parties ultimately must align themselves on one side of the adversarial line or another. Multiparty, multiplex lawsuits or disputes may be distorted when only two sides are possible. Consider all of the multiparty and complex policy issues that courts contend with in environmental clean-up and siting, labor disputes in the public sector, consumer actions, antitrust actions, mass torts, school financing and desegregation, and other civil rights issues, to name a few examples.

Finally, scholars have criticized modern adversarialism for the ways it teaches people to act toward each other. Although I share some of the critics' views regarding the incivility of lawyers, I am more concerned that the rhetoric and structure of adversarial discourse prevent not just better and nicer behav-

20. Lon Fuller's essay on the structure of mediation reminds us that complex multiplex, multiparty disputes may belong in forms other than adjudication. See Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305 (1971).

21. See, e.g., Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994) (involving a suit by private corporation that incurred environmental clean-up costs against another responsible party to recover those costs).


28. See generally WOLFRAM, supra note 11, at 609-10 (discussing the relationship between adverse attorneys).

ior,\textsuperscript{30} but more accurate and open thinking.

A culture of adversarialism, based on our legal system,\textsuperscript{31} has infected a wide variety of social institutions. Although I will focus primarily 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, and labor and management relations, to name only a few examples.

After I critique the adversary system, you will wonder what I would substitute for it. It should be obvious that as a postmodern, multicultural thinker I have no one panacea, solution, or process to offer—instead, I think we should contemplate a variety of different ways to structure process in our legal sys-


\textsuperscript{31} Although 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 \textsc{Lawrence M. Friedman}, \textit{A History of American Law} (1973); \textsc{Stephan Landsman}, \textit{The Adversary System: A Description and Defense} (1984). Formal rules of logic, and Aristotelian and classic philosophy, have long favored argument, dialectics, and debate as ideal ways of learning the truth. \textit{See, e.g.}, \textsc{Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies} 478-79 (1989). Marxism and other "-isms" are based on the dialectics of reasoning of Hegel. \textit{See generally} Nancy C.M. Hartsock, \textit{The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism}, in \textit{Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science} 283, 296, 298, 309 (Sandra Harding & Merrill B. Hintikka eds., 1983) (illustrating the intersection of Marxist and Hegelian thought) [hereinafter \textit{Discovering Reality}]. At another level, athletic and military competition have 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. \textit{See Carrie J. Menkel-Meadow, Can a Law Teacher Avoid Teaching Legal Ethics?}, 41 J. LEGAL EDUC. 3 (1991); \textit{see also Wolfram, supra note 11, at 567; Elizabeth G. Thornburg, Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System, 10 WISC. WOMEN'S L.J. 225 (1995). Judge Frankel notes the phrase "sporting theory" of justice was probably cliché when Roscoe Pound used it in his famous address in 1906. Roscoe Pound, \textit{The Causes of Popular Dissatisfaction with the Administration of Justice}, 29 A.B.A. REP. 395, 404 (1906), reprinted in 35 F.R.D. 241, 281 (1964); Frankel, \textit{The Search for Truth}, supra note 3, at 1033 n.5. Unfortunately, with the growing importance of computers in our lives, we may be entering an age of mandated binarism and artificial categories.
tem to reflect our multiple goals and objectives. For example, to achieve the goal of determining criminal guilt a different process may be required than is required for allocating money or human, parental, or civil rights. Sometimes other processes, such as mediation, inquisitorial-bureaucratic investigation, public fora or conversations, "intermediate sites of discourse,"32 private problem-solving (negotiation) or group negotiation, and coalition and consensus building would resolve better the legal and other issues involved. I am thus suggesting variety and diversity for our legal process that will, in turn, require more diverse and complex thinking about which legal ethics would be appropriate in different settings.34 Some might prefer to reform the adversary system to keep it protean enough to remain inclusive, as a model, for our entire legal system. In my own view, this will not be adequate. We need to explore alternative models of legal process and ethics that will better meet the needs of more complex postmodern, multicultural disputes and issues.

II. THE PITFALLS OF ADVERSARIAL / BINARY THINKING IN A POSTMODERN WORLD

Although I cannot, in this limited time or space, review the full history and sources of this country's particular approach to adversarialism, I note that the Anglo-American legal system did

32. See Lani Guinier & Susan Sturm, Reflections on Race Talk (1995) (unpublished manuscript, on file with author) 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.


34. I am currently engaged in this project myself as I look at what ethics are required in alternative dispute resolution settings that may differ from legal ethics in the adversary setting. See, e.g., Carrie Menkel-Meadow, Ancillary Practice and Conflicts of Interests: When Lawyer Ethics Are Not Enough, ALTERNATIVES TO HIGH COST LITIG., Feb. 1995, at 15 [hereinafter Menkel-Meadow, Ancillary Practice]; Carrie Menkel-Meadow, Conflicts and Mediation Practice, DISP. RESOL. MAG., Spring 1996, at 6 [hereinafter Menkel-Meadow, Conflicts]; cf. Geoffrey C. Hazard, Jr., When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues, ALTERNATIVES TO HIGH COST LITIG., Dec. 1994, at 147 (arguing that a law firm engaged in ADR practice should observe the rules of ethics). I currently chair the CPR Commission on Ethics and Standards in Alternative Dispute Resolution.
not originate the idea of oppositional presentations of “facts.” Both classical philosophical discourse and medieval scholastic disputations exhibit the belief that contested, oppositional presentations of “facts” will best reveal the truth. At this point we should note quickly one important 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, at least, are committed theoretically to a genuine search for the truth. This is not the motivating ideal when an ethics regime that places duty to the client at least as high, if not higher than, the duty to truth harnesses the adversary system to the legal system. Although philosophers may seek the truth, lawyers seek to achieve their client’s interests and to “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. Even if the particular use of the oppositional/adversary model can be defended as a procedure of knowledge and truth-finding in other settings, as used in legal settings it lacks an important quality: the genuine search for truth.

35. As my colleague, philosopher Stephen Munzer, pointed out in a personal communication, however, the dialogues of Plato or Socrates were not “real” but were, rather, staged efforts to canvass and dispute particular ideas. Nevertheless, philosophers thought that we would best arrive at the truth by proposing and refuting ideas. See Janice Moulton, A Paradigm of Philosophy: The Adversary Method, in DISCOVERING REALITY, supra note 31, at 149.


