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Rethinking Adversariness in Nonjury Criminal Trials

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Rethinking Adversariness in Nonjury Criminal Trials[†]

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Table of Contents

I.	Introduction	3
II.	The Criminal Bench Trial	8
	<i>A. Nonjury Criminal Trials in the United States</i>	8
	<i>B. Diplock Trials in Northern Ireland</i>	11
III.	Conceptual Framework: Adversarial v. Inquisitorial Processes	13
	<i>A. Adversarial and Inquisitorial Models of Criminal Adjudication</i>	13
	1. <i>The Contest Model of Proof</i>	15
	2. <i>The Inquest Model of Proof</i>	18
	<i>B. Adversariness Within the Anglo-American Criminal Process</i>	22
IV.	The Nonjury Context	25
V.	Maintaining Adversariness in Bench Trials Through (More or Less) Traditional Means	30
	<i>A. Enforcing the Rules of Evidence</i>	30
	<i>B. Minimization of Taint</i>	34
	<i>C. Encouraging Judicial Fact-Finders to Adopt a Position of Relative Passivity</i>	37
VI.	The Reasoned Judgment and Beyond	44
	<i>A. Importance of the Reasoned Judgment in Bench Trials</i>	44
	<i>B. Limitations of the Reasoned Judgment</i>	47
	1. <i>Appealability</i>	49
	2. <i>Jury Instructions</i>	50
	3. <i>Threats to Adversarial Protection</i>	53
	<i>C. Toward an Adversarial Process of Judgment</i>	54
VII.	Conclusion	57

This Article argues that when the jury is withdrawn from the common-law criminal trial, the accused suffers an adversarial deficit. This deficit occurs because many of the procedural devices built into the trial process—particularly those designed to provide the defendant with a meaningful opportunity to contest the case against him and to ensure that any determination of guilt is based solely on the evidence adduced in the courtroom—are predicated on the existence of a decision-making body that

comes "cold" to the contest, devoid of extraneous knowledge concerning the facts of the case or the relevant principles of law. The authors contend that a number of important changes must be made to procedures in nonjury cases to correct for this deficit and thus to make certain that basic adversary principles are preserved in the nonjury setting.

I. Introduction

It is a curious quirk of legal scholarship that so much attention has been devoted to the rules and procedures in jury trials, and so little has been devoted to the way these rules and procedures operate in the vast majority of trials that are conducted without a jury. This "jury-centeredness," as it has been called,¹ was noted more than thirty years ago by the American scholar Kenneth Culp Davis when he urged scholars and the legal profession to escape from thinking about evidence law as dominated by the needs of the three percent of trials that involve juries, and to think instead about the needs of the remaining ninety-seven percent of trials that are tried without a jury.² It is certainly true that the withdrawal of the jury from many categories of cases throughout this century has not been accompanied by any instant changes in the law of evidence.³ Certain commentators have noted that, in spite of James B. Thayer's claim that the rules are the "child of the jury system,"⁴ the rules of evidence have proved remarkably resilient in outlasting the decline and, in some cases, complete demise of the jury.⁵ The parent may have ceased to exist in many legal proceedings, but the child has lived on.

In recent years, however, in some common-law jurisdictions where the

1. William L. Twining, *Identification and Misidentification in Legal Processes: Redefining the Problem*, in *EVALUATING WITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND NEW PERSPECTIVES* 255, 260 (Sally M. Lloyd-Bostock & Brian R. Clifford eds., 1983).

2. Kenneth Culp Davis, *An Approach to Rules of Evidence for Non Jury Cases*, 50 *A.B.A. J.* 723, 725 (1964). The point is not a new one. See *Anonymous Letter to the Harvard Law Review*, 36 *HARV. L. REV.* 193, 193 (1922) (stating that four-fifths of litigation is tried before the court rather than a jury, resulting in "the tail wagging the dog" where the application of evidentiary law is involved).

