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TOWARDS A MOBILIZATION* OF THE ADVERSARY PROCESS**

By GEORGE W. ADAMS†

One of America's most eminent jurists once wrote:

I suggest that there is something fundamentally wrong in our legal system in this respect. If a man's pocket is picked, the government brings a criminal suit and accepts responsibility for its prosecution. If a man loses his life savings through breach of a contract, the government accepts no responsibility. Shouldn't the government perhaps assume some of the burden of enforcing what we call private rights?

Jerome Frank, *Courts on Trial*
(1949) at 97.¹

This observation of Jerome Frank provided the seed to the following analysis. The observation was one of great insight in 1949 and, in light of social change, it is of even greater relevance today. Frank was calling for a mobilization of law in response to a growing criticism directed at the administration of justice.² This criticism continues unabated. Today's indictment, directed at courts and administrative agencies alike, contains a long list of procedural shortcomings. The conflict resolution provided by these bodies is said to be too expensive, too lengthy, too formalistic, too unintelligible . . . in short, too much like the administration of injustice.³

* This term and its importance is developed in Black, *The Mobilization of Law* (1973), 2 J. of Legal Studies 125; Frank, *Courts on Trial* (Princeton: Princeton University Press, 1973) at 98; Cahn and Cahn, *What Price Justice: The Civilian Perspective Revisited* (1965-66), 41 Notre Dame Law. 927

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¹ While Frank's observation appears to be plaintiff-oriented, he was quick to recommend the equivalent of the public defender to the civil process. See Frank, *supra*, at 97.

² Smith, *Justice and the Poor* (New York: 1919) at 6; Pound, *The Limits of Effective Legal Action* (1916-17), 27 Int'l J. of Ethics 150-151 and 161-167, found in Howard and Summers, *Law, Its Nature, Function and Limits* (Englewood Cliffs, N.J.: Prentice-Hall, 1965) at 417; Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), 29 A.B.A. Rep. 395, found in Vanderbilt, *Cases and Materials on Modern Procedure and Judicial Administration* (New York: Washington Square Pub. Co., 1952) at 32; Carlin, Howard, Messinger, *Civil Justice and the Poor* (New York: Russell Sage Foundation, 1966) at 9; Wald, *Law and Poverty* (Washington: U.S. Gov't Printing Office, 1965) at 46; Semmel, *New Approaches in the Law of Civil Procedure* (Mineola, N.Y.: Foundation Press, 1970) at 41.

³ Carlin, Howard, *supra*, note 2 at 9; Carlin and Howard, *Legal Representation and Class Justice* (1965), 12 U.C.L.A. L. Rev. 381; Handler, *Neighbourhood Legal Services* (Washington: U.S. Gov't Printing Office, 1966); *Id.*, Semmel; Wald, *supra*, note 2 at 46; Jarmel, *Legal Representation of the Poor* (Woodbridge: New Jersey Appellate Print. Co., 1971); Hann, *Decision-Making in the Canadian Criminal Court System* (Toronto: U. of T. Center of Criminology, 1973); Schur, *Radical Non-Intervention* (Englewood Cliffs, N.J.: Prentice-Hall, 1973); Jones, ed., *The Courts, The Public and the Law Explosion* (Englewood Cliffs, N.J.: Prentice Hall, 1965); Blumberg, ed., *The Scales of Justice* (Chicago: Aldine Pub. Co., 1970).

I think we would all concede that the charges are not without foundation and in need of serious investigation. Indeed, such consensus has contributed to the creation of law reform bodies, and a developing science of court administration.⁴ The result has been a number of proposals for structural reform.⁵

Unfortunately, however, the concept of civil justice,⁶ the subject matter of the indictment, has proved to be chameleonic in nature, taking its definition from both the context in which it is discussed and the perspective of the discussants. Due to the substantive objective of these reformists, or to the complexity of the topic, fundamental principles of conflict resolution have been neglected. The neglect of these basic touchstones may be as costly as the present system that we all agree is in need of reform.

I would like to discuss these principles in relation to the debate over the appropriate procedural structure for the small claims court.⁷ In light of this discussion I will sketch a procedural reform that calls for a mobilization of the adversary process in contrast to the more fashionable exposition of alternatives to it.

While at first glance the topic appears quite limited, the procedural choice confronting this tribunal is one that has confronted or will confront many other dispute-resolving agencies serving the vast majority of the public.⁸ Let me briefly illustrate the problem.

The small claims courts in Canada and the United States process hundreds of thousands of legal claims each year. Individual plaintiffs and defendants are not represented by lawyers or agents, nor are lawyers or agents consulted at any point during the history of a small monetary claim. A primary reason for this reluctance is simple economics.⁹ The amount of

⁴ See generally Hann, *supra*, note 3; *United States President's Commission on Law Enforcement and Administration of Justice* (1967); *Ontario Report of the Royal Commission Inquiry into Civil Rights*, Toronto: Queen's Printer, 1968) — McRuer Report.

⁵ See sources cited *supra*, note 3.

⁶ Hazard, *Social Justice Through Civil Justice* (1969), 36 U. of Chi. L. Rev. 699 at 711; Carlin, Howard, Messinger, *supra*, note 2.

⁷ *Canada*

(Alberta) *The Small Claims Act*, R.S.A. 1970, c. 343; (British Columbia) *The Small Claims Act*, R.S.B.C. 1948, c. 79 as am. by S.B.C. 1968, c. 28, s. 20; (Manitoba) *Small Debts Recovery Act*, R.S.M. 1970, c. 140; *The County Courts Act*, R.S.M. 1970, c. 260 as am. by S.M. 1971, c. 77, Part II; (New Brunswick does not have a small claims court); (Newfoundland and Labrador permit small claims in magistrate court); (Nova Scotia) *Municipal Courts Act*, R.S.N.S. 1967, c. 158; (Prince Edward Island does not have a small claims court); (Quebec) *The Code of Civil Procedure*, S.Q. 1971, c. 86; (Ontario) *Small Claims Courts Act*, R.S.O. 1970, c. 439; (Saskatchewan) *Small Claims Enforcement Act*, R.S.S. 1965, c. 102.

United States

See generally, Institute of Judicial Administration, *Small Claims Courts* (1954); Institute of Judicial Administration, *Small Claims Courts in the United States* — 1959 Supplement (1959). See also National Institute of Consumer Justice, *Redress of Consumer Grievances* (1973).

United Kingdom

The United Kingdom does not have a small claims court as such; small debts must be

submitted to the county court; however, the registrar acts as a lesser judge for small monetary claims. See generally Jackson, *The Machinery of Justice* (3d ed. Cambridge: Cambridge University Press, 1959) at 10; Gt. Brit. *Report of the Royal Commission on Assizes and Quarter Sessions* (1969; Cmd. 4153) — Beeching Report; Gt. Brit. *Report of the Committee on Civil Judicial Statistics* (1968; Cmd. 3684) — Adams Committee; Gt. Brit. *Report of the Committee on the Enforcement of Judgment Debts* (1969; Cmd. 3909) — Payne Committee; *The Consumer Council Study, Justice Out of Reach: Case for Small Claims Courts* (London: H.M.S.O., 1970). The following Practical Direction was issued by the Lord Chancellor on Sept. 21, 1973:

1. S. 92 of the County Courts Act 1959, as amended by s. 7 of the Administration of Justice Act 1973, enables a county court, in such cases as may be prescribed, to order any proceedings to be referred to arbitration to such person or persons (including the judge or registrar) and in such manner and on such terms as the court thinks just and reasonable. Under Order 19, Rule 1 (2), inserted by the County Court (Amendment No. 3) Rules 1973 as from October 1, 1973, the registrar may make an order under this section if the sum claimed or amount involved does not exceed £75 or the parties consent to the reference.

2. In order to secure uniformity of practice and to give the parties and their advisers an indication of the course likely to be taken under these provisions, the registrar should, in settling the terms on which an order of reference is to be made, consider the desirability of including such of the terms mentioned in the Schedule below as he may think appropriate. The list is not intended to be exhaustive and the registrar may consider other terms to be desirable in the circumstances of the particular case; but the parties should be given sufficient notice of a contemplated departure from the terms set out in the Schedule to enable them to make any representations they may think fit, and a party who himself wishes to propose a different term should inform the registrar and the other side before the order is made.

SCHEDULE

- (1) The strict rules of evidence shall not apply in relation to the arbitration.
- (2) With the consent of the parties the arbitrator may decide the case on the basis of the statements and documents submitted by the parties. Otherwise he should fix a date for the hearing.
- (3) Any hearing shall be informal and may be held in private.
- (4) At the hearing the arbitrator may adopt any method of procedure which he may consider to be convenient and to afford a fair and equal opportunity to each party to present his case.
- (5) If any party does not appear at the arbitration, the arbitrator may make an award on hearing any other party to the proceedings who may be present.
- (6) With the consent of the parties and at any time before giving his decision and either before or after the hearing, the arbitrator may consult any expert or call for an expert report on any matter in dispute or invite an expert to attend the hearing as assessor.
- (7) The costs of the action up to and including the entry of judgment shall be in the discretion of the arbitrator to be exercised in the same manner as the discretion of the court under the provisions of the County Court Rules [or as the case may be]. [1973] 1 W.L.R. 1178; [1973] 3 All E.R. 448.