37. Many scholars, judges, and practitioners have discussed whether truth or other goals are the primary rationales for our adversary system. See, e.g., FRANK, supra note 16, at 80-102 (comparing the “fight” and “truth” theories); Frankel, The Search for Truth, supra note 3; Morley R. Gorsky, The Adversary System, in PHILOSOPHICAL LAW: EQUALITY, ADJUDICATION, PRIVACY 127, 131-35 (Richard Bronaugh ed., 1978) [hereinafter PHILOSOPHICAL LAW] (explaining how the rules of evidence inhibit fact finding); John T. Noonan, Jr., The Purposes of Advocacy and the Limits of Confidentiality, 64 MICH. L. REV. 1485 (1966). Although 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 DERSHOWITZ, supra note 2, at xvi-xvii; see also Thomas L. Shaffer, The Unique, Novel and Unsound Adversary Ethic, 41 VAND. L. REV. 697 (1988).
Despite the longevity and robustness of adversarialism as a mode of human discourse,\textsuperscript{38} even some philosophers and epistemologists have questioned its value as the best way to understand the world.\textsuperscript{39} It is this feature of postmodernism that I want to apply critically to the adversary system as we know it in the legal system. In general terms, a variety of philosophers, literary critics, art and architecture critics, social scientists, and legal scholars have questioned whether any "truth" exists out there that is knowable and stable.\textsuperscript{40} Postmodernism expresses some skepticism, if not cynicism, in the belief that there are immutable, universal, global, and discoverable facts or interpretations of facts.\textsuperscript{41} Whether by literary deconstruction,\textsuperscript{42} feminist epistemology,\textsuperscript{43} philosophical or linguistic decompositions of language,\textsuperscript{44} or in our own field, critical legal studies' exposure of the indeterminacies of our laws,\textsuperscript{45} the legacy of postmodernism is that truth is not fixed, meanings are "located" provisionally, not "discovered,"\textsuperscript{46} and people who "find" truth,

\textsuperscript{38} Other modes of human discourse exist from which we could choose—the scientific method, for example, which, although it needs to "falsify" propositions with contrary data, does not set out to prove something by juxtaposing its opposite. Additionally, conversation, storytelling, mediation, and consciousness-raising are all more circular and less structured in method. Dangerous monologic (or false adversarial) forms like inquisitions and Star Chambers also exist. Finally, there are other, completely different legal systems—civil, mediational, and bureaucratic systems are examples.

\textsuperscript{39} See supra note 16.

\textsuperscript{40} See generally DISCOVERING REALITY, supra note 31 (discussing feminist philosophical perspectives illustrating deconstructionism); FISH, supra note 31, at 154-55 (noting the pervasiveness of deconstructionism).

\textsuperscript{41} For an excellent summary of the major contributions of postmodernism to social science from which much of the above discussion is drawn, see PAULINE M. ROSENAU, POST MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS (1991).

\textsuperscript{42} Literary deconstruction uncovers the suppressed meanings of a text that renders the text indeterminate.

\textsuperscript{43} Feminist epistemology seeks to uncover the biases of scientists. See, e.g., SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES (1991) (a feminist critique of science).

\textsuperscript{44} See Merrill B. Hintikka & Jaakko Hintikka, How Can Language Be Sexist?, in DISCOVERING REALITY, supra note 31, at 139.

\textsuperscript{45} See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 86-113 (1987) (elaborating the theories on which critical approaches to law in a variety of fields expose the contradictions of legal foundationalism).

\textsuperscript{46} These phrases are Rosenau's. See ROSENAU, supra note 41. Thus, there is
whether judges, juries, critics, or, yes, even scientists, have interests—social, economic, political, racial, gender—that affect how they see the world. In addition to interpretations of texts, meanings, and facts, postmodernists have questioned the very notion of a unified self having a stable set of characteristics, values, and attributes with which to process information.⁴⁷ Because we occupy multiple roles in modern society, being powerful in some—for example, the role of “father”—but subordinated in others—for example, the role of “worker”—the multiplicity of our social roles structures and filters our knowledge. Context—both present and our own personal and group histories—also deeply affects our knowledge. If we believe any of this (and I believe enough of it to consider the impact it might have on the finding of facts, the interpretation of law, and the production of “legal knowledge”), we must therefore ask how the legal system can assess truth and assign remedies confidently.

In an important book describing the significance of postmodernism for explaining social science’s knowledge, Pau-

⁴⁷ See MARY JOE FRUG, POSTMODERN LEGAL FEMINISM (1992); Naomi Scherman, Individualism and the Objects of Psychology, in DISCOVERING REALITY, supra note 31, at 225.
line Rosenau has distinguished between more skeptical, nihilistic postmoderns who believe that "truth" is always partial, transitory, and uncertain, and affirmative postmoderns who instead seek to broaden and increase the methods of knowledge acquisition.\(^4\)\(^8\) Affirmative postmoderns would, thus, include the recent spate of narrative writers in legal scholarship\(^4\)\(^9\) who seek to increase the stories that are told and heard\(^5\)\(^0\) in our legal system and appeal to empathy\(^5\)\(^1\) and affective, as well as rational,\(^5\)\(^2\) ways of knowing.

Both groups of postmoderns share a skepticism that truth can be "represented" accurately. This claim, which originates in art and literary criticism,\(^5\)\(^3\) has some dangerous teaching for our rules of evidence and trial procedure. Although our various exclusionary rules are designed to protect against some distortions in "factual" representations, so that over-probative and prejudicial forms of evidence often are excluded, oppositional fact presentation itself may deserve criticism for its inherent need to involve extreme or distorted "representations" of past acts and motives that may be impossible to "re-present" in a courtroom.\(^5\)\(^4\)

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48. See supra note 41.
52. For an evocative argument that there are many ways (some of them gendered) of learning and "knowing," see WOMEN'S WAY OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (Mary F. Belenky et al. eds., 1985).
53. FISH, supra note 31, at 154.
54. Some of the postmodern attacks on knowledge would reject any legal system. If the truth is unknowable, then inquisitorial, and bureaucratic, and "alternative"
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 studies demonstrating that facts presented to fact finders are processed through "schemas," "filters," or common narratives, then the presentation of two oppositional stories or conclusions may color how all of the 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 the fact finder has an off/on, guilt/innocence determination to make, though it still carries the danger that all the fact finders will process incremental facts through a preexisting frame, but will not work as well when polycentric factual findings, legal conclusions, and mixed fact/law questions are at issue: comparative negligence, business necessity defenses, excuse and justification in criminal law, and the best interest of the child, are a few examples. My argument here is that the "false" or "exaggerated" representation of oppositional stories may oversimplify the facts and not permit adequate consideration systems of dispute resolution would fare no better in discerning facts.