3. Marcus Stone, *The Decline of Jury Trial and the Law of Evidence*, 3 *RES JUDICATAE* 144, 145 (1947) (Eng.); A. Leo Levin & Harold K. Cohen, *The Exclusionary Rules in NonJury Criminal Cases*, 119 *U. PA. L. REV.* 905, 905 (1971).

4. JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 266, 509 (1898).

5. Cf. 1 JOHN H. WIGMORE, *EVIDENCE* § 4d.1, at 228-29 (Peter Tillers rev., 1983) (explaining the expansion of relevancy principles and the moderation of the exclusionary force of nonconstitutional exclusionary rules in bench trials).

civil jury trial has all but disappeared, there have been signs of the kind of rethinking advocated by Professor Davis. In England and Wales, for example, recently enacted provisions relaxing the hearsay rule and requiring the compulsory exchange of witness statements prior to trial have shifted attention away from rules of evidence at trial toward regulation of the pretrial discovery process.⁶ These provisions have been accompanied by other changes designed to reduce comprehensive party control over the presentation of evidence and increase court involvement in every aspect of the litigation.⁷ The effect has been a striking change in the character of the English civil trial, as papers delivered at a recent seminar on dispute resolution made clear.⁸ Without doubt, the decline of the jury in English civil procedure⁹ made these changes possible.¹⁰ As long as the jury remains a fixture of the adjudicatory process, trials must maintain their continuous and oral nature.¹¹ These features become less imperative

6. See Civil Evidence Act, 1968, ch. 64, § 2 (Eng.) (allowing any hearsay to be "admissible as evidence of any fact stated therein of which direct oral evidence [by the speaker] would be admissible"), § 4 (allowing the admission of business records, § 5 (allowing the admission of computer records); R. SUP. CT., Ord. 38, rr. 21-24 (Eng.) (requiring a party who wishes to enter evidence admissible under the Civil Evidence Act §§ 2, 4, or 5 to serve notice to the other parties before trial), amended by R.S.C. (Amendment) 1969 (S.I. 1969 No. 1105) and by R.S.C. (Amendment No. 4) 1979 (S.I. 1979 No. 1542); see also LAW COMMISSION, THE HEARSAY RULE IN CIVIL PROCEEDINGS, 1993, CMND 2321, at 44-45 (calling for the complete abolition of the rule against hearsay in civil cases); Civil Evidence Act (1988) (Scot.) (abolishing the hearsay rule completely in Scottish civil proceedings).

7. See generally Cyril Glasser, *Civil Procedure and the Lawyers—The Adversary System and the Decline of the Orality Principle*, 56 MOD. L. REV. 307 (1993) (discussing the need for realizing the dominance of adversarial parties in controlling civil proceedings in an increasingly complex society).

8. The seminar, entitled "The W.G. Hart Legal Workshop on Dispute Resolution: Civil Justice and its Alternatives," took place in London at the Institute of Advanced Legal Studies in July 1992. The papers delivered at the seminar were published in 56 MOD. L. REV. 277 (1993). One contributor noted that the two striking features of the English trial, "its climactic nature as a drama played out in continuous session" and "the extent to which the proceedings are oral," have each undergone substantial change. Sir Leonard H. Hoffmann, *Changing Perspectives on Civil Litigation*, 56 MOD. L. REV. 297, 304 (1993).

9. The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, ch. 36, § 6 (Eng.), provides for a jury trial in civil actions involving libel, slander, malicious prosecution, seduction, or breach of promise of marriage, on the application of any party. In all other civil cases, the grant of a jury is at the discretion of the court. *Id.* In the leading case of *Ward v. James*, 1 Q.B. 273, 280 (1966) (Eng. C.A.), the Court of Appeal ruled that in actions for damages for personal injuries, trial is by judge alone.

10. See SIR JACK I.H. JACOBS, *THE FABRIC OF ENGLISH CIVIL JUSTICE* 266, 266 (1987) (noting that, because trial by jury is no longer considered to be the ideal mode of civil adjudication in much of the common-law world, there has been a willingness to challenge the necessity for the rules of evidence in this context).