⁸The choice I am referring to is between a due process procedure or one of paternalistic inquiry. Contrast Ison, *Small Claims* (1972), 35 Mod. L. Rev. 18; *The Code of Civil Procedure*, S.Q. 1971, c. 86 with the "due process" trend in other forums reflected in *Kent v. United States* (1966), 386 U.S. 541; *Re the Application of Gault* (1967), 384 U.S. 997; Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, [1965] Wis. L. Rev. 7; *Goldberg v. Kelly* (1969), 42 So. Cal. L. Rev. 600. Cf. Handler, *Controlling Official Behavior in Welfare Administration* (1966), 54 Cal. L. Rev. 479. See also Skolnick, *Social Control in the Adversary Process* (1967), 11 J. of Con. Res. 52.

⁹But we are only beginning to recognize and deal with the complicated psychological and social reasons contributing to this failure to activate the law. See Carlin, Howard, *supra*, note 3 at 423.

money involved does not justify the expense of a lawyer, or the individual is of insufficient means. But business interests who use these courts can afford some kind of representation either because of their volume of business in the court or because of an inherent ability to pay for just about anything in the short run. Therefore, when a business and an individual have a disagreement, a condition of unequal representation results. This inequality may distort the adversary nature of the proceedings and thereby adversely and unfairly affect the outcome. Assuming this unfairness can be substantiated, how can it be remedied?

There are at least three approaches, and these three approaches involve, essentially, a choice between two classes of procedural frameworks — the adversary process and the inquisitorial process.¹⁰

One approach is to provide individuals with consultation and representation, thereby revitalizing the adversary process by evening up the sides. While this approach might be very costly, the costs will vary according to the institutional form of the service and the kind of personnel envisaged.

The second approach is to bar all lawyers and agents from appearing in a small claims court or from offering any service in relation to a small claim. Inequality in representation and consultation is overcome by denying legal services to all parties involved in such a dispute. In imposing the investigational burden on the decision-maker, the economic costs of this approach may be less than the first. However, inquisitorial decision-making may entail other kinds of less quantifiable costs — I will call them institutional costs — that should not be overlooked. Moreover, businesses must act through employees and these employees will acquire experience in processing claims causing the inequality in representation to reappear.

This latter possibility leads to the third approach, essentially a variant of the second, which would absolutely prohibit most businesses from bringing a claim in the small claims court. The inquisitor would then have a manageable number of claims to investigate and the problem of employee expertise would dissolve.

Without considering the full implications of each approach at this time, notice the choice between the adjudication of conflict and the inquisition of conflict — adjudication depending upon an effective adversary process, and inquisition relying upon a paternalistic investigational process.

It is my contention that this option confronts all dispute-resolving agencies experiencing large numbers of small monetary claims. In consequence of this, can policy-makers ignore the fundamental tenets governing institutional design? Let me explain.

The administration of justice is a social welfare program and like other welfare programs it experiences the problem of defining a minimum service level.¹¹ In defining this level of service policy-makers must have regard to at least three basic principles.

¹⁰ This choice is outlined in Hazard, *Rationing Justice* (1965-66), 8-9 J. of Law and Eco. 1 at 8.

¹¹ *Id.* at 2.

First, in light of the limited public monies available for all welfare programs, more money spent on the administration of justice will mean less money available for other public services. Therefore, social priorities have to be set.¹² Second, the degree of civil justice or fairness obtained by a procedural arrangement is an important influence upon the integrity and acceptability of the legal rules administered by that arrangement. Hence, any definition of a minimum service level must take this relationship into account.¹³ Third, the requirements of civil justice are not coincidental with claims for greater social justice. While accessibility to the agencies administering legal rules has an important role to play, social justice is more effectively provided for by direct substantive reform.¹⁴ Procedural reform costs a great deal of money but there is no guarantee that it will result in transfer payments to those people in need of greater social justice.

I want to elaborate these principles and their implications for our procedural choice. We might first examine the last mentioned tenet — the general importance of procedure in modern society but its limited relationship to social justice.

Procedure grapples with the debris of larger social forces, but has very little direct control over these forces. To effectively resolve many of the problems that find their way before our inferior tribunals, these forces must be directly tempered by substantive reform, thereby altering the roots of social problems. Social justice is unlikely to be obtained by either denying would-be litigants access to the small claims court or denying them representation when in that court. Nor will providing counsel to each and every litigant accomplish this for that matter. Such things should be done on procedural grounds alone.

Still, I do not mean to deny all relationships between social and civil justice. The kind of procedure that a legal system adopts has an important bearing upon the availability of the substantive rules that provide social justice and upon the creative application of those rules. Admittedly, law both codifies custom and depends upon a great deal of self-enforcement. But many of society's institutions that have formerly played important roles in instilling acceptance of and obedience to legal rules are of declining influence today.¹⁵ For instance, with the drift toward a mass urban society, kinship and

¹² *Id.*

¹³ This is a thesis that forms the basis to much of Professor Fuller's writing. See Fuller, *Morality of Law* (New Haven: Yale University Press, 1964), [hereinafter Fuller 1964]; Fuller, *Anatomy of the Law* (New York: Praeger, 1968), [hereinafter Fuller 1968]; Fuller, *Adjudication and the Rule of Law 1959-60*, *Am. Soc. of Int'l Law* (Proceedings 1960). See also Weiler, *Two Models of Judicial Decision-Making* (1967), 46 *Can. Bar Rev.* 406.

¹⁴ Hazard, *supra*, note 6; Hazard, *Law Reforming in the Anti-Poverty Effort* (1970), 37 *U. of Chi. L. Rev.* 242.

¹⁵ Selznick, *Legal Institutions and Social Controls* (1963-64), 17 *Vand. L. Rev.* 79. See also Parsons, *The Law and Social Control* in Evan, *Law and Sociology: Exploratory Essays* (New York: Free Press of Glencoe, 1962) at 56; Fuller, *Human Interaction and the Law* in Wolff, ed., *The Rule of Law* (New York: Simon and Schuster, 1971) at 171.

religion today do not provide adequate informal pressures to encourage conformity to legal rules. And most of the people using the small claims court do not experience the continuous dealings with one another that might foster trust and informal compromise. Effective access to a formal application of these rules is therefore more important than ever before.

Finally, another importance of procedure comes with the realization that the substantive neglect of a broad substratum of society can be explained by the degree of access these people have to the ultimate sources of power in our society.¹⁶ If it is difficult to deny the greater efficiency of the legislative process in providing social justice,¹⁷ these political realities make it equally difficult to deny the important role of courts and administrative tribunals in adapting the legal framework to social change. These agencies, when procedural arrangements permit, provide minorities with the opportunity for a one-man lobby.¹⁸ Unfortunately, one seldom observes receptiveness on the part of anglo-Canadian courts when such occasions arise.

In summary, the legislatures and the courts have a collaborative role to play. Social injustice cannot be eradicated by civil justice alone. It can be tempered by a creative elaboration of existing standards but fundamental reform needs legislative enactment. Social justice requires a fairer and more equal distribution of wealth — wealth in the very broadest sense.¹⁹ In their quest of that goal, individuals are beginning to react to realities that the trade union movement responded to years ago. Interested parties can cause reform, but these parties must assume the form of power organizations. "Organization first; anti-poverty program second," is Saul Alinsky's law of change.²⁰

Having placed the importance of procedural reform in this more limited perspective, it is necessary to consider the demands of civil justice on procedure.

¹⁶ See Caplovitz, *Debtors in Default* (Bureau of Applied Social Resp., Columbia University, 1971), c. 15-18. See generally Chambliss and Seidman, *Law, Order and Power* (Reading, Mass., Addison — Wesley Pub. Co., 1971); Moynihan, *The Politics of a Guaranteed Income* (New York: Random House, 1973); Friedman, *Law and Social Change in Urban Development* (1970), 8 Osgoode Hall L. J. 347 at 349.

¹⁷ For a description of the relative institutional capacities of legislative and judicial decision-making, see Weiler, *supra*, note 13.

¹⁸ Hazard, *Law Reforming in the Anti-Poverty Effort*, *supra*, note 14 describes the limits but importance of this opportunity.

¹⁹ See generally Adams, *The Poverty Wall* (Toronto: McClelland and Stewart, 1970); Adams, Cameron, Hill, Penz, *The Real Poverty Report* (Edmonton: M.G. Hurtig, 1971); Can. Report of the Special Senate Committee on Poverty in Canada (Ottawa: Queen's Printer, 1971); Batchelder, *The Economics of Poverty* (New York: Wiley, 1966); Harp and Hofley, ed., *Poverty in Canada* (Scarborough, Ont.: Prentice-Hall of Canada, 1971); Harrington, *The Other America* (New York: MacMillan, 1962); Mann, ed., *Poverty and Social Policy in Canada* (Vancouver: Copp Clark, 1970); Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971); Seligman, *Permanent Poverty* (Chicago: Quadrangle Books, 1968); Simmel, *The Poor* (1965-66), 13 Soc. Prob. 118; Vallieres, *White Niggers of America* (Toronto: McClelland and Stewart, 1971); Wald, *supra*, note 2, *passim*.

²⁰ Moynihan, *Maximum Feasible Misunderstanding* (New York: Free Press, 1969) at 185.

I said that any definition of the minimum service level in the administration of justice most note that the degree of civil justice obtained by a procedure has an important influence upon the integrity and acceptability of the legal rules administered. Therefore, returning to our two procedural choices for the small claims court, do both the adversary and inquisitorial processes achieve a requisite degree of civil justice? From this vantage point, is one process to be preferred over the other?