56. Consider how you "filtered" each of the individual facts in the O.J. Simpson case given your "conclusion" about whether he was guilty or innocent. What would it have taken to change your mind? Consider this same question in light of different and more complicated issues: Does Microsoft have too large a share of the software market? What should be done if you think it does?

57. Here is my de rigueur cite to THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970), telling us that we can understand reality only through historically contingent paradigms, like the lawyer's oppositional stories, which do, on occasion, shift. Id. at 43-51.

58. What postmodernists call constructivism is the advocate's stock-in-trade.

59. Stanley Fish has gone so far as to say that all knowledge claims merely result from contextual and artificial agreements among professional communities. See FISH, supra note 31. So, if we cannot justify adequately the adversary system, and most philosophers have agreed that we cannot—see Luban, supra note 1, at 93-111—then the adversary system itself is the product of our professional "conspiracy" to perpetuate its existence. It has not been validated empirically. Id. at 118; cf. E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE
of fact interpretations or conclusions that either fall somewhere in between, or are totally outside of, the range of the lawyers' presentations.60 Indeed, one version of postmodernism could read the adversary system as totally and arbitrarily imposing order through its binary decision making process where no order exists, and where we cannot determine relevance rationally.61

An implicit, but sometimes explicit, aspect of all postmodernism 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 so-called neutral, passive judge as well. Critical legal scholars have advanced most explicitly the skeptical argument of postmodernism by demonstrating both the law's linguistic contingency—its indeterminance—and its manipulation by particularized interests, such as economic, or class (in critical legal theory), or race-based interests in critical race theory, and gender-based interests in feminist legal thought.62 Most critical legal scholars' work has focused on the law and rules—the "texts" of the legal system.63 The attacks on certainty, legal knowledge, and neutrality, however, have clear and dangerous implications for legal process, and for the adversary system.64 A neutral judge, either as a

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60. Jury nullification may represent one effort to escape not just the law but also the need for binary fact determinations—maybe somebody was "a little bit guilty"—say, 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.
61. This view also coincides with chaos theory—that causality is not as linear as we modern science romanticists believe. Consider the arguments about "relevance" in the ever-expanding soap opera of the O.J. Simpson case and its aftermath—was 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?
62. In feminist epistemology more generally, philosophers of science have argued that even the construction of questions of "truth" in science have depended upon 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. See SANDRA HAR-DING, THE SCIENCE QUESTION IN FEMINISM (1986); EVELYN F. KELLER, A FEELING FOR THE ORGANISM: THE LIFE AND WORK OF BARBARA McCLINTOCK (1983).
63. See, e.g., KELMAN, supra note 45, at 15-63 (chapter on rules and standards).
64. I am reminded of the article in Time magazine a few years ago that attempt-
passive umpire of a trial process or as a more active fact-finder, likely will be predisposed to favor one side of the story over the other or to favor his or her own interpretation of the story.\textsuperscript{65} Party-initiated presentation of evidence might not uncover a judge's predisposition when the lawyers cannot learn the judge's own story. Some use this postmodern strategy to critique the false claims of objectivity and neutrality; others suggest that we simply should acknowledge the difference in values and accept that we may not have total unanimity over "fundamental interests."\textsuperscript{66} The latter group of postmoderns argue that we should make explicit the appeal to fact finders' different values, beliefs, or emotions.\textsuperscript{67} More than "two stories" may thus exist in the courtroom if litigants attempt to deal with the variety of values or emotional "frames" that could influence a fact finder.\textsuperscript{68} In my...
view, this reflects the reality of life in a postmodern, multicultural world—a recognition that if "truth" is to be arrived at, it is best done through multiple stories and deliberations rather than through only two. How this will be structured in a litigation system, which is still based on oppositional evidence presentation, remains to be seen.

I want to address briefly one other element of postmodernism: the explicit recognition that we reason in binary oppositions with a hierarchy of values, usually subordinating one side of an opposition, as in male/female, white/black, rule/discretion, law/equity, market/family, etc. In postmodernism 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 re-situate the oppositions, which, of course, preserves them. In some forms, however, the purpose of deconstruction is to demonstrate that binary oppositions do not explain the world. Hierarchies of claims hide more than they reveal. Thus, many in Los Angeles hoped the jury would convict Rodney King's attackers, not because it was "a white or black thing," but because they were appalled by the beating.

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69. See infra notes 70-76 and accompanying text.


72. For example, the argument that some feminists make, that women are different and better than men, preserves gender differences. One side of the binary opposition is still better than another. See Joan C. Williams, Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory, 1991 DUKE L.J. 296.

73. Similarly, many hoped that the jury would convict the beaters of Reginald Denny, because of what they did, not because of a need to set an "oppositional"
Taken out of its postmodern context, deconstruction is a useful tool for those who criticize the adversary system because it exposes the distorting properties of both the "text" of adversarial argument and of the literary texts that deconstructionists analyze. In concrete legal terms, and none of these claims are new or original to my argument, oppositional presentation often—though not always—distorts the truth by making extreme claims, by avoiding any potentially "harmful" facts, by 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 was "on trial."

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

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

76. For a nice catalogue, by a practicing lawyer, of the distortions in evidence presented through the adversarial method, see Gorsky, supra note 37. Gorsky lists evidence distortions as sources of incorrect evidence production or its inequality where: (1) there is a reluctant witness, whom both parties may be afraid to call; (2) there is an unawareness 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—for example, the witness 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 Carrie Menkel-Meadow, The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us, 2 Mo. J. DISP. RES. 25 (1985).

77. Many justify the adversary system as part of human evolution from trial by real combat to modern "bloodless" combat in the courtroom. See, e.g., LANDSMAN, supra note 31, at 8-10 (describing the early origins of the adversary system). Perhaps the distortions of modern verbal combat have outlived their usefulness and we can evolve to the next level—a combat-less legal system. For an interesting description of variations in lawyer aggressiveness, even outside of litigation, see Neil A. 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, at B18 (describing the variations in the New York lawyer who "fight[s] at all costs for a client" versus the Washington lawyer who is more concerned about "how things looked") (attributing remarks 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 in-
refusing to acknowledge any truth in the opposition, by limiting story telling to two, rather than allowing for a multiplicity of stories, by refusing to share information, or, conversely, by strategically giving or demanding too much information, 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 by actively "coaching" witnesses). Another common complaint about the adversary system demonstrates one of the claims made by deconstructionists. In litigation, the unequal resources of the parties will often determine the hierarchy of opposition. In an ideal and abstracted form, the adversary system clearly contemplates adversaries of equal skill and economic support; the result should not depend upon the resources or "skill" of the

spire trust and higher moral standards. Id.