11. *But see* Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37, 43 (1992)

when the jury is withdrawn.¹²

No such rethinking has taken place with respect to criminal trials without a jury. The obvious explanation for this phenomenon is that the jury trial is still viewed as the central feature of postarrest criminal procedure in common-law jurisdictions.¹³ Moreover, when scholars do take notice of the fact that this paradigm event never takes place in the vast majority of criminal cases, they usually turn their attention to the subject of plea bargaining.¹⁴ As a result, the routine use of nonjury trials in criminal cases has gone almost unremarked.

In fact, during the last half of the twentieth century, there has been a marked increase in criminal bench trials in common-law jurisdictions around the globe. In the United States, for example, where felony defendants have a constitutional right to trial by jury,¹⁵ routine use has been made of procedures that encourage defendants to waive this right and elect a bench trial instead.¹⁶ In other countries, where no such constitu-

("One could design a system in which a jury met at intervals, perhaps one day a month, to hear proceedings in the same case, and jurors, like judges, could study the documents and transcripts generated at one hearing in a case to prepare for the next hearing.").

12. See Mirjan R. Damaska, *Atomistic and Holistic Evaluation of Evidence*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF JOHN MERRYMAN 90* (David S. Clark ed., 1990) [hereinafter Damaska, *Atomistic and Holistic*] (differentiating between the holistic treatment of evidence in Continental legal culture and the atomistic approach in Anglo-American jurisdictions); Mirjan R. Damaska, *Hearsay Analogues*, 76 *MINN. L. REV.* 425, 429 (1992) [hereinafter Damaska, *Hearsay Analogues*] (noting that practical difficulties in reconvening lead to the exclusion of hearsay evidence).

13. Recommendations to curtail jury trials in criminal cases continue to encounter strong opposition. In England and Wales, the Royal Commission on Criminal Justice's recommendation that the defendant's right to elect a jury trial should be abolished was instantly criticized by senior members of the legal establishment when the Commission's report was published in July 1993. Gerry Maher, *Reforming the Criminal Process: A Scottish Perspective*, in *CRIMINAL JUSTICE IN CRISIS 59* (Michael McConville & Lee Bridges eds., 1994).

14. See, e.g., MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978) (examining the adaptation of attorneys and judges to the plea bargaining system); *PLEA BARGAINING* (William F. McDonald & James A. Cramer eds., 1980) (comparing plea bargaining in the United States and Britain); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. CHI. L. REV.* 931 (1983) (explaining defects in the plea bargaining system); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 *U. ILL. L. REV.* 37 (arguing that plea bargains are coercive); Welsh S. White, *A Proposal for the Reform of the Plea Bargaining Process*, 119 *U. PA. L. REV.* 439 (1971) (arguing that prosecutors should reform plea bargaining procedures because courts have failed to exercise judicial control over the processes).

15. U.S. CONST. amend. VI; see *infra* note 24 and accompanying text.

16. See MARVIN A. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* 80, 80 (1977) ("Defendants in Pittsburgh are discouraged from pleading not-guilty and requesting a jury trial by the severity of visiting judges . . ."); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 *HARV. L. REV.* 1037, 1062 (1984) (noting that high bench trial rates in the

tional right exists, there has been an increasing tendency to categorize offenses as suitable for nonjury, and often summary, trial.¹⁷ In addition, some countries have suspended trial by jury because certain exigencies require its abandonment in particular categories of cases. Cases connected with the emergency situation in Northern Ireland, for instance, are dealt with by a judge sitting alone in so-called Diplock courts,¹⁸ while in the Republic of Ireland, trials with a terrorist connection are handled by the Special Criminal Court presided over by at least three judges.¹⁹ One common-law country, Israel, has never offered criminal defendants the right to a jury trial under any circumstances.²⁰

This is not to say that the rules of evidence governing criminal cases have remained completely stagnant in the common-law world. To the contrary, in recent years a number of common-law countries have enacted significant changes in this area of the law.²¹ But where there has been an alteration or relaxation of the rules of evidence in criminal cases, it has occurred in both jury and nonjury trials. It has not been suggested that there are special considerations warranting formal change in one context but not the other.