Civil justice is the term used to describe the standards by which we evaluate the procedural arrangements used to administer a variety of primary legal rules. It could be equated to the concept of fairness.²¹ And in turn, civil justice as fairness conveys the idea of a set of principles that can be used to elaborate the meaning of fairness. But rather than exhaustively list and detail these principles,²² I shall put two questions which capture their significance — one at a theoretical level and the other at a practical level.

First, in theory, all things being equal, does the procedure resolve the dispute by an impartial application and purposive elaboration of the substantive directives? Secondly, if all things are not equal, is this accomplished? Several assumptions underlying these questions suggest the content I ascribe to civil justice.

I have assumed that substantive directives should be applied in an impartial manner to command the respect and cooperation of all persons subjected to them. The impartial application of legal rules is one important feature supporting their acceptability.²³

I have assumed that a system of law should be applied in a purposive manner to perform and maintain its intended regulatory function. If it is not, the result will command little more respect than a biased decision and the system will soon be avoided by the affected parties because the real dispute will remain unresolved. This is of course just what happened in the area of labour relations with its existing administrative tribunals and private boards of arbitration.²⁴

Finally, I have assumed that the theoretical nature of a procedure can vary significantly from what actually occurs in practice. What the parties experience in practice must be put to the test of civil justice, an exercise often neglected. For instance, the availability of the procedures may be so limited, or so slow in operation, that certain individuals will be denied an official resolution of their disputes. The substantive rules will have very little meaning for these people, and their respect for the law will be adjusted accordingly. Or the procedure may require that disputants possess equal and substantial

²¹ Rawls, *supra*, note 19 at 13.

²² This is attempted in Rosenberg, *Devising Procedures That Are Civil To Promote Justice That is Civilised* (1971), 69 Mich. L. Rev. 797.

²³ Weiler, *supra*, note 13. This notion is also developed in Fuller, *The Forms and Limits of Adjudication* (1958), (unpublished paper); *Collective Bargaining and the Arbitrator*, [1963] Wis. L. Rev. 3.

²⁴ Adams, *Grievance Arbitration and Judicial Review in North America* (1971), 9 Osgoode Hall L. J. 443 at 446.

monetary resources, and to the extent that this is not so, the outcome may be biased against the unendowed party or the purposive application of the law may suffer. Accordingly, the second question — examining the relationship between theory and practice — isolates what might be described as the poverty of a procedural arrangement.²⁵

Do our two procedural choices provide such civil justice?

I will begin with the adversary process and its institutional structure — *adjudication*. The primary focus of adjudication is the impartial settlement of disputes arising out of private lines of conduct, by evaluating such conduct in the light of established rules and principles.²⁶ It has been argued that the institutional structure of adjudication — “its incidence, access to it, the mode of participation in it, the basis of decision and the nature of relief available to it” — is defined by and flows from its function. Because of this relationship between the form and function of adjudication, the adversary process is an essential and irreplaceable element of this structure.²⁷ To speak of adjudication as an adversary process assumes that, as a prelude to the dispute being solved by the application of the law, the interested parties have the opportunity to adduce evidence and make argument to a disinterested and impartial arbiter. The arbiter then decides the case on the basis of this evidence and these arguments.²⁸

The use of the adversary process in adjudication is distinctive because it guarantees to each of the parties affected by the decision the right to prepare the representations on the basis of which the dispute is to be resolved. In this sense, the affected parties participate in the solution to their dispute, and ordinarily this form of participation will heighten the rationality and acceptability of the result.

But this is not the only value of the process. The adversary process decentralizes dispute resolution by eliciting aid for the arbiter's understanding of the case from those who, with different points of view, are most likely to see the relevant necessities in the situation.²⁹ Each party has an incentive to develop both the most convincing legal theory and complete factual presentation. This kind of adversarial input insures that the fabric of the law will be continually stretched and shaped in resolving human conflict.

With the parties engaged in the adversarial research and the presentation of law and fact, the arbiter can adopt a relatively passive pose. This “en-

²⁵ Merriam, *Political Power* (1934), at 156 referred to in Selznick, *supra*, note 15 at 83.

²⁶ Weiler, *supra*, note 13 at 410. The use of the word, private, is becoming increasingly inappropriate. See Frank, *supra*, note 1.

²⁷ Weiler, *supra*, note 26. See also, Jowell, *The Legal Control of Administrative Discretion*, [1973] Pub. Law 178.

²⁸ Weiler, *supra*, note 13 at 412; Skolnick, *Social Control in the Adversary System* (1967), 11 J. of Con. Res. 54; Barrett, *The Adversary System and the Ethics of Advocacy* (1961-62), 37 Notre Dame Law. 479.

²⁹ Weiler, *supra*, note 13 at 413; Hart and Sacks, *The Legal Process* (Cambridge, Mass.: Tentative Ed., 1958) at 229.

hances his ability *to be* and *to seem* impartial."³⁰ He can remain impartial because he need not form premature hypotheses with which to discover the necessary factual and legal basis for a proper decision: the parties are doing this for him. As a result, he is less likely to filter out relevant material that would be inconsistent with any premature assumption. For this reason his decision is more likely to be the right and proper one in the circumstances. This thesis has been eloquently advanced by Professor Lon Fuller and is worth restatement.³¹ He writes:

What generally occurs in practice [as evidence is heard] is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.

Most recently, a series of very significant studies give empirical support to this general claim advanced by Fuller.³² The importance of this attribute of the adversary process stems from the greater accuracy of unbiased judgments and from the perception of this impartiality by the affected parties. Moreover, impartiality gives a peculiar moral force to a decision, enhancing the acceptability of the result while minimizing the costs associated with enforced adherence.³³ These are the theoretical bases of the legal doctrine of natural justice³⁴ and the prohibition of undue interference imposed upon trial judges.³⁵

³⁰ Weiler, *supra*, note 13 at 413; Fuller, *Forms and Limits of Adjudication*, *supra*, note 23.

³¹ Fuller, *The Adversary System*, in Berman, ed., *Talks on American Law* (Washington: Voice of America, 1972) at 43-44, also cited in Thibaut, Walker, Lind, *Adversary Presentation and Bias in Legal Decision-Making* (1972), 86 Harv L. Rev. 386 at 390.

³² Thibaut, Walker and Lind, *supra*, note 31, and Walker, *Discovery and Presentation of Evidence in Adversary and Non-adversary Proceedings* (1973), 71 Mich. L. Rev. 1129.

³³ Weiler, *supra*, note 13 at 413.

³⁴ *Re Hoogendoorn & Greening Metal Products and Screening Equipment Co.*, [1969] S.C.R. 30; Adams, *Grievance Arbitration and Judicial Review in North America*, *supra*, note 24; Reid, *Administrative Law* (Toronto: Butterworth's, 1971), c. 6; *The Civil Rights Statute Law Amendment Act 1971*, S.O. 1971, v. 2, c. 50.

³⁵ *Philips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637 (Ont. C.A.); *cf. Re Board of Commissioners of Police for the City of Windsor and Langois*, [1972] 1 O.R. 833 (Ont. H.C.); Wyzanski, *A Trial Judge's Freedom and Responsibility* (1952), 65 Harv. L. Rev. 1281; Silverman, *The Trial Judge: Pilot, Participant or Umpire?* (1973), 11 Alta. L. Rev. 40.

Making a nice analogy to the competitive market place, Professor Weiler writes:³⁶

The individual adversaries pursue their private interests, a specific decision by the adjudicator in their favour. To this end they each do their best to advance all the reasons which support the principle that favours their own position and to pick out and demolish all the weak links in their opponent's arguments. The neutral adjudicator, able to see the same problem from the relevant opposing points of view, achieves the public good by selecting and establishing the principle with the strongest notional support. The appropriateness of the metaphor of the "invisible hand" is apparent.

Finally, another feature of the adversary process that is just as important is the tremendous saving of costs to society for all those cases that would have gone on to incur the expense associated with adjudication had they not been settled beforehand. Dispute resolution in a legal system of private rights can be analogized to a pyramidal conception having the settlement of disputes through negotiation at its broad base and a final court of appeal at its apex.³⁷ If all disputes arising out of the governance of conduct by rules were to go to adjudication, an enormous bureaucracy would be needed to process the claims. This would be an unnecessary expense if the parties themselves could have negotiated a settlement in light of the predictability of the rule application. Let me elaborate this important point.

Negotiation is a process by which affected parties resolve conflict through voluntary agreement when that agreement is preferable to no agreement at all.³⁸ In disputes over rights, a voluntary settlement will be negotiated if it is preferred to an adjudication of the issue³⁹ and this may be the case for any number of reasons.

To begin with, the result of the adjudication may be so predictable that the offending party will want to save himself the processing costs of a trial. A party will most readily and accurately come to this realization when confronted with the parallel prediction of his opponent. It is this adversarial prediction culminating in a settlement that provides the parties with the same sense of participation they experience at trial.

In the second phase, parties may wish to avoid an adjudication because the outcome there is undesirably indeterminate. Accepting that legal rules should lend themselves to prediction, prediction is dependent upon certain findings of fact and the quality of judging. Facts after the event can be very

³⁶ Weiler, *supra*, note 13 at 415.