78. 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 adversarial approaches to dispute resolution has become the focus of those studying negotiation and mediation. If we cannot 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 Robert H. Mnookin & Lee Ross, Introduction, in BARRIERS TO CONFLICT RESOLUTION, supra note 16, at 3, 22-23; Robert H. Mnookin, Why Negotiations Fail: An Exploration of the Barriers to Resolution of Conflict, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993); Lee Ross, Reactive Devaluation in Negotiation and Conflict Resolution, in BARRIERS TO CONFLICT RESOLUTION, supra note 16, at 26.


argument’s representative, but on the merits of the argument.\textsuperscript{82}
We all know, however, that “the ‘haves’ come out ahead.”\textsuperscript{83}

Whatever the persuasiveness or merits of postmodernism’s
attack on truth or knowledge generally, its teachings are ex-
tremely problematic for the legal system.\textsuperscript{84} Whatever problems
may inhere in presenting only two stories, or in the impossibility
of knowing what really happened, the legal system must find
facts and make decisions if it is to maintain any semblance of
order. The legal system’s problem with postmodernism is the
same as epistemology’s: How can we evaluate anything and by
what standards are we to judge anything? Even critical legal
scholars like Joel Handler\textsuperscript{85} thus acknowledge that even if no
single “procedure . . . [has] access to truth or reality, including
science,”\textsuperscript{86} we must use some measure to assess facts and to
act.\textsuperscript{87} For Handler, as for others,\textsuperscript{88} that “something” is a
nonfoundational pragmatism: “[T]he test of knowledge is effica-
cy.”\textsuperscript{89} Handler, however, like other pragmatists, and I include
myself in this group,\textsuperscript{90} envision a greater multiplicity of stories

\textsuperscript{82}. This is what happens when the fault lies with the man and not with the art
(i.e., the quality of representation). See Martin P. Golding, On the Adversary System
and Justice, in PHILOSOPHICAL LAW, supra note 37, at 98, 112 and PLATO, GORGIAS
(Terence Irwin trans., 1979) for arguments about the morality of the “bought” or
partisan rhetorician. In postmodern parlance, the case turns on the performance or
“performativity” of the advocate, rather than on the “facts,” thereby demonstrating
once again that “truth” in the legal system is neither objective nor necessarily rati-
onal.

\textsuperscript{83}. See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the
Limits of Legal Change, 9 LAW & SOCIETY REV. 95 (1974).

\textsuperscript{84}. Indeed, one might suggest that the label of “nihilists” attached to the critical
legal scholars by Paul Carrington and others (see Paul D. Carrington, Of Law and
the River, 34 J. LEGAL EDUC. 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.

\textsuperscript{85}. Joel F. Handler, Postmodernism, Protest, and the New Social Movements, 26

\textsuperscript{86}. Id. at 703.

\textsuperscript{87}. Id. at 722 (“[E]ven local power cannot be confronted with a comprehensive
political and economic plan.”).

\textsuperscript{88}. Such as myself.

\textsuperscript{89}. Handler, supra note 85, at 702.

\textsuperscript{90}. For explorations of the Deweyan sources of this modern legal pragmatism, see
RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989); ELIZABETH V.
SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT
being told, of more open, participatory, and democratic processes, yielding truths that are concrete but contextualized, explicitly focused 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 that they ask and answer form part of the description of the "truth." In the final section of this Essay I explore how these observations may help us both to reform some of the defects of the adversary system and to open up and more radically transform our whole legal process. This has obvious implications—requiring further exploration—for our core concepts of legal ethics. First, however, I want to air some more complaints.

III. THE LIMITED REMEDIAL POWER OF ADVERSARIALISM

What our adversary system, as exemplified by courts, permits as resolutions to disputes makes the structure of adversary argument—limiting cases to two "sides," or a limited set of other-party arguments through the use of joinder, interpleader, and subclasses—more problematic. 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 adversarial argument can achieve. Although I am mindful of the fact that parties are always free to exit the system and settle for their own more tailored solutions, the truth is that the limited,


91. Handler, supra note 85, at 712-18.

92. HARDING, supra note 43; Sandra Harding, Introduction: Eurocentric Scientific Illiteracy—A Challenge for the World Community, in THE RACIAL ECONOMY OF SCIENCE: TOWARD A DEMOCRATIC FUTURE 1, 17-19 (Sandra Harding ed., 1993). "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." Id. at 18. Note the structural parallel in this argument to John Rawls's "veil of ignorance" in political philosophy. JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1973).

93. Menkel-Meadow, supra note 9, at 768-83.
remedial imagination of lawyers who bargain "in the shadow of both the court and the law" often constrain settlements. Without rehashing my earlier arguments here, I want to suggest that we should think carefully about which cases require binary solutions (and I believe that some cases require such solutions) and which do not. At the same time, however, we need to examine why this one mode of dispute resolution still so thoroughly dominates our thinking about legal problem solving. Whatever efforts have been made to expand the scope of processes and remedies recognized by courts, the co-optation of these processes by determined advocates continues. As I have argued elsewhere, expanding the stories, the interests, the issues, and the stakes actually enhances the likelihood of making "trades" and finding other creative solutions to problems so that we can minimize contentious argument and satisfy more party needs. To accomplish such a reframing of attitudes and thought processes will require a great deal of re-education and reorientation; indeed, major cultural, not just ethical, change among lawyers is needed. Thinking creatively is not neces-

94. Id. at 775-76.
95. This examination could also extend to business and interpersonal relationships as well as life in general. For example, see the interesting but depressing example of application of competitive thinking, derived from game theory, to a wide range of human problem solving in AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS AND EVERYDAY LIFE (1991).
96. See, e.g., Frank E.A. Sander, Varieties of Dispute Processing, 70 F.R.D. 111 (1976) (multidoor courthouses and other efforts to enact Frank Sander's ideas about multiple processes).
98. Menkel-Meadow, supra note 97, at 12.
99. My favorite illustration of nonadversarial dispute resolution comes from a UCLA faculty cocktail hour at 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 valued different things. 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.
100. See Carrie Menkel-Meadow, To Solve Problems, Not Make Them: Integrating
sarily the same process as thinking critically or analytically; the negative and reactive thinking produced by adversarial argument may limit more open ways of conceptualizing solutions to problems.\textsuperscript{101}