Thirty years later on, then, Davis's plea for greater focus on determining the rules of evidence and procedure that would be best suited for nonjury trials remains especially apposite for nonjury criminal trials. Indeed, given the shift in emphasis away from the oral adversarial trial that has occurred in English civil cases, it may be that attention ultimately

Philadelphia Common Pleas Court result from the willingness of judges to give reduced sentences in exchange for a jury waiver); White, *supra* note 14, at 441-42 (exposing that statistics recorded as "waivers" are misleading because the cases are more accurately characterized as "slow pleas of guilty").

17. In England, for example, the ability of defendants to opt for trial by jury has been eroded since the James Report in 1975 recommended that a number of offenses be transferred to the sole jurisdiction of magistrates. See INTERDEPARTMENTAL COMMITTEE ON CRIMINAL BUSINESS BETWEEN THE CROWN COURT AND THE MAGISTRATES' COURT, 1975, CMND 6323, at 121-25 (adding motor vehicle theft to the list of offenses to be tried summarily without a jury); Criminal Law Act, 1977, ch. 45, § 15 (Eng.) (requiring that certain listed offenses "be triable only summarily" or without a jury); Criminal Justice Act, 1988, ch. 33, §§ 37, 39 (Eng.) (setting out the main conclusions and recommendations of the Committee chaired by Right Honorable Lord Justice James).

18. The name derives from the commission chaired by Lord Diplock in 1972, which proposed the adoption of this mode of trial. See *infra* notes 49-53 and accompanying text.

19. CLIVE WALKER & GERARD HOGAN, *POLITICAL VIOLENCE AND THE LAW IN IRELAND* 227 (1989).

20. Eliahu Haron & Alex Stein, *Reform Movements in Criminal Procedure and the Protection of Human Rights*, 64 INT'L REV. PENAL L. 1177, 1184 (1992).

21. See Criminal Justice Act, 1988, ch. 33 (Eng.) (showing recent changes in England); Andrew L.T. Choo, *Reform of Evidence Law in Australia*, 1993 CRIM. L. REV. 268 (describing reforms of the hearsay rule and the rule of corroboration in Australia).

needs to be focused on pretrial and appellate procedures in criminal cases as well. The jury system, for example, has long been thought to militate against any effective appellate review of verdicts on grounds of fact.²² Arguably, appellate courts should be prepared to take a more active role in reviewing judicial findings of fact. This Article, however, is primarily concerned with the trial process.

The Article begins in Part II by measuring the frequency of the phenomenon under study—the criminal bench trial. First, statistics regarding the number of such trials in the United States in both federal and state courts are examined. The Article then turns to a description of the system of Diplock trials in Northern Ireland. The examination of Diplock trials is interesting in its own right, and it provides a backdrop for the later discussion concerning ideal evidentiary procedures in nonjury settings.

Before any critical analysis of the procedure in bench trials can take place, a conceptual framework must be developed. This Article borrows its theoretical framework from scholars of comparative criminal procedure, most notably Professor Mirjan Damaska of Yale. Professor Damaska has outlined two ideal types of adjudication: adversarial and inquisitorial.²³ Part III of the Article features a discussion of these ideal types of adjudication and indicates how they can be of assistance in the evaluation of evidentiary procedures for criminal bench trials in common-law jurisdictions. The analysis makes clear that adversary processes require “input” controls to ensure that the parties are on an equal footing before the fact-finder and to make certain that the fact-finder is not influenced by information extraneous to the adversary process. Inquisitorial processes necessitate “output” controls in order for the system to assess the performance of a relatively autonomous fact-finder. Part III ends with an examination of the factors that have led common-law countries to adopt, on the whole, adversary procedures in criminal cases.