³⁷ Hart and Sacks, *supra*, note 29; Fuller (1968) at 37.

³⁸ Stevens, *Strategy and Collective Bargaining Negotiation* (New York: McGraw-Hill, 1963) at 16; Schelling, *The Strategy of Conflict* (Cambridge, Mass.: Harvard University Press, 1960) at 21; Ross, *Settled Out of Court* (Chicago: Aldine Pub. Co., 1970), c. 4; Walton and McKersie, *A Behavioural Theory of Labour Negotiations* (McGraw-Hill, 1965); Coulson, *How to Stay Out of Court* (New York: Crown Publishers, 1968); Barkin, *Law Without Sanctions* (New Haven: Yale University Press, 1968).

³⁹ Ross, *supra*, note 38 at 142. See Aubert, *Courts and Conflict Resolution* (1967), 11 J. of Con. Res. 40; Coulton, *supra*, note 38, and see the discussion of negotiation under law outlined in Aubert, *Competition and dissensus: two types of conflict and conflict resolution* (1963), 7 J. of Con. Res. 26.

difficult to establish and one need only consider the varying intellects and philosophic outlooks that judges bring to bear on their determinations to realize that adjudicative outcomes are not always within the realm of relative certainty.⁴⁰ This uncertainty is aggravated by the existence of broad substantive principles that can sometimes conceal personal motivations.⁴¹ Adversarial preparation and negotiation serve to highlight these vagaries in judicial outcomes and to assist the parties in avoiding or minimizing their associated costs and risks.

Lastly, negotiated settlements may be preferred to adjudication because of the more flexible outcomes available or because of a preference for the informality of this process. Adjudication is what some game theorists call a zero-sum game where the winner takes all. Whereas negotiation, a variable sum game, is a very informal process of compromise that can occur over the telephone. Therefore, it is not surprising that reasonable people may prefer a tailored compromise, arrived at inexpensively, to assuming the risks associated with an official determination.

Thus, all of these characteristics of negotiation illustrate its relationship to adjudication, its fundamental importance to our legal system, and its dependence upon the adversary process. Negotiation insures that adjudication is a viable enterprise and together they provide a rational process of conflict resolution that meets the requirements of civil justice.

What about the inquisitorial process?

A pure system of inquisitorial determinations requires an expert decision-maker to actively investigate the claims of unrepresented litigants and to make his findings under the relevant law without their assistance.⁴² By contrast with the adversary process, one might say that the decision-maker plays three roles in the course of his determination: the judge, the plaintiff, and the defendant. This procedural model appears to draw its sustenance from a concept of scientific inquiry.⁴³ Resolving conflict in light of legal rules is

⁴⁰ Adams and Cavaluzzo, *The Supreme Court of Canada: A Biographical Study* (1969), 7 Osgoode Hall Law J. 61; Peck, *A Behavioural Approach to the Judicial Process: Scalogram Analysis* (1967), 5 Osgoode Hall L.J. 1; Peck, *The Supreme Court of Canada 1958-66: A Search for Policy Through Scalogram Analysis* (1967), 45 Can. Bar. Rev. 666. I would note that these studies, if taken at face value, might undercut much of the rationale of the adversary process as developed in this paper. However, I believe that these studies represent only one aspect of judicial decision-making, and are insufficient as an exclusive explanatory device. Furthermore, I believe that the effect of a decision-maker's "past" is minimized as he strives to achieve the aspiration of rationality prescribed by adjudication.

⁴¹ Farnsworth, *Legal Remedies for Breach of Contract* (1970), 70 Colum. L. Rev. 1145 at 1208; Linden, *Down with Foreseeability! Of Thin Skulls and Rescuers* (1969), 47 Can. Bar. Rev. 545 at 570.

⁴² Thibaut, Walker and Lind, *supra*, note 32 at 388; Engelmann, *A History of Continental Civil Procedure* (Boston: Little, Brown & Co., 1927) at 13; Homburger, *Functions of Orality in Austrian and American Civil Procedure* (1970-71), 20 Buff. L. Rev. 9; Kaplan, *Civil Procedure — Reflections on the Comparison of Systems* (1959-60), 9 Buff. L. Rev. 409.

⁴³ Barrett, *The Adversary System and the Ethics of Advocacy* (1961-62), 37 Notre Dame Law 479 at 480.

perceived as a search for "truth" — a search that can best be accomplished by one impartial decision-maker with little assistance from the affected parties. As a result, this impartial decision-maker will leave no question unasked and no concept unapplied. Moreover, this thorough investigation eliminates the need for advocates and the concomitant expense and delay involved in their adversarial machinations.

Furthermore, it has been proposed that the impartial decision-maker should assume the additional role of the conciliator or mediator. After completing his investigations, and with the threat of an adverse decision lurking in the background, he is to encourage the parties to voluntarily resolve their dispute and thereby eliminate the further expense, delay and coerciveness entailed in its official resolution.⁴⁴

Is this procedural model as theoretically fair as the adversary process? I do not think so, and my reasoning draws on the necessary relationship between the form and function of conflict resolution. The inquisitorial process undermines the effectiveness of conflict resolution by undermining the integrity of legal rules.

It does this in the following ways. I have argued that if the outcome of an official determination is to command respect and allegiance, it must be arrived at impartially, and this impartiality must be apparent to the affected parties.⁴⁵ Unfortunately, the inquisitorial process does not permit the decision-maker to remain passive and refrain from formulating a premature and, possibly, an erroneous working hypothesis. In fact, it forces him to formulate a working theory in order to investigate the facts and distinguish the relevant from the irrelevant. It is this premature hypothesis inherent in paternalistic inquiry that promotes biased outcomes. At least one party, because he has been denied an opportunity to participate meaningfully in this fact-finding and law-finding process, could come to resent both the working hypothesis adopted in the circumstances and the concomitant outcome.

The paternalistic character of inquisitions unavoidably raises suspicions of bias and tastes of despotism. The participants are not given sufficient opportunity and assistance to present their reasons, or to submit their questions, to the decision-maker. The decision-maker cannot possibly foresee all of these positions and, accordingly, his reasoning may fail to deal with the grievance as they perceive it. If this happens, one or both of the parties may walk away from the hearing feeling "if only the judge had considered this" or cynically guessing why the judge failed to consider that. The adverse effect upon the integrity of legal rules is obvious.

In the second place, the inquisitorial process eliminates the vast majority of negotiated settlements because the parties are unrepresented and must rely upon the expert decision-maker to determine the merits of their case. This means the decision-maker must investigate all disputes. Does not the time, the cost, and the number of judges required to accomplish this task undermine any claim of speed and economy made by this model?

⁴⁴ (Quebec), *The Code of Civil Procedure*, S.Q. 1971, c. 86, s. 975.

⁴⁵ Weiler, *supra*, note 13 at 413.

In the next place, the inquisitorial process constrains the creativity of conflict resolution because of the limited capacity of one man or woman to consider the most effective legal argument for each of the parties. I would submit that three heads are better than one in virtually any intellectual enterprise and this is particularly true in resolving human conflict by way of legal rules.

Finally, the ability of this judge to perform the role of a conciliator capably must be critically examined. For instance, one of a mediator's prime functions is the facilitation of communication between the parties to a dispute.⁴⁶ Without a mediator, parties may experience difficulty in finding a common ground for agreement. A candid party may make unnecessary concessions achieving less than he might have, had he been less open. As might be expected, many disputes remain unresolved because the parties are too fearful of making these unnecessary concessions. But with a mediator acting as a go-between, the parties are able to communicate more effectively. On the understanding that the actual resistance point of a party will not be revealed to an opponent, the mediator can scan the real proposals of each party to find the common ground or contract zone. Once this overlap is spotted, he simply announces the agreement to the parties.

But it is important to realize that a mediator has no power to bind or threaten the parties — he simply helps them arrive at an agreement of their choice. By contrast, information revealed to the inquisitor-*cum*-conciliator can be used to an individual's prejudice should these mediatory efforts fail and an official determination then become necessary. Under such circumstances the parties will be loath to confide in the conciliator, and this will undermine the efficacy of his communicative function. Moreover, this once again illustrates the important relationship between the institutional function and form of conflict resolution.⁴⁷

To summarize my critique of inquisition, it requires an abundance of decision-makers to perform many otherwise unnecessary determinations and these determinations will be subject to apparent, if not real, bias. For these reasons, I would submit that it fails to meet the requirements of civil justice, at least in principle. One sees some merit in using it if the legal standards are clear and if facts are undisputed — a situation that needs little adversarial input — but in few others.

In fact, this theoretical failing may explain why pure inquisition has seldom been formally adopted as a primary mode of administering legal rules in practice. However, a prominent example occurred in Prussia during the late 1700's under Frederick The Great, and is worth a brief word or two. Apparently the legislation was "inspired in considerable measure by Frederick's obsession that the lawyers were to blame for the unsatisfactory

⁴⁶ Stevens, *supra*, note 38 at 127; Schelling, *supra*, note 35 at 68; Simkin, *Mediation* (Washington: Bureau of National Affairs, 1971); Eckhoff, *The Mediator and the Judge* in Aubert, *Sociology of Law* (Penguin, 1972) at 171; Barkin, *supra*, note 38 at 94.