I will heretically suggest that even some criminal matters—a category of cases most often understood as paradigmatically requiring binary solutions followed by punishment—might be susceptible to other processes and remedies such as Victim-Offender Mediation,\textsuperscript{102} which attempts to create a guilt-imposing relationship between offenders and victims of some small crimes to encourage restitutlonary remedies rather than punishment. If we are to defeat the hold that crime has on us then we must also broaden and increase our responses\textsuperscript{103} and searches for solutions, especially where there is not enough room for all at the inn—the prison.\textsuperscript{104}

In the civil arena, where I have focused my work, we must consider the cases that do not lend themselves easily to right or wrong answers\textsuperscript{105} or to more binary solutions. Often, third-party-imposed solutions, such as those imposed by courts, do not deal with causes underlying ongoing conflicts or disputes, espe-


\textsuperscript{101}See, e.g., JAMES L. ADAMS, CONCEPTUAL BLOCKBUSTING: A PLEASURABLE GUIDE TO BETTER PROBLEM SOLVING (1986) (explaining how to improve problem solving skills); MARTIN GARDNER, AHA! AHA! INSIGHT (1978) (discussing problem-solving).


\textsuperscript{103}Additionally, systemic efficiency—remedies, treatments, and processes to deal with the crushing criminal caseload—must be addressed to fashion complete remedies.

\textsuperscript{104}Obviously, this implicates more important and complex questions of criminal law and policy. Difficulty lies in learning who benefits from such perceived "more lenient schemes."

\textsuperscript{105}Winning may not be everything; often a short-term win may be followed by long-term resentment and efforts to execute a judgment or monitor an injunction. For example, segregation is wrong, but we now wonder whether busing was the best or only solution. Some groups had tried to look for other solutions earlier. See, e.g., Derrick Bell, \textit{Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation}, 85 YALE L.J. 470, 487-88 (1976) (citing alterations to the racial balance remedy, including equality of financing).
cially if personal or relationship issues are at stake—this includes commercial as well as civil rights matters. Third-party-imposed solutions, therefore, may not endure. The courts, to their credit, have realized this, 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. Most recently, courts have supervised other kinds of dispute resolution, particularly in class action settlements of consumer and antitrust cases and mass torts. We must look for ways to preserve limited funds so that they are fairly distributed to all deserving claimants as well as look for opportunities in which people may desire things other than, or in addition to, monetary relief. Greater possibilities of remedy and more creative "remedial" imaginations should thus affect the choices we make about what processes to use. Adversarialism may greatly restrict what can be accomplished.

106. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1313-16 (1976) (stating that continual judicial oversight is necessary if justice is to be done in an increasingly regulated society); Stephen Yeazell & Theodore Eisenberg, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465, 474-94 (1980) (arguing that institutional litigation, in which courts are asked to oversee the operation of public institutions, has support from older judicial traditions).

107. Here, my personal favorite was when I received books from Harcourt, Brace & Jovanovich, instead of cash, in settlement of an antitrust case involving overcharges in Bar Review courses. Such a settlement is not unlike the coupons for air fare discounts recently received in settlement of an airline antitrust action. See In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993). These types of responses illustrate 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.


109. Both Judge Jack Weinstein and I have noted that in addition to cash, claimants in mass tort matters also seek some cathartic value in the process they desire. See Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Carrie Menkel-Meadow, Ethics and Mass Tort Settlements: When the Rules Meet the Road, 80 Cornell L. Rev. 1159, 1215-16 (1995).
IV. HOW MULTICULTURALISM (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 Americans, and the "moots" of some African cultures remind us that legal processes are culturally specific and chosen, not given. Here I want to explore, very controversonially I am sure, the cultural assumptions of our adversary system as they operate both at the national and international level. Again, although I have neither sufficient time nor space to do a complete review of comparative legal systems, 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 WTO and the Law of the Sea Treaty, the experience of dealing with multiple parties having different cultures and legal regimes has revealed that we will have to participate in

110. See generally LANDSMAN, supra note 31, passim (discussing the adversary system in terms of the Anglo-American legal tradition).
111. See id. at 50.
113. See MEDIATION Q., Summer 1993 (special Issue on Native American Dispute Resolution).
114. See Folberg, supra note 112, at 4-5.
TROUBLE WITH ADVERSARY SYSTEM

alternative—to us—forms of dispute resolution and culturally complex international cooperation.

Within our own borders multicultural concerns are revealed when immigrants from other systems either fear or will not use our system because they do not understand or trust it, or when it is alien to what they know. Although our dominant melting pot and assimilationist ideologies suggest that recent newcomers to our shores simply should acculturate themselves to our legal system as one of the few “all-American” institutions, I, instead, posit that we might do well to take the opportunity of reexamining our system for ethnocentric bias and try to imagine creating and utilizing other dispute resolution institutions. The very premises of our system—that “winning” is all and that harms suffered are monetized—may not be culturally congruent with the belief systems of all members of our society.

At its most disturbing and controversial moments, our legal system presents a malingering question of what commitment our own citizens have to a system that some perceive delivers only injustice. Many would argue that the structure of the adversary system, itself, is not the trouble but, rather, that the inequalities of resource distribution and access within the system have caused many disempowered groups to feel less committed to the legal system.

Lawyers working with immigrant groups in communities like Los Angeles have reported to me that some national groups, such as some South and Central Americans, will not use our adversary system because it is unfamiliar to them. They often carry with them distrust of official courts from perceptions about corrupt regimes in their native lands—are we any less corrupt? Obviously, access to courts and to lawyers plays a large role in this reluctance. Some lawyers and community groups, however, report that some national groups prefer to create their own community dispute resolution processes. JEROLD AUERBACH, JUSTICE WITHOUT LAW? 69-94 (1983) (chronicling the continuation of American immigrant community dispute resolution development). Some cultures also 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.)