In Part IV, the Article takes a critical look at bench trials in criminal cases with the ideal models in mind. Specifically, it demonstrates that bench trials tend to be more inquisitorial in nature than trials when a jury is the finder of the facts. Part V sets forth three methods of moving bench trials back toward the adversarial sphere: stricter enforcement of evidentiary rules; implementation of procedures designed to limit the trial judge’s exposure to incriminating, inadmissible evidence; and encouraging

22. Richard Nobles et al., *The Inevitability of Crisis in Criminal Appeals*, 21 INT’L J. Soc. L. 1, 1 (1993).

23. As Professor Damaska points out, although the inquisitorial system of adjudication is commonly associated with Continental European countries, and the adversarial system is associated with the Anglo-American world, the actual systems found in these societies are in fact hybrids that include features identified with both ideal types. See *infra* notes 57-65 and accompanying text.

a stance of relative passivity by judicial fact-finders. Part V concludes that, though important, these measures fall far short of restoring the adversary balance.

Part VI of the Article features an examination of the requirement, borrowed from inquisitorial procedures, that the trial judge justify a decision with a “reasoned judgment.” Although such a procedure is an essential requirement of a nonjury trial, it is insufficient to move nonjury criminal trials to the adversary ideal. Thus, Part VI closes with a novel proposal: that judges in criminal bench trials be required to state and justify a provisional verdict that—if it is a verdict of guilty—is open to challenge and debate. The Article concludes with a reminder that all of the procedural protections examined during its course are necessary to ensure that nonjury criminal trials produce fair and accurate outcomes.

II. The Criminal Bench Trial

A. *Nonjury Criminal Trials in the United States*

In the United States, in all cases that subject a criminal defendant to a term of imprisonment of more than six months, the defendant has a constitutional right to trial by jury.²⁴ In addition, “[m]ost jurisdictions, including the federal courts, allow the judge or the prosecutor to ‘veto’ a defendant’s waiver of jury trial.”²⁵ Thus, as a general matter, nonjury criminal trials occur in the United States in serious cases²⁶ only when the procedure is agreed upon by all parties.²⁷

24. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (holding that the right to a jury trial applies in all cases where the maximum prison term is more than six months); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (applying the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment).

25. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 670 (3d ed. 1983). For federal courts, the pertinent rule is FED. R. CRIM. P. 23(a). The Supreme Court upheld prosecutorial vetoes of jury waivers in *Singer v. United States*, 380 U.S. 24, 37 (1965).

26. The authors note that this Article is concerned with the procedural protections that ought to be present in serious criminal cases. We do not take issue with the proposition that the adjudication of minor criminal offenses (misdemeanors and petty offenses) be subject to a more summary process.

27. It appears that this is a primary reason why the rules of evidence are so loosely enforced in nonjury criminal trials in the United States. *See supra* notes 2-5 and accompanying text. The prevailing attitude seems to be that the parties (including the defendant) get exactly what they have asked for—a less formal, faster trial. This Article rejects this point of view. It takes the position that when a criminal defendant chooses to waive a jury, he

Determining the rate of criminal bench trials in the United States is not an easy task, primarily because of definitional difficulties and the fact that the court statistics rarely address the issue directly. For example, the Administrative Office of the Federal Courts reported that, in the twelve months ending September 30, 1993, district and appellate judges (not including magistrates) had completed 3,702 nonjury trials and 5,324 jury trials in criminal cases.²⁸ Taken at face value, these statistics lead to the conclusion that about forty-one percent of all federal criminal trials are tried without a jury—a number sure to astonish federal criminal practitioners. But the number cannot be taken at face value, for the Administrative Office defines “trials” to include “hearings on contested motions . . . and other contested proceedings in which evidence is introduced.”²⁹ Given that federal judges often hold hearings in criminal cases on pretrial motions during which evidence is taken, this figure grossly overestimates the number of federal bench trials where the issue of the defendant’s guilt is at stake.

The Administrative Office provides one other set of statistics that helps shed some light on the matter. For the twelve month period ending in 1993, juries decided the fate of 5,589 defendants in federal cases.³⁰ During the same period, federal judges determined the guilt or innocence of 898 defendants.³¹ These figures do not reveal the number of jury and bench trials, however, because many federal criminal trials are multi-defendant. Nevertheless, if one makes the (apparently) reasonable assumption that the average number of defendants is more or less the same for jury and nonjury trials, these numbers do indicate that bench trials compose about fourteen percent of all federal criminal trials.