⁴⁷ The integration of these institutional forms results in a number of other failings. For instance, settlements coerced by the threat of a decision are not really voluntary settlements reflecting the true satisfaction of the parties. And official determinations made after the unsuccessful efforts of mediation are unlikely to appear fair. The decision-maker is likely to destroy his credibility as a decision-maker during the mediation process.

condition of civil justice." The system which was evolved sought to minimize their influence by enlarging the functions of the court.⁴⁸ In reviewing the operation of this court, Arthur Englemann reports:⁴⁹

This system remained intact only for forty years, when it began to succumb under adverse criticism. It was supplanted by legislation of 1833 and 1846, re-introducing in effect the principle of party-presentation. The experiment was a remarkable one, and one whose failure makes evident a fact which zeal for procedural reform is even with us, sometimes disposed to obscure, namely, that the interested striving of two contending parties is in the long-run, an infinitely better agency for the ascertainment of truth than any species of paternalistic inquiry.

Similarly, the contemporary European procedural arrangements, often cited to support the efficacy of inquisitorial procedures, are in fact a mixture of "party presentation" and "judicial prosecution," and even these mixed forms are not without the problems inherent to inquisitions.⁵⁰ Perhaps the most unique attempt to combine party presentation with the principle of court prosecution is the *Austrian Code of Civil Procedure* drafted by Franz Klein.⁵¹ Klein recognized that the destruction of the principle of party presentation would cause the downfall of the entire system of private rights and duties. But on the other hand, he felt that court prosecution could lead to faster, less expensive determinations more consistent with the public interest. Fully aware of the subtle adjustment needed to integrate the two principles, he created a system which accepts the thesis that it is for the parties, and only for them, to determine the content of the cause (principle of party presentation). He then tempered it by mixing into the system "a solid dose of court initiative, which gives the court a significant role in shaping the case and assembling the proof (court prosecution)."⁵² The most unique characteristic of this system is a trial by colloquy between the court and the litigants not unlike the Socratic method of legal education.⁵³

But, notwithstanding the genius of this structure, it has not overcome many of the difficulties outlined in our preceding discussion of theory. The Austrian judge has the unenviable task of feeling his way along the borderline between asking too many or too few questions, or explaining too much or too little. While the colloquy humanizes the hearing and enables the judge to assist a litigant whose lack of skill or resources puts him at an unfair disadvantage, his role is close to the point where the integrity of the adversarial

⁴⁸ Englemann, *supra*, note 42 at 17.

⁴⁹ *Id.* at 18-19.

⁵⁰ *Id.* at 17. The institution of the investigating magistrate has been analyzed in Fuller, (1968) at 38:

The investigating magistrate is thus a kind of quasi judge standing halfway between the prosecutor and the regular court. The danger of the institution lies precisely in this twilight zone of function which it occupies The element of prejudgment involved constitutes a threat to the integrity of the trial in open court; the accused has, in effect, had a kind of half-trial in advance of the real trial, and this half-trial is conducted not before but by a kind of half-judge who acts essentially as an inquisitional court. In those countries where it is a part of the legal system, the role of the investigating magistrate continues to be a subject of debate, and even where it is generally accepted, there is always some lingering concern lest it become the subject of inconspicuous abuse.

⁵¹ Homburger, *supra*, note 42 at 24.

⁵² *Id.* at 25.

⁵³ *Id.* at 26.

process is in jeopardy. There remains this risk of judicial over-involvement in partisan efforts which threatens the integrity of the judicial function. Informed commentators report that the Austrians in seventy-five years of experience, have not been able to define the court's powers clearly for the guidance of the judiciary. They emphasize that a compromise of the judge's impartiality in fact, or at least in appearance, is the greatest single disadvantage of the procedure.⁵⁴

But even if one could report the blissful performance of inquisitorial variants abroad, the unique historical and cultural backgrounds of these countries still raise a presumption against their successful portability to other legal systems.⁵⁵ Thus, I submit that these comparative experiences only affirm our theoretical discussion. The inquisitorial model, in theory and in practice, is unlikely to provide requisite fairness or civil justice. At least this is so in circumstances where the existence and implications of legal standards are unclear; where facts are disputed; where the resolution of conflict entails more than a simple syllogistic exercise.

Yet, unfortunately, this cannot be the end of our inquiry. The performance of the adversary process may be so dismal in practice that inquisitorial alternatives compare well. More precisely, the adversary process must also be put to the test of my second question — how does the procedure perform in practice?

As we all know, it has not been free of significant imperfections.⁵⁶ The one which is material to this essay is the failure of those agencies proceeding by way of adjudication to be sufficiently adversary in their procedure.⁵⁷ This imperfection is one of the most perplexing procedural problems

⁵⁴ *Id.* at 29.

⁵⁵ This notion is developed in Dunlop, *The Industrial Relations System* (Carbondale and Edwardsville: Southern Illinois University Press, 1958, reprinted 1970). See generally, Friedman and Macaulay, *Law and Behavioural Sciences* (Indianapolis: Bobbs-Merrill, 1969), c. 6.

⁵⁶ The Adversary Process has received examination in Auerbach, Garrison, Hunt, Mermain, *The Legal Process: An Introduction to Decision-Making by Judicial, Legislative, Executive and Administrative Agencies* (San Francisco: Chandler Pub. Co., 1961); Levi, *Four Talks on Legal Education*; Frank, *supra*, note 1, *passim*; Wood, *Criminal Lawyer* (New Haven: College and University Press, 1967); Weiler, *supra*, note 13, *passim*; Chambliss and Seidman, *supra*, note 16.

⁵⁷ It is my belief that this is the only important criticism that can be directed at the adversary process and that a number of other attacks are essentially misguided. Let me digress a bit and elucidate this point lest the presence of these other criticisms obscure the merits of my proposal to mobilize the adversary process.

First, it may be that certain kinds of conduct should not be subjected to law and formal regulation by way of adjudication. For instance, it has been argued that certain kinds of domestic disputes and acts of moral turpitude should not be regulated by the criminal process. This is an objection to the presence of law, not an attack on the inadequacies of the adversary process. See Schur, *supra*, note 3; Packer, *The Limits of the Criminal Sanction* (Stanford, Calif.: Stanford University Press, 1968).

Secondly, certain kinds of activities might be better regulated by more expert decision-makers, applying a more accommodative legal framework and hence it is recommended that the regulation of those legal subcultures be taken away from the courts and given to a specialized conflict-resolving institution. Again, this is not an attack on the adversary process but on the content of substantive law and its rigid application by generalists. This happened in the area of labour relations and commercial law. The

new regulatory bodies in labour relations continued to use the adversary process in the light of greater substantive expertise and a more hospitable legal climate. This same process is beginning to happen in the area of landlord and tenant, and consumer law. See *Green Paper on Consumer Product Warranties in Ontario* (1973); Note, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis* (1973), 982 Yale L. J. 1495. In fact, in an area where the new agency adopted a more inquisitorial, paternalistic procedure, substantial difficulties were encountered to the point where the Supreme Court of the United States has imposed a more adversary procedure upon the juvenile court. See *Kent v. United States* (1966), 386 U.S. 541; *Re Application of Gault* (1967), 384 U.S. 997. The court recognized that conflicts in interest are a necessary condition to law and that these conflicts, by definition involve the competing claims of adversaries. See Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, [1965] Wis. L. Rev. 7. Notwithstanding the euphemism of the word treatment, the juvenile court is doing something to children that they would not voluntarily submit to. See Schur, *id.* Thirdly, many of the procedural trappings associated with adversary process have been criticized as time-consuming and expensive. Certain evidentiary requirements of a court of law, its pleadings or time-consuming discoveries, have at one time or another received deserved criticism. But this is not a critique of the adversary process. The adversary process can exist without the formal pleadings, rules of evidence and discoveries as long as the streamlining does not undermine the ability of the parties to investigate and prepare their case.

Fourthly, the standards regulating certain activities may be so vague and amorphous that they are incapable of detailed elaboration over time. If this is so, an advocate cannot predict the agency's response or make a meaningful submission. See Fuller, *Adjudication and the Rule of Law*, *supra*, note 13. The effectiveness of the adversary process is thereby seriously diluted. But this is a criticism of the quality of the legal standards, not of the adversary process. See also, Boyer, *Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic and Social Issues* (1972), 71 Mich. L. Rev. 111. An example of an agency administering such standards is the C.R.T.C. in Canada, or the F.C.C. in the United States. Possibly these agencies should proceed by rule-making after a very broad consultation with affected parties. Another example is the arbitration of wage disputes where the arbitrator's mandate is to effect a just settlement between the parties. There are no meaningful and generally accepted standards for either the adversaries or the adjudicator to use in this determination.

Another misguided attack on the adversary process involves attempts to adjudicate polycentric problems. See Fuller, *id.* An example of a many centered problem is the exercise of establishing a wage rate for a certain job in an industrial plant. The wage of this job is affected by many other jobs within the plant. The parties affected by the decision are literally everyone in the plant. Such a problem is not capable of resolution by legal rules and adjudication. It is best left to the processes of negotiation or managerial discretion.

Finally, my last example which brings us back to a most valid criticism of the adversary process — its failing to be sufficiently adversary — is the criminal courts. Recently it has been argued that defense counsel in the criminal courts conspire with the Crown to the detriment of the accused and that this conspiracy is in some way an indictment of the adversary process.