isting social power differentials.\textsuperscript{120}

I think that the issue goes beyond access and resources within the process. As Patricia Williams so eloquently reminded us in her book, \textit{Alchemy of Race and Rights},\textsuperscript{121} some in our society—as a specific example, African-Americans—have been the “acted upon” in law, as objects of law—property in slave lega-

cy—and did not historically participate in the creation of our legal process.\textsuperscript{122} As some have criticized our “science” for its exclusion of particular voices,\textsuperscript{123} we must wonder what a more multicultural 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. Although it seems true that many cultures think in binary terms, take for example the Asian yin-yang conception, it is not so clear that the dichotomies or binarisms are arranged hierarchically in the same manner, or that binary thinking necessarily must structure legal culture. Chinese mediation, derived from Confucian principles, is de-

signed to seek “harmony, not truth.”\textsuperscript{124} I wonder what would result if we redefined our legal system to seek “problem-solving” as one of its goals rather than “truth-finding.”\textsuperscript{125} Although we remain committed to detached and unbiased third-party “neu-

\begin{itemize}
  \item \textsuperscript{120} Did the “playing of the race card” result in a majority black jury’s acquittal of O.J. Simpson as a “pay back” for the majority white jury in the Rodney King beating case?
  \item \textsuperscript{121} PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).
  \item \textsuperscript{122} \textit{Id.} at 216-21.
  \item \textsuperscript{123} See HARDING, supra note 43.
  \item \textsuperscript{125} I can imagine huge outpourings of objections here—where are justice, punishment, and 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 how we could select others. I do not suggest 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?
\end{itemize}
trials,” other cultures value decision makers who understand and are enmeshed in the community and who have “wisdom” from experience.126

I fear the adversary system and its contributions to the larger culture have hindered rather than helped race and ethnic relations127 by polarizing discussion and by continuing to perpetuate their own form of bi-polar thinking. Third-party-imposed solutions seldom get at root-causes of conflicts or provide enduring solutions. Black/white race 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, of the legal profession itself.126 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 express views that are not determined entirely by their “given” cultural identities. To that end, let me turn to some proposals for reform of the adversary system.

V. REFORMING THE ADVERSARY SYSTEM

I am torn at this point between choosing from the most incremental reform options, keeping the adversary system in its place

126. As a feminist, I am not endorsing the “wise elder” form of mediation found in many world-cultures because it tends to be paternalistic and exclusive of women. I am suggesting, however, that the principles informing such choices differ from ours and might be worth examining in some areas. Using “substantive expertise” in some forms of ADR—for example, 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, 1492-95 (D. Utah 1995) (discussing complications of applying conflicts rules when small groups of skilled lawyers—in this case, specializing in a relatively small area of the computer industry—act as both litigators and mediators).

127. So do Lani Guinier and Susan Sturm. They have looked for other ways to facilitate the study of race. See Guinier & Sturm, supra note 32.

and thereby keeping most of my audience, and beginning with
the most radical of proposals so that, in the end, you will hap-
pily 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. Because the adversary system has not
been validated empirically as the most effective legal sys-
tem, let us think about what it does best and attempt to
cabin its influence to those cases needing the "full-court press" of
adversarialism. Next, let's move on to thinking about what other
processes might appropriately serve other goals. Many of you
will think that all criminal cases belong in the former category,
where the state can threaten a lone individual's potential loss of
freedom—I disagree. Others likely think that all disputes
involving some "public question" belong in open court with fully
contested arguments and rules designed to create fairness of
process and result. Still others would include in the former
category cases that involve large numbers of people, like the
mass tort, consumer, and securities cases that we face. Yet more
people suggest that we need adversarial, conventional processes
precisely when the parties are unequal so that courts may police
resource and "performativity" imbalances. For me, the opera-

129. See Thibaut & Walker, supra note 59, at 6-21; Luban, supra note 1, at 83-
122. But see Damaska, Evidentiary Barriers, supra note 115, at 578-89.
130. 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 contrive and impose some
universal system for both. Call me a postmodern, but I think enough variation in
our case types already exists that neither process rules nor ethics rules can continue
to be totally global and transsubstantive. See Menkel-Meadow, supra note 109, at
1188-201.
131. As William Simon controversially has suggested, it is not always true that
state powers are superior to criminal defendants. See William H. Simon, The Ethics
132. See, e.g., David Luban, Settlements and the Erosion of the Public Realm, 83
Geo. L.J. 2619, 2622-40 (1995) (discussing the arguments in favor of adjudication
instead of settlement in terms of public good and public values); Judith Resnik,
Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication, 10
Ohio St. J. On Disp. Resol. 211, 252-53 (1995) (comparing the fairness of ADR and
adjudication).
133. Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Preju-
tive 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."134

B. Other Possible Forms of Dispute/Conflict Resolution

What I most want to think about, however, are other forms of legal dispute resolution. In what circumstances could we begin to experiment safely 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.135 Mindful of the postmodern and multicultural critiques of legal knowledge, could we imagine a forum where more than two voices could be heard? Here I will sketch some possible alternate modes of dispute resolution to consider.

When a dispute involves more than two sides, one could imagine processes with more than just plaintiffs and defendants as parties. In a modification of old historical forms, one could imagine a tri-partite criminal proceeding with states' interests, victims' interests, and defendants' interests all represented. Or,
as has occurred in a variety of environmental siting, community block-grants and other multiparty situations, one could utilize a multiparty mediation-like process in which a single dispute broadens community and democratic participation in a single issue that affects more than two parties and establishes a process for greater participation. 136 "Reg-neg"—regulatory negotiation or negotiated rule-making—represents another example of current recognition that processes other than conventional adversarial ones may more effectively involve more than two parties and lend greater legitimacy to the result if people get involved in the construction of rules before they take effect. 137

We could further adapt our current forms of subclasses, multiparty, multidistrict litigation, and other forms of consolidation to allow for participation by more than "two sides" in civil cases having a variety of private and public issues at stake. 138

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 discussing divisive issues that attempt to alter the debate mode and focus instead on structured, reframed, multiparty "representational," and diverse conversation. In a recent forum at UCLA on affirmative action (a very disputed issue on my campus and in my state), for example, we organized a workshop designed to avoid adversarial and debate-like presentations. The process involved four diverse presenters, diverse in views, issues, and demographics, 139 who each briefly stated


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

139. The forum thereby illustrated both demographic and positional diversity. There were ranges of views on what kind of affirmative action was appropriate in the educational arena, including discussions of differences in admissions, educational programs, employment, and contracting; what groups should be part of such plans, and views that there should be no affirmative action at all. In a very "PC" environment, the latter view is not easy to openly express, but was accomplished because of the
their views on the subject of affirmative action including statements about how their personal and individual histories had affected their views. The speakers were then asked a series of probative questions by a moderator-facilitator. The questions that the moderator-facilitator asked purposefully probed more than adversarially 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? The four presenters followed the moderator-facilitator’s questions by questioning each other through the question-reframing-moderator who attempted to dislodge the personal attacks or hostility in questions and responses. Audience questioning followed the self-initiated questioning segment and the forum concluded with an attempt to draft a statement that reflected commonalities and differences of thinking and listed areas in which more information was required. All of this was followed by an audience-participant process-critique session.