Fourteen percent is far from trivial. This is especially true in light of the fact that, by excluding from these statistics cases that are tried before magistrates, this figure generally takes account of only those trials that involve allegations of serious offenses. Under federal law, magistrates are

ought not be required to waive a fair, adversarial process as well: Our position is supported by the fact that, in jurisdictions where bench trials are prevalent, it appears that defendants are induced to elect this option because courts make it known that they hand out more severe sentences in the event of conviction after a jury trial. *Alschuler, supra* note 14, at 1029; *Schulhofer, supra* note 16, at 1062-63. A criminal defendant should not be required to elect between a short sentence and a fair trial.

28. DIR. ADMIN. OFF. U.S. CTS., 1993 ANNUAL REPORT: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *in* UNITED STATES COURTS: SELECTED REPORTS § 3, at AI-90 (Table C-7); *see also id.* at 162 (noting that Table C-7 references trials by judges, not magistrates).

29. *Id.* at AI-92.

30. *Id.* at AI-141 (Table D-4). Of these defendants, 4,683 were convicted and 906 were acquitted. *Id.*

31. *Id.* Of these defendants, 502 were convicted and 396 were acquitted.

empowered to hear all cases involving misdemeanors and petty offenses.³² Although misdemeanor defendants may elect for trial before a district court judge,³³ this is an infrequent event.³⁴ Thus, cases heard by district court judges usually involve felonies, which are defined as crimes punishable by more than one year imprisonment.³⁵

Interpreting the data from state courts is even more difficult. The source of the problem is twofold. First, states define the term "trial" differently: some count a case as having been disposed of at trial if (in the case of jury trials) the jury was sworn or if (in the case of bench trials) evidence was introduced or the first witness sworn; others consider a trial disposition to occur only if a verdict or decision has been reached.³⁶ In light of the fact that many trials are aborted by dismissals and guilty pleas,³⁷ this definitional difference is significant.

Second, states report statistics for a variety of often incommensurable categories of offenses. Many states, for example, do not separate felonies from other cases, making it impossible to discern the bench trial rate for serious cases only. As a result, it is not surprising that in 1988, states reported bench trial rates in criminal cases (expressed as a percentage of total criminal trials) between 2.82% (District of Columbia felony cases) and 92.86% (South Dakota misdemeanor and DUI cases).³⁸ The main concern of this Article, however, is serious criminal cases.³⁹ In 1988, thirteen states reported trial rates for felony cases only.⁴⁰ Even when limiting the sample to felony cases, though, the differences among the various states is tremendous. Once again expressed as a percentage of the total number of criminal trials, the District of Columbia's 2.82% was the

32. 18 U.S.C. § 3401(a) (1995).

33. *Id.* § 3401(b).

34. From author Seigel's experience, the rarity of this event derives from the perception among defense practitioners, and probably the reality, that a defendant who imposes upon a busy district court judge to hear his misdemeanor case is likely to pay for this decision with a longer sentence upon conviction.

35. *See* 18 U.S.C. § 3581 (1995) (providing that the maximum sentence for a misdemeanor is one year imprisonment).

36. NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1988, at 52 (Text Table 1) [hereinafter ANNUAL REPORT 1988]. Two states fall into a category of their own, counting a criminal case as having been disposed of by trial, jury or nonjury, if evidence was introduced or a witness was sworn. *Id.*

37. *See id.* at 53 (Text Table 2) (giving the percentage of civil and criminal cases tried by jury and bench tried in California, Colorado, and New Jersey).

38. *Id.* at 55 (Text Table 3). The numbers in the text are derived from Text Table 3 by dividing the percentage rate of bench trial dispositions by the total rate of trial dispositions, which is calculated by adding the percentage rate of jury trial and bench trial dispositions together.

39. *See supra* note 26.