See Skolnick, *supra*, note 8. This position is often raised in relation to the phenomena of plea bargaining. See also, Blumberg, *The Practice of Law as Confidence Game* (1967), 1 Law & Soc. Rev. 15. I believe there is nothing wrong with plea bargaining as there is nothing wrong with the settlement of civil litigation. What would be objectionable is if these settlements are not in the best interests of the client. If this is so in the criminal courts, it is only because of the defense counsel's dependency on the office of the Crown for cooperation in providing information in future cases. In other words, the adversary nature of the criminal process is diluted because a defense counsel's success in all his cases depends on the cooperation of the Crown. To remedy this imperfection, some commentators have recommended that the right of discovery be instituted in criminal proceedings, thereby eliminating this dependency and revitalizing the adversary process. See Hooper, *Discovery in Criminal Cases* (1972), 50 Can. Bar. Rev. 445; Glaser, *Pretrial Discovery and the Adversary Process* (New York: Russell Sage Foundation, 1968).

for both courts and administrative tribunals alike and it is the most salient imperfection of the adversary process affecting the small claims court.⁵⁸

In very general terms, the adversary process's reliance upon lawyers to represent litigants has created two legal systems within our society.⁵⁹

One legal system, characterized by rationality, services those people who can afford or merit the services of these independent advocates.⁶⁰ And this legal system most closely approximates the civil justice promised by the theoretical underpinnings of the adversary process previously mentioned. Commercial litigation in the High Court is an apt example.

The other legal system governs those people who cannot afford the services of the independent advocates. It is characterized by two salient features which combine to provide not civil justice but what Weber has called *khadi* justice.⁶¹ First, one or both litigants is unrepresented during the adjudication. This is so because legal services are too expensive in relation to either the ability of the parties to pay or to the amount of money involved in the dispute. Secondly, a great number of disputes are presented for adjudication within this legal system because it governs great numbers of people or transactions.⁶² These two features combine to produce a system of routinized decision-making which carries the risk of one of two contrasting pathologies. Either it will be uninformed if the judge remains passive; or potentially biased if the judge assumes an inquisitorial posture.

The small claims court is illustrative. While the minimal filing fees and the limited recovery of court costs have made this agency more accessible to individuals than might otherwise be the case, the decision-making has remained essentially irrational or *khadi*. The number of claims filed in the small claims court of Ontario totalled 168,000 in 1971, whereas during that

⁵⁸ For example, now that various agencies must afford a hearing to individuals, who will represent them at this hearing? — hence the adversary/inquisitorial choice. See McRuer Report, *supra*, note 4, v. 1; *The Civil Rights Statute Law Amendment Act*, 1971, S.O. 1971, v. 2, c. 50; *Goldberg v. Kelly*, *supra*, note 8; *Kent v. United States*, *supra*, note 8; *Re Application of Gault*, *supra*, note 8.

⁵⁹ Shils, trans., Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1954) at 351, also found in Aubert, *supra*, note 46 at 153, and Friedman and McCaulay, *supra*, note 55 at 918. The contemporary setting of this legal system is exhaustively described in Carlin and Howard, *supra*, note 3.

⁶⁰ Edward Shils, trans.: Max Rheinstein, ed., *supra*, note 59 at 351.

⁶¹ *Id. Khadi* — the Moslem judge who sits in the market place and, at least seemingly, renders his decisions without any reference to rules or norms but in which appears to be a completely free evaluation of the particular merits of every single case — used by Weber as a term of art to describe the administration of justice which is oriented not at fixed rules of a formally rational law but at the ethical, religious, political or otherwise expediential postulates of a substantively rational law. *Id.*, at p. 213.

⁶² Another perspective to this volume of business problem can be found in Friedman, *Legal Rules and the Process of Social Change* (1967), 19 *Stan. L. Rev.* 786. See also Sykes, *Cases, Courts and Congestion*, in Nader, ed., *Law in Culture and Society* (Chicago: Aldine Pub. Co., 1969).

same period the number of writs filed in the High Court of Ontario 29,638.⁶³ The implication of assembly line justice is clear.⁶⁴

Unfortunately, a qualitative assessment of Ontario claims has not yet been performed but at least five other studies conducted in jurisdictions not obviously dissimilar to Ontario reveal that the vast majority of these claims are initiated by businesses against unrepresented individuals.⁶⁵ Moreover, the most striking characteristic of these claims is the staggering number of default judgments. All of these studies report a default judgment rate in excess of sixty percent of those claims going to judgment and when certain claims are isolated — for example, debt — the rate exceeds ninety percent.⁶⁶

Professor Caplovitz interviewed a sample of defaulting debtors in three large American cities for 1967 and asked them why they failed to appear in Court in response to the summons.⁶⁷

For Chicago, he reported that fewer than 10% of the debtors said they failed to attend because of admitted liability. In other words, the vast majority claimed that they failed to attend because they thought the action had been discontinued; they thought the debt was settled; they had been sick; they could not afford the loss of a day's wages or they were afraid.

Even if these responses are viewed as self-serving, and Professor Caplovitz reports that in most cases the breakdown of a credit relationship could be traced to some failure of the debtor, he nevertheless concluded that in a substantial minority of the cases the breakdown was due, at least in part, to some failing of the creditor and had the debtors had a trial, they would have escaped judgment.⁶⁸ To Professor Caplovitz, "the concept of 'judgment' is largely a façade for routinized bureaucratic procedures that have nothing at all to do with the actions of officials known as 'judges'."⁶⁹

These studies illustrate that the fear of procedural abuse in small claims courts is not unfounded. Many judges have remained passive and the adversary process, for reasons of economics, is all but non-existent. Once more,

⁶³ Ontario, *Annual Report of the Inspector of Legal Offices* for the years 1970 and 1971.

⁶⁴ For a startling report of this kind of justice before inferior criminal tribunals, see Hann, *supra*, note 3.

⁶⁵ (1) *The Oakland-Piedmont-Emeryville Study*. (Note, *The California Small Claims Court* (1964), 52 Cal. L. Rev. 876.)

- (i) Business and government agencies were plaintiffs in 60% of all claims filed. Individuals were plaintiffs in 35% of all claims filed. Individuals were defendants in 85% of all claims filed. Sixteen organizations accounted for 45% of all claims filed.
- (ii) Of all claims filed, 30% involved the non-payment of goods; 14% involved government services.
- (iii) Of all claims filed, 50% involved amounts of money between \$25 and \$100.
- (iv) Of all claims filed, 65% reached the stage where a judge took some action and this action was taken within 40 days of the date of filing.
- (v) Of those cases going to judgment, the plaintiff was successful in 90% of them.
- (vi) Of those cases going to judgment, only 40% of them were contested.

(2) *The Moulton Study*. (Note, *The Persecution and Intimidation of the Low-income Litigant as Performed by the Small Claims Court in California* (1969), 21 Stan. L. Rev. 1657.)

- (i) Corporations, proprietorships and government agencies were plaintiffs in 78.8% of all claims filed. Individuals were plaintiffs in 16% of all claims filed. Individuals were defendants in 93.3% of all claims filed.
- (ii) Of all claims filed, 46% of them went to judgment.
- (iii) Of all claims going to judgment, the plaintiff was successful in 93.5% of them.
- (iv) Of all claims going to judgment, 73.5% were uncontested.
- (3) *The Alberta Study* (Samuels, *Small Claims Procedure in Alberta*, A Report of the Institute of Law Research and Reform of Alberta, Research Project No. 4 (1969).
- (i) Small businesses were plaintiffs in 45.3% of all claims filed. Individuals were plaintiffs in 24.5% of all claims filed. Finance companies were plaintiffs in 12% of all claims filed. Large department stores were plaintiffs in 9.4% of all claims filed. Individuals were defendants in 78% of all claims filed.
- (ii) Neither party was represented by counsel in 82% of all claims filed. Institutional litigants used counsel in only 25% of their claims.
- (iii) Of all claims filed, 40% of them involved a sum of money less than \$100.
- (iv) Of all claims filed, 40% of them went to judgment. Professor Samuels reported that a large majority of them were *ex parte* or by default.
- (v) Most of the cases were disposed of in 10 weeks from the date of filing.
- (4) *The Manitoba Study* (Gerbrandt, T. Hague and A. Hague, *Preliminary Study of the Small Claims Court Procedure in Manitoba* (October 1972 — unpublished).
- (i) Businesses were plaintiffs in 69% of all claims filed. Individuals were plaintiffs in 31% of all claims filed. Individuals were defendants in 73% of all claims filed.
- (ii) Of all claims filed, 58% involved outstanding accounts; 2% involved consumer complaints.
- (iii) The percentage of cases going to judgment was unreported; however, 17.3% of all claims filed ended in default judgment.
- (iv) Neither party was represented by counsel in 84.3% of all claims filed.
- (v) Of all claims going to judgment, 72.2% were heard within 5 to 6 weeks.
- (5) David Caplovitz, *supra*, note 16, c. 11-36. It should be noted that this was not a study of small claims court but I believe the statistics are portable.

*Reasons for Not Appearing in Court in
Response to the Summons, by City*

	Chicago	Detroit	New York
1. Tried to settle and thought court action was discontinued	33%	28%	21%
2. Advised not to go to court by plaintiff's attorney or own attorney or case being handled by some professional	13	13	9
3. Thought debt settled and did not owe more money	5	6	10
4. Unable to go; sick or could not afford loss of day's pay	16	8	12
5. No particular reason; forgot	10	14	11
6. Couldn't pay; no defense	7	14	8
7. Received summons too late to go to court	4	3	3
8. Did not know that he was supposed to go to court	3]] 4%	6]] 7%	15]] 19%
9. Afraid to go to court	1]	1]	4]
Total per cent*	92%	93%	93%

* The percentages do not total 100 because we have omitted a miscellaneous category as well as the "no answer" cases.