I recognize that such a multilayered procedure might not work in cases calling for an assessment of civil damages or a determination of guilt. A multilayered procedure certainly may be used, however, for policy deliberations and in the negotiation and settlement of large multiparty lawsuits. Lani Guinier and Susan 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 in 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, process protections offered.

140. Indeed, with the exception of the representative-advocates of each “party,” this structure is not that dissimilar from a multiparty, private mini-trial whereby the principals intend to complete the negotiation and resolve the dispute themselves. ERIC D. GREEN, CENTER FOR PUBLIC RESOURCES, THE CPR LEGAL PROGRAM MINI-TRIAL HANDBOOK (1982). If the audience participated in drafting the statement or agreement, we might have something that looked like a summary jury trial. See Thomas P. Lambros, A Summary Jury Trial Primer, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE GUIDE 373 (John Wilkerson ed., 1990) [hereinafter DONOVAN LEISURE].

141. See Guinier & Sturm, supra note 32.
rather than debate.\textsuperscript{142} Similarly, I have called mediation an "intermediate" space\textsuperscript{143} where individual disputants can meet outside of both more informal, for example, family or workplace, and formal, for example, court, settings. Intermediate spaces,\textsuperscript{144} even without formal or complexly facilitated rules, may allow for more authentic grappling with issues and differences\textsuperscript{145} and may even lower the stakes to some extent.\textsuperscript{146} 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 postmodern 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—their major advantage being that a nonpartisan investigation leads to, at least in theory, a genuine search for truth. Purporting to engage in a genuine search for truth may be appropriate for some governmental and regulatory questions. Furthermore, as long as individual liberty is not at issue, even the most confirmed adversarialist might acknowledge that the proverbial quest for "truth" is, ultimately, likely to be both more effective and cheaper.\textsuperscript{147} Even the United Kingdom, with its commitment to the adversary system,

\begin{footnotesize}
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\item\textsuperscript{142} See id.
\item\textsuperscript{144} Regarding "intermediate spaces," another personal favorite of mine is the bookstore reading. In a recent reading in Washington, D.C., Derrick Bell demonstrated the democratic power of such sites by engaging in conversation (after completing his reading), with a very diverse audience of people—young and old, black and white—who both supported and challenged his views (and his own position) on race relations as discussed in \textit{BELL}, supra note 119.
\item\textsuperscript{145} Moreover, intermediate spaces, perhaps, come closer than any other setting to achieving Jurgen Habermas's "ideal speech conditions." See JURGEN HABERMAS, 2 \textit{The Theory of Communicative Action} (1987).
\item\textsuperscript{146} I often wonder how much the O.J. Simpson trial would have been different without the press coverage and play-by-play sports commentary.
\item\textsuperscript{147} Note that I do not suggest this in those circumstances as now used when a "neutral" court officer investigates something like parental fitness and makes recommendations to the court without adversary contestation.
\end{enumerate}
\end{footnotesize}
employs governmental investigatory commissions and procedures far more often than we do.\textsuperscript{148}

I strongly believe that we are on the right track in experimenting and using a variety of forms of "alternative dispute resolution"—I prefer the new term "appropriate dispute resolution." Yet, 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.\textsuperscript{149} Lawyers and third-party neutrals will clearly have to learn new roles to play in mediation. In recognition of this need, programs for teaching people to be effective problem solvers and, heaven forbid, advocates, within the ADR process are emerging. These fledgling programs are good, because dealing with the weaknesses of adversarialism necessitates new mind-sets about law practice.\textsuperscript{150}

Fact finding, third party neutraling, and judging might also deserve reconsideration. Some years ago, I suggested that if gender differences in judging and fact finding had any merit, the system might benefit if it considered using male-female judge teams, who had to decide together, instead of a single judge.\textsuperscript{151} Consider the changes required of both our judge and jury roles and selection processes if we are to reflect fully "multicultural" considerations in decision making and process facilitation.

Close to my heart, and related to the concept of accounting for multicultural considerations, is my concern regarding whether different forms of process will require different ethical requirements.\textsuperscript{152} Should lawyers attending an in-office, Early Neutral

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\item \textsuperscript{148} See, e.g., The Royal Commission on Criminal Justice, 1993, CMND 2263 (following investigation of several cases of "miscarriages" and false convictions in political trials). White papers and green papers on important legal issues affecting public policy are also good sources.
\item \textsuperscript{149} In comparison, other forms of "ADR" such as arbitration, summary jury, and bench trials are intended to be more conventionally adversarial. See Resnik, supra note 132, at 218-22.
\item \textsuperscript{152} See Robert A. Baruch Bush, National Institute for Dispute Resolution,
Evaluation session with court-appointed volunteer lawyers have a duty of candor to the tribunal under Model Rule of Professional Conduct 3.3? What conflicts of interests rules should we apply to those who both mediate and litigate?

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 that I am both cynical about policing efforts and skeptical that reforms will not themselves become the victims of the adversarial process much as we have seen with Rule 11 reforms and are beginning to see with recent disclosure reforms.

So, if the excesses of adversarial behavior concern us we could prohibit the coaching of witnesses, require earlier and more forthright disclosure of adverse, as well as favorable, facts and witnesses and adverse legal authority in both civil and criminal cases, require all lawyers, not just prosecutors to “do justice” in lieu of only serving their clients’ interests, prohib-
it 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 attorney, and impose serious sanctions for violations of these rules. More radically, we could require equalization of resources of the advocates, either by taxing the wealthier litigant or by providing more public subsidies for poorer litigants; however, 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 that we will ever come close to realizing this. I suspect, furthermore, that, even if we equalized economic resources, an inequality in raw, legal talent might still exist 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 lottery basis? Could we ever equalize advocacy skills so that the "merits"—whatever those may be in a postmodern world—and not the performance drives the result?

Although I would certainly like to see abuses of adversarial behavior curbed (and I still think professional reputation does

161. These latter examples make adversarialists cringe. They raise the important issue of deciding when a lawyer may appropriately judge his own client, see DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973), and raise important epistemological concerns about how we "know" the truth; see, e.g., Nix v. Whiteside, 475 U.S. 157 (1986) (where a client claimed he had been denied a fair trial by his counsel's admonitions that he testify truthfully). If my postmodernist 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 to go on than a client or witness interview.