40. ANNUAL REPORT 1988, *supra* note 36, at 56 (Text Table 4).

lowest reported felony bench trial rate.⁴¹ The highest felony bench trial rate, 77.38%, was reported by Virginia.⁴² The difference between these figures cannot be explained by differences in definitions because both the District of Columbia and Virginia count a case as having been disposed by a bench trial if opening statements were made.⁴³

Only two additional states reported felony bench trial rates, again expressed as a percentage of the total number of felony trials, in single digits: Alaska (4.17%) and New Jersey (7.55%).⁴⁴ The remaining nine states reported rates between 14.28% (Vermont) and 69.12% (Mississippi).⁴⁵ As in the case of federal trials, the percentage of serious criminal trials that are tried before a judge sitting without a jury in state cases is not trivial. Indeed, given these numbers, the fact that so little attention has been paid to criminal bench trials in the United States ought to be a matter of some concern.

B. Diplock Trials in Northern Ireland

Nonjury criminal trials have received a great deal more attention in Northern Ireland because they marked a dramatic departure from prior procedure in response to that country's "troubles," as they have euphemistically come to be known.

At the time of the British government's assumption of direct control over Northern Ireland's affairs in 1972,⁴⁶ one of its first tasks was to re-evaluate the effectiveness of the normal criminal justice process in the light of the escalation of political violence that was taking place at that time. The previous measure that was adopted to stem the flow of violence had merely contributed to its intensification. The measure was called internment—the detention of suspects without trial—and was introduced by the Stormont government in 1971 under powers contained in the Civil Authorities Act of 1922.⁴⁷ The Diplock Commission was appointed in October 1972 specifically to "consider whether changes could be made in the administration of justice in order to deal more effectively with terrorism without using internment under the Special Powers Act."⁴⁸

41. *Id.*

42. *Id.*

43. *Id.* at 56.

44. *Id.* at 56 (Text Table 4).

45. *Id.*

46. For the history of Northern Ireland under its own "home rule," see generally JONATHAN BARDON, *A HISTORY OF ULSTER* (1992) and PATRICK BUCKLAND, *A HISTORY OF NORTHERN IRELAND* (1981).

47. Civil Authorities (Special Powers) Act (Northern Ireland), 1922, ch. 5, §1 (N. Ir.).

48. H.C. DEBS., Apr. 17, 1973, at col. 276 (statement of William Whitelaw, then

The commission recommended, among other things, that certain kinds of offenses should henceforth be tried in the ordinary courts without a jury. At the time, this recommendation stood out as the most drastic departure from the normal criminal process, and it has proven to be one of the most enduring of the broad range of emergency measures that were recommended alongside it. Of all the legacies that Lord Diplock left throughout his legal career,⁴⁹ the "Diplock courts," as the system of trial by judge alone in emergency cases in Northern Ireland has come to be known, must rank as one of the most significant. The term Diplock court is, however, misleading in so far as it suggests a special criminal court system. In fact, the nonjury trials take place in Belfast Crown Court in the same courthouse (in Crumlin Road) where ordinary Crown Court jury trials continue to be held, and they are presided over by the same High Court and county court judges who conduct normal court business in Northern Ireland.

Cases are selected for Diplock trials based upon the type of offense involved. Offenses tried in Diplock courts are known as "scheduled offenses" because they are listed in a schedule to the legislation which governs the Diplock trial process.⁵⁰ The offenses are all those that could have a terrorist connection, including murder, manslaughter, riot, most nonfatal offenses against the person, robbery, aggravated burglary, arson, and offenses involving firearms, explosives, or membership in a proscribed organization. Many of the offenses, however, may be descheduled by the Attorney-General if he determines that the particular case has no connection with the emergency situation.⁵¹ Other offenses, notably robbery and aggravated burglary when a firearm or explosive was used, cannot be descheduled.⁵² Thus, it is likely that some of the defendants tried in

Secretary of State for Northern Ireland). The Diplock Commission ultimately published its findings and recommendations in a report. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, CMND 5185, at 1 (stating that overcoming intimidation by terrorists may be accomplished through extra-judicial process or changes in criminal procedures).