⁶⁶ See Caplovitz, *supra*, note 16, c. 11-67.

⁶⁷ *Id.*, c. 11-36.

⁶⁸ *Id.*, c. 11-64 and c. 12.

⁶⁹ *Id.*, c. 11-64.

this data establishes the relevance of our two procedural choices and a brief overview of attempted and proposed reforms will illustrate, with some ambivalence, society's drift towards inquisition in this area.

In general, numerous arrangements have been instituted in an effort to make adjudicative proceedings more truly adversarial.⁷⁰ At first, the poor did not have to pay for the King's writ and, later, the *in forma pauperis* procedure provided impecunious litigants with legal representation without charge. Today, we are familiar with a variety of legal aid schemes, group legal services, prepaid legal services or insurance, class actions and community law offices.⁷¹ They evidence an increasing societal concern in bringing the legal technocracy down to people who cannot otherwise afford it.⁷²

And because of the value ascribed to individual freedom and the stigma associated with the criminal law, public assistance has been more readily forthcoming in that area. But in other matters, where incarceration is not at issue and the outcome is expressed in terms of mere dollars and cents, public assistance is discretionary with only a partial application of legal aid schemes.⁷³ The decision-making has remained essentially *khadi*.

It is in these contexts that reforms have drifted toward inquisitorial dispute resolution notwithstanding that model's relationship to civil justice. Let me return to the small claims court to examine this trend.

Virtually all such courts discourage any form of traditional representation either through limited cost recovery provisions or by completely prohibiting the presence of lawyers or agents.⁷⁴ The proponents of these early reforms intended small claims court judges to assume an inquisitorial posture

⁷⁰ Abel-Smith and Stevens, *Lawyers and the Courts* (London: Heineman, 1967) at 135 and 315.

⁷¹ See Handler, *supra*, note 3; Carlin, Howard and Messinger, *supra*, note 2; Carlin and Howard, *supra*, note 3; Wald, *supra*, note 2; Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility* (1967-68), 35 U. of Chi. L. Rev. 417; Bortosic and Bernstein, *Group Legal Services as a Fringe Benefit: Lawyers for Forgotten Clients Through Collective Bargaining* (1973), 59 Va. L. Rev. 410; Brakel, *Free Legal Services for the Poor — Staffed Office versus Judicare: The Client's Evaluation*, [1973] Wis. L. Rev. 532; Evans, *The Legal Aid Trade* (1973), 11 Alta. L. Rev. 65; Cahn and Cahn, *What Price Justice: The Civilian Perspective Revisited* (1965-66), 41 Notre Dame Law 927. And see "Legal Advice and Assistance Program" proposed by The Law Society of Upper Canada, *Report on Community Legal Services* (1972) at 33.

⁷² Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and Organized Bar* (1965), 12 U.C.L.A. L. Rev. 438; Christensen, *Lawyers for People of Modest Means* (Chicago: A.B.F., 1970).

⁷³ *The Legal Aid Act*, R.S.O. 1970, c. 239, s. 13. Notes, *Indigent Access to Civil Courts: The Tiger is at the Gates* (1973), 26 Vand. L. Rev. 25. Note, *The Right to Counsel in Civil Litigation* (1966), 66 Colum. L. Rev. 1322; Note, *The Indigent's Right to Counsel in Civil Cases* (1966-67), 76 Yale L.J. 545; Maguire, *Poverty and Civil Litigation* (1922-23), 36 Harv. L. Rev. 361.

⁷⁴ Institute of Judicial Administration, *Small Claims Courts in the United States — 1959 Supplement* (New York: 1959); Note, *Small Claims Court: Reform Revisited* (1969), 5 Col. J. of Law and Soc. Prob. 47.

but they failed to prescribe this explicitly. One of the most influential, Roscoe Pound, reflects this intention in writing:⁷⁵

In the higher courts, lawyers of experience on each side will be watchful to see that the claims of the parties are well presented, that the court is fully informed, and that justice is done so far as skillful advocacy may secure it. In petty cases there ought to be no expensive advocacy. One side or the other, unless the game of litigation is played for pure pleasure, cannot afford it. The court, therefore, has no assistance, or no adequate assistance. Hence the judge cannot be a mere umpire. He must actively seek the truth and the law, largely if not wholly unaided. The lay vision of every man his own lawyer has been shown by all experience to be an illusion. The other extreme, a professional lawyer for every man, has no place in petty litigation. The alternative is a judge who represents both parties and the law, and a procedure which will permit him to do so effectively. No doubt he should have assistance in the way of clerks, who may save valuable judicial time by showing parties how to present their respective claims. At any rate our first concern in a people's court is a procedure that will help parties assert and secure their rights, and to get away from the involved and overmechanical procedure which has become in so many jurisdictions a means afforded each party of hindering the other in his search for justice.

Today, the preceding statistics question the efficacy of these reforms standing alone. Commentators have concluded that the court has been turned against its intended beneficiaries. And, in consequence of this, a few reformists have recently recommended that the volume of claims be reduced by eliminating certain kinds of claims and that a more formalized and paternalistic form of inquisition be specifically instituted. The proposal of Professor Ison and the recent small claims court legislation of Quebec are representative of this procedural choice.⁷⁶ In light of our discourse considering the requirements of civil justice, can these reforms be supported?

Professor Ison proposes that the investigational role of the judge be openly declared and that this role be conducted on an informal, consultative basis at the convenience of the parties. In this regard he states:⁷⁷

Described by comparison with existing institutions the *modus operandi* of a small claims judge should approximate more closely to that of a police detective or an inspector of weights and measures than to that of a High Court judge.

and because lawyers and other agents would be superfluous, he recommends that their attendance be prohibited.⁷⁸ Once a claim is submitted, the judge

⁷⁵ Pound, *The Administration of Justice in the Modern City* (1912-13), 26 Harv. L. Rev. 302 at 319.

⁷⁶ Ison, *Small Claims* (1972), 35 Mod. L. Rev. 18; (Quebec) *The Code of Civil Procedure*, S.O. 1971, c. 86. See also, Note, *Resort to the Legal Process in Collecting Debts* (1967), 14 U.C.L.A. L. Rev. 879; Note, *Small Claims Courts as Collection Agencies* (1951), 4 Stan. L. Rev. 237; Comment, *Small Claims Courts and the Poor* (1969), 42 So. Cal. L. Rev. 493; Note, *California Small Claims Court* (1964), 52 Cal. L. Rev. 876; Note, *The Persecution and Intimidation of the Low Income Litigant* (1969), 21 Stan. L. Rev. 1657.

For the purposes of this essay, I have considered Professor Ison's proposal and the Quebec legislation to be related. This is because both proposals support a formalized inquisitorial approach to small monetary claims. I recognize that Professor Ison's proposal is made in relation to Britain; but he is aware of, and considered, the American and Canadian procedures in making his recommendation.

⁷⁷ Ison, *supra*, note 76 at 28.

⁷⁸ *Id.* at 32.

would begin his investigation. Default judgments would not occur because the judge would contact the defendant in all cases to get "his side of the story".

Professor Ison admits that this would not be workable with the present volume of claims and consequently he recommends the abolition of all debt claims arising out of retail transactions.⁷⁹ This reform would permit sufficient time to be devoted to the investigation and resolution of the residual. And, in his opinion, such a step is justifiable on substantive grounds as well; on the grounds that the present conveyor belt system of default judgments only promotes many abuses in marketing. The large number of claims initiated by businesses against individuals leads him to believe that many of these claims must involve fraud, high-pressure techniques, and the deliberate sale of defective goods.⁸⁰ Without enforcement, these techniques, he argues, would be rendered unprofitable. Moreover, the prohibition would discourage retailers from extending credit to poor credit risks, thereby reducing consumer insolvency. In consequence of this, retailers would be limited to their self-help remedy of repossession.

Paralleling Ison's proposal, the Province of Quebec has passed legislation which formally recognizes the inquisitorial role of the judge and prohibits the presence of agents or advocates.⁸¹ The judge is given carriage of the action at the hearing and is authorized to elicit evidence by questioning the affected parties.⁸² But, unlike Professor Ison's proposals, the judge does not investigate the claim prior to the hearing, and consequently the hearing is his sole opportunity to grasp the detail of the dispute. Furthermore, a judge is also encouraged to attempt a reconciliation of the parties when this is possible;⁸³ notably a provision which encounters the difficulties of mixed institutional forms previously described.

It is significant that neither of these proposals adverts to the inherent costs of inquisitorial decision-making nor justifies why the great number of people affected by small monetary claims must submit to an arbitrary and paternalistic form of dispute resolution. Admittedly, the proposals may represent an improvement over the present state of informal and poorly structured inquisition, but this is a very limited claim of success. Inquisitions do not provide civil justice. Are we to assume that the costs of alternative schemes were evaluated and that this compromise reflects the procedural priority assigned to small claims? Surely, if this kind of inquisition is to be effective it will require a large bureaucracy to assist the inquisitor in investigating the great volume of disputes. Would this not involve a substantial expense?