162. See supra note 82 and accompanying text.

163. Although, in principle, client choice of lawyer forms the basis of our legal system, we know that many exceptions to this premise exist in assigning public defenders and criminal and civil court appointed lawyers, in assigning 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 J. Breger, Legal Aid for the Poor: A Conceptual Analysis, 60 N.C. L. REV. 281 (1980), I strongly opposed it on class terms. It might be different, however, if it were applied to all litigants.

164. Would we then be asking some lawyers to be "dumb and dumber" while we try to make others smart and smarter?
more to police this than anything else, interspersed with a few very public scandals\textsuperscript{165} that cause us to reexamine our loyalties and rules once in a while),\textsuperscript{166} I am skeptical that ethics rules changes can really reform the adversary system. Adversarialism is so powerful a heuristic and organizing framework for our culture, that, much like a great whale, it seems to swallow up any effort to modify or transform it. Though some legal scholars have interpreted the Model Rules' language change from "zealous" advocacy\textsuperscript{167} to "diligence"\textsuperscript{168} to mean that the ethics rules have shifted somewhat away from adversarialism, I still see the loophole in the language of the comments—where zeal continues to rear its dragon-like smoke. No one, however, can point to any change in lawyers' 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 recognize that it has its value and there are likely to be a number of objections to my criticisms and proposals.\textsuperscript{169} As a former trial lawyer and continuing reluctant adversarialist\textsuperscript{170} I will

\textsuperscript{165} Such as the involvement of the law firm Kaye, Scholer, Fierman, Hays & Handler in the Lincoln Savings and Loan scandal. See George H. Brown, Financial Institution Lawyers As Quasi-Public Enforcers, 7 GEO. J. LEGAL ETHICS 637 (1994) (discussing the role of lawyers in the collapse of savings and loans); Dennis E. Curtis, Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision and the Pursuit of the Dollar, 66 S. CAL. L. REV. 985 (1993) (discussing the role of the Kaye, Scholer law firm in the savings and loans scandal).

\textsuperscript{166} Other participants in the W.M. Keck Foundation Forum on the Teaching of Legal Ethics, published in this issue of the William & Mary Law Review, have explored the specific issues entailed in whistleblowing on one's own client and the implications for client confidentiality and loyalty. See, e.g., John S. Dzienkowski, Lawyering in a Hybrid Adversary System, 38 WM. & MARY L. REV. 45, 51 (1996) (discussing the attorney's duty to disclose client fraud to the tribunal).

\textsuperscript{167} CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980).

\textsuperscript{168} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).


\textsuperscript{170} 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 Advocacy; I mediate and arbitrate, but, as anyone who knows me will say, I can still argue and become quite adversarial.
canvas a few objections and attempt to respond to them.

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 bargains,171 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 an increase of judicial and administrative management of cases exists or where, even in court, judges apply more discretionary, bureaucratic rules and continue to push the parties toward settlement.172 Others suggest that all of the attempts to cure the ills of civil litigation—using ADR, Rule 11, disclosure rules, and civility rules—will destroy the criminal justice system in cases where the client needs a fully armed advocate.173 Most telling to me is the fear that if we tame the adversarial dragon too much, even in civil cases, our expensive and tedious discovery process will not turn out the occasional jewel of achievement in locating that famous “smoking memo” that informs the rest of us of serious wrongdoing.174

In addition, although I have labored long and hard to canvas the faults of the adversary system, we know that any system that we might substitute for it would have other, perhaps worse, flaws for those who fear the power of state investigators, or the absence of clear standards or governing rules in private dispute

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171. Plea bargains are rapidly decreasing in states like California having “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 in which third time offenders can 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, L.A. TIMES, Aug. 13, 1995, at A1.


173. See Silver, supra note 11, at 887.

174. The Pinto case, see Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (1981), the asbestos litigation, see PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL, (1985), the Dalkon Shield litigation, see RICHARD B. SOBEL, BENDING THE LAW (1991), and now the tobacco cases, see, e.g., RJR Nabisco Holdings Corps. v. Dunn, 657 N.E.2d 1220 (Ind. 1995), are examples of these triumphs of our adversary system.
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.\textsuperscript{175} What began as a more private, benevolent, but paternalistic system, without adversary protections, was converted during the "Due Process Revolution" to include virtually the full panoply of adult adversarial adjudication techniques and protection that we witness today.\textsuperscript{176} Most recently, with the advent of ADR and more sophisticated or simply different psychological models, we have again moved closer 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. Process itself is therefore subject to the same "paradigm shifts"—or trends, or fads—as other intellectual frameworks. (You can see this is coming to a postmodern conclusion.)

Thus, although 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. A cultural change is required, and that is not easy to legislate. What I urge instead is the cabining of the adversarial system to the situations where it can do its best work, with all the limitations I have described. I would prefer that we take the teachings of postmodernism and multiculturalism seriously enough to consider other forms and formats of conflict and dispute resolution—such as employing many-personed and -sided factual presentations and handling 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.\textsuperscript{177} I be-

\textsuperscript{175} I rely upon MURRAY SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION (2d ed. 1985), which raises questions about the value of the adversary system, starting with the \textit{Gault} decision. \textit{See In re Gault}, 387 U.S. 1 (1967).
\textsuperscript{176} \textit{See Auerbach}, \textit{supra} note 16, at 126-27.
\textsuperscript{177} \textit{See, e.g.}, Frank E.A. Sander & Stephen B. Goldberg, \textit{Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure}, 10 \textit{Negotiation J.} 49 (1994) (explaining how to determine which ADR procedure, if any, best suits a par-
lieve 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 who is governed by the Judicial Code of Conduct.\textsuperscript{78} To take up a more radical strain of postmodernism, 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 postmodern 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, one that is more sensitive to the particular postmodern needs of parties and the particularities of cases. I do not think that any one micro-reform or any single process will successfully supplant and replace the adversary system. I hope, however, that the post-postmodern legal system will give parties a greater choice about how they want to resolve their disputes. Greater choice in dispute resolution will allow lawyers who want to be “moral activists,” problem solvers,\textsuperscript{179} lawyers for the situation\textsuperscript{181} or the community,\textsuperscript{182} discretionary lawyers,\textsuperscript{183} civic republicans,\textsuperscript{184} or statesmen\textsuperscript{185} [sic] to have greater flexibility

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\textsuperscript{79} DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 160-61 (1988).

\textsuperscript{180} Menkel-Meadow, supra note 100.


\textsuperscript{185} ANTHONY KRONMAN, THE LOST LAWYER (1994).
in the models they choose. Not everyone will have to be a "hired gun" in an epistemological system that is crumbling as we speak.