

Criticism & Defense of the Adversary System

- Pace of Adjudication
- Discovery of the Material Truth
- Access to the Courts
- Power of the Attorney
- Jury System

Pace of Adjudication

Criticism:

- Parties take too long to present evidence.
- J should have power to accelerate proceedings.
- Jury selection & instructions slow proceedings.

Defense:

- The slow pace allows for careful deliberation.
- The slow pace due in part to **party control** (benefits truth-finding, sense of control, lower impositional costs).
- J's inability to accelerate proceedings is an aspect of **passivity** (avoid appearance of partiality).

Discovery of Material Truth

Criticism:

- Party control of evidence gathering & presentation means that the decision maker will hear only the evidence the parties want to present.
- Party control of discovery allows for “fishing expeditions.”

Defense:

- Party control has above-mentioned benefits.
- “Fishing” should be allowed.

Discovery of Material Truth (cont'd)

Criticism:

- Party coaching of witnesses distorts the truth.

Defense:

- Subornation of perjury is illegal.
- Admittedly, Ls have a subtle impact on witness testimony. The negative impact of this may be outweighed by the value of information gathered through zealous investigation.

Discovery of Material Truth (cont'd)

Criticism:

- Rules requiring lawyers' zealous advocacy & client loyalty do so at cost to the search for truth.

Defense:

- Since Ls are just advocates for their clients, these costs are inherent in **party control**.
- If Ls were required to act on behalf of ct in seeking truth, it could discourage party candor, cooperation, & trust in L.
- There are some limits to zealousness, including the rules against aiding in the commission of a crime or fraud.

Discovery of Material Truth (cont'd)

Criticism:

- The rules of evidence prohibit a wide range of info from being presented to the fact finder, undermining the search for truth:

Defense:

- Rules preserve **party control** by controlling J's power to choose what evidence to admit.
- Rules protect the **neutrality** of fact finder by insulating him from info that is misleading or could evoke bias.

Access to the Courts

Criticism:

- Party control of gathering & presenting evidence is technical, requiring L. Only wealthy can afford justice.

Defense:

- This failing of the adversary system is undeniable. Compare to the inquisitorial system, where both parties get the same fact gatherer—the judge.
- Inquisitorial system may have greater **impositional costs**: J may be unwilling to pursue claim against gov't.

Access to the Courts (cont'd)

Defense (cont'd):

The adversarial system can increase access to the courts by low income people through:

1. Public defender: Indigent criminal def who faces the prospect of jail has a right to a lawyer at gov't expense.
2. Contingency fee
3. Legal Services Corporation
4. Class actions
5. *Pro bono* work
6. Attorney fee shifting provisions

Power of the Attorney

Criticism:

- L may dominate the process, reducing parties' sense of control and creating “**impositional costs**.”

Defense:

- Rules of ethics require L to allow clt to make certain decisions (e.g., in criminal case, whether to plead guilty, whether to testify, whether to accept a settlement offer).
- The potential of a malpractice claim allows clts to control Ls.

Constitutional Recognition of Adversarial Procedures

1. Article III: Federal Js hold office for life (unless impeached) & their pay cannot be decreased. This promotes independence from other branches.
2. Article III and Sixth amendment: Create the right to trial by jury in criminal cases.
3. Sixth Amendment: Allows accused in criminal case “to be confronted with the Witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”
4. Seventh Amendment: Preserves the common law’s right to jury trials in civil cases and specifies that “no fact tried by jury, shall be otherwise re-examined in any Court.”

Nonadversarial Reforms

The U.S. has abandoned adversarial techniques in several settings. For example:

1. Limits on courts' subject matter jurisdiction: e.g., workers' compensation boards.
2. Judges are encouraged to take an active role in settling cases, including rendering opinions regarding issues not yet litigated.
3. Judges have been ceded power to question and call witnesses.

Jury System

Criticisms:

- Adjudication takes longer (\$).
- Abilities of juries as decision makers. (Would J be less biased, more expert in deciding Qs of fact?).

Defenses

- Protect against tyranny.
- Value of civic participation.
- Help protect Js' independence.