The Quebec structure presumes that the parties will be sufficiently prepared to answer the questions of the jury, a dubious presumption at best, and

⁷⁹ *Id.* at 24. For an example of a prohibition against particular claims, see *The Limitation of Civil Rights Act*, R.S.S. 1965, c. 103, s. 18.

⁸⁰ Ison, *supra*, note 76 at 24.

⁸¹ (Quebec), *The Code of Civil Procedure*, S.Q. 1971, c. 86, s. 976 and s. 955. For a critique of this court see Shulman, *Bill 70 — Comparative Legislation, Analysis and Comment* (1973), 33 *La Revue du Barreau* 145.

⁸² (Quebec), *The Code of Civil Procedure*, S.Q. 1971, c. 86, s. 976.

⁸³ (Quebec), *The Code of Civil Procedure*, S.Q. 1971, c. 86, s. 975.

Professor Ison circumvents the expense of a bureaucracy the way a repeal of welfare legislation would eliminate welfare abuses.

Not only is the allegation that the present system reinforces market abuses is pure speculation but more importantly, his recommendation would not eliminate the market abuses. They would merely continue outside the judicial system. It is unlikely that credit would be denied to low-income consumers, but the interest rates would be increased to cover the new cost of doing business. Moreover, repossession as an exclusive remedy might give rise to even greater injustice familiar to anyone who has experienced the intrusion and abrasiveness of this self-help remedy. And while the repossessions might be regulated to insure that sufficient grounds first exist, this would require the bureaucracy that Professor Ison seeks to avoid.

We must be candid. These reforms are attempts to implement substantive goals through procedural reform, and they end up doing an injustice to both. They erroneously presume small claims courts were intended to be a forum for the exclusive use of low-income litigants or the poor.⁸⁴ In actual fact, they were created to resolve the small monetary disputes of all plaintiffs and defendants, particularly the merchant and the common working man.⁸⁵

The preceding discussion of theory suggests that the adversary process possesses a much greater potential for achieving civil justice. This should lead to the presumption that formalized inquisition, no matter how benevolent, is to be preferred only if the costs of a more adversarial small claims court procedure are excessive — excessive in light of other social priorities.

It is in the light of this presumption that I propose a reform in marked contrast to paternalistic inquiry. It is a proposal that attempts to revive the intrinsic values of the adversary process for the small claims court.

The adversary process is absent in this court because professional advocates cannot afford to service it. Because of economics, the present organizational structure of the legal profession is inappropriate to serving causes which cannot bear standard legal fees. Policy-makers must recognize how pervasive this problem is.

Ontario has just experienced a tremendous breadth of reform requiring administrative tribunals to provide hearings in the course of making determinations that had heretofore been considered administrative-type decisions. Many of these tribunals affect vast numbers of people in administering legal claims that involve relatively small amounts of money. It is my submission that these hearings, paralleling the trend in the small claims courts, will be

⁸⁴ Riddell, *The Bar and the Courts of Upper Canada or Ontario* (Toronto: MacMillan, 1928) at 82. See generally Holdsworth, *The History of English Law* (London: Methuen and Co., 1927) v. 1 at 64 and 412-13; Pluncknett, *A Concise History of the Common Law* (London: Butterworth and Co., 1940) at 97; A.V., *The Law and Practice of Upper Canada* (1861), 7 U.C.L.J. (O.S.) 34. See also Dawson, *A History of Lay Judges* (Cambridge, Mass: Harvard University Press, 1960) and Abel-Smith and Stevens, *supra*, note 70.

⁸⁵ Pound, *The Administration of Justice in the Modern City* (1912-13), 26 Harv. L. Rev. 302 at 315.

neglected by the professional advocates and will evolve into inquisitorial determinations.

The public permits the legal profession to hold a monopoly on the delivery of legal services because it is in the public's long-run interest to have independent advocates available. This rationale does not apply to these areas of human conflict that the profession has chosen not to service. The profession has made a rational economic choice, but, in so doing, it should not now stand in the way of creative attempts to service these areas by institutional forms that look radically untraditional and, to their way of thinking, unprofessional. Through tradition and economics it must be recognized that the lawyers have abdicated their role as the principal administrators of the adversary process and, as a consequence, its mobilization will be without their assistance.

Two informed observers have argued that society must make justice under law a product for mass consumption.⁸⁶ With this I wholeheartedly agree. Moreover, I submit that the adversary process, so critical in providing civil justice, can be adapted to accord with their admonition. The key to its adaptation resides in the use of lay advocates and paralegal personnel.⁸⁷ The mobilization of the adversary process depends upon their substantial involvement in the administration of legal rules.

The profession has no monopoly over common sense, and no monopoly over both the ability to perceive injustices and the skills of communication. Moreover, we have not begun to explore ways of sharpening these attributes in individuals. Whether we rely upon community colleges, on-the-job training, or combinations of both, the potential is vast, as evidenced by the successful use of lay personnel in medicine.⁸⁸ Similarly, anyone familiar with the negotiation and administration of collective bargaining agreements can attest to the viability of laymen administering legal systems by way of an adversary process. Likewise, just consider the number of legal services that are now executed by lay personnel. Real estate companies, title searchers, insurance claim adjusters, collection agencies, and trust and probate services are representative.

It is with this vast potential in mind that I propose the creation of separate plaintiff and defendant offices for each small claims court.⁸⁹ These

⁸⁶ Cahn and Cahn, *What Price Justice: The Civilian Perspective Revisited* (1965-66), 41 *Notre Dame Law* 927 at 937.

⁸⁷ *Id.*; *Symposium on Legal Paraprofessionals* (1971), 24 *Vand. L. Rev.* 1077.

⁸⁸ Statsky, *The Education of Legal Paraprofessionals: Myths, Realities, and Opportunities* (1973), 24 *Vand. L. Rev.* 1083. Louis Brown reports that in 1966, doctors of medicine constituted less than 10% of all personnel employed in health and medical services. Brown, *Preventive Law and the Legal Assistant* (1973), 24 *Vand. L. Rev.* 1181. Whereas, by comparison, lawyers today probably make up over 50% of those involved in the legal profession. Holme, *Paralegals and Sublegals: Aids to the Legal Profession* (1969), 46 *Denver L. J.* 392, 404.

⁸⁹ For a similar proposal made in regard to the juvenile court, see Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, [1965] *Wis. L. Rev.* 7, but *cf.* Handler, *Controlling Official Behaviour in Welfare Administration* (1966), 54 *Cal. L. Rev.* 479.

offices would be manned by lay personnel, but possibly supervised by a lawyer. In the cities with law schools, clinical training programs might be structured around these offices.

Individuals would be able to seek advice and assistance in relation to any legal claim for a very modest fee. Businesses would not be able to avail themselves of this mechanism, but would have to deal with the appropriate office when involved in a claim. In effect, these offices would provide a community grievance system.

For example, an individual could attend at, or phone, the plaintiff's office in his neighbourhood to outline his grievance. The office would assess the nature of his claim, advise him of its merits, and formulate the most feasible course of action he should pursue. If need be, the defendant's office would then be contacted and this office would approach the defendant. The defendant's office would assist the defendant in replying to the claim, either by negotiating a settlement that was in his interest or by representing him during its adjudication.

It is my belief that this proposal would eliminate the vast majority of those claims now going to judgment. It would establish a dispute-resolving climate not unlike that existing in other commercial contexts. In this regard, Professor Caplovitz has noted that the severity of a dispute between individuals in a small claims court is in no small part due to the absence of communication between them, and their failure to know each other in the same way that business firms that have dealt with each other for long periods of time come to know and to depend on each other.⁹⁰ I visualize the relationship between businesses and these plaintiff and defendant offices as providing a stable communication system within the community — again a function not unlike that performed by the grievance process administering a collective agreement. And, as in these other systems, the vast majority of claims will be amicably settled without the need for a formal hearing.

Nevertheless, should a settlement fail to materialize, a hearing must be held at a time and place convenient to individuals. This hearing should be similar to the procedural informality of grievance arbitration in labour or commercial matters. The judges or hearing officers, full-time or part-time officials, should be able to accept any oral or written evidence they consider proper, whether admissible in a court of law or not. This informality will eliminate procedural delay, maximize the efficiency of the lay advocates and ensure the psychological comfort of affected individuals — That, in sum, is my proposal.⁹¹

I only want to say and emphasize in conclusion that if law is not to die a slow death, civil justice must be mobilized.⁹² It has not been my purpose to minimize the expense involved or to deny the existence of other equally

⁹⁰ Caplovitz, *supra*, note 16, c. 15-16. See also, Caplovitz, *The Poor Pay More* (New York: Free Press of Glencoe, 1967).

⁹¹ Of course, no one reform is going to usher in the millenium — and mine is no different.

⁹² See generally, Black, *The Mobilization of Law* (1973), 2 J. of Leg. Studies 125.

compelling social priorities. Rather, if we are serious about reform, in this area, I have attempted to construct an argument for why this mobilization should be on an adversary basis.

I fear that there has been a growing tendency to overlook both the fact that all variables of human conflict involve differences between adversaries and that one principal justification of participatory democracy assumes this conflict will be more fairly and successfully resolved if they the adversaries participate in the decision making. Accordingly, without a systematic inquiry, I submit that this trend towards inquisition appears more the product of a class bias than of an egalitarian concern.