49. For comment on the contributions made by Lord Diplock in the course of his career toward the development of the substantive areas of administrative law and the law of contract, see Brice Dickson, *The Contribution of Lord Diplock to the General Laws of Contract*, 9 OX. J. L. STUD. 441, 446-52 (1989) (explaining novel distinctions by Diplock concerning "innominate terms," "primary obligations," and "non-fulfillment of a condition precedent" in the law of contracts); Richard Wilberforce, *Lord Diplock and Administrative Law*, 1986 PUB. L. 6-7 (noting his progressive formulation of the grounds for administrative review such as "illegality," "irrationality," and "procedural impropriety").

50. *E.g.*, Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, sched. 1 (Eng.).

51. *Id.* at n.1.

52. *See id.* ¶ 17(e), (f), (g), & (j) (naming offenses related to firearms that are not subject to footnote 1, cited *supra* note 51, which allows the Attorney General to deschedule certain offenses).

Diplock courts have no connection to terrorist activities.⁵³ In addition, the difference between certain "ordinary" robbery cases and those sent for trial by a Diplock court may not always be significant.

The introduction of Diplock courts was achieved with minimal alteration to the formal rules of procedure governing the conduct of the trial. Only three changes are worthy of mention: the new requirement that the judge provide a reasoned judgment in support of a decision to convict,⁵⁴ the new provision of an automatic right of appeal against conviction or sentence,⁵⁵ and a change in the rules governing the admissibility of confessions.⁵⁶

III. Conceptual Framework: Adversarial v. Inquisitorial Processes

A. *Adversarial and Inquisitorial Models of Criminal Adjudication*

Adversariness has been the subject of much debate in Anglo-American legal scholarship largely because Anglo-American processes have for a long time been associated with adversarial qualities. But there has been considerable confusion about the meaning of the terms "adversarial" or "accusatorial," on the one hand, and "nonadversarial" or "inquisitorial," on the other, because these terms are assigned a variety of loose meanings.⁵⁷ As Professor Damaska has explained, the term adversarial has often been used misleadingly as a description of Anglo-American procedure in contradistinction to inquisitorial procedures that operate in civil law systems.⁵⁸ According to Damaska, the attempt to portray adversarial and inquisitorial proceedings as distinctive descendants of actual historical systems becomes enmeshed in difficulties about the features that should be considered as criteria of inclusion for each type.⁵⁹ Legal procedures in both Anglo-American and continental systems operate with a mixture of adversarial and inquisitorial, or contest and inquest, features.⁶⁰

53. For a critical examination of the workings of the scheduling system, see generally John D. Jackson & Sean Doran, *Diplock and the Presumption Against Jury Trial: A Critique*, 1992 CRIM. L. REV. 755.

54. Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, § 10(5) (Eng.).

55. *Id.* § 10(6).

56. *Id.* § 11.

57. Mirjan R. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 507, 513 (1973) [hereinafter Damaska, *Evidentiary Barriers*].

58. MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 3-6 (1986) [hereinafter DAMASKA, *FACES OF JUSTICE*].

59. *Id.*

60. *Id.* at 6.

Another use of the term adversarial is as an ideal type of procedure, detached from the contingencies of history and particularly well-suited to a particular purpose of adjudication—namely, the resolution of disputes between particular parties. The essential characteristic of adversariness in this context is the notion of procedure as a contest between two sides decided by a third party. In such an adversarial contest, the disputants define the issues over which they disagree, and a neutral person resolves these issues in favor of one side or another. By giving the interested parties maximum control over the scope and terms of their dispute, and by ensuring that the fact-finder is impartial, adversariness as an ideal model of dispute resolution promotes the acceptability of juridical verdicts. Acceptability is critical both to the enforcement of verdicts and to their efficacy in setting societal norms.⁶¹ This contest model can be contrasted with an inquest-type procedure, which is more suitable for achieving purposes other than dispute resolution, such as the implementation of state policy in order to solve a problem. The hallmark of the inquest procedure is an official inquiry conducted by a government agent who has responsibility for seeking resolution of difficult issues.⁶²

Another useful way of viewing adversariness is as an ideal model of proof that is able to establish the truth or falsity of a particular hypothesis and that can be contrasted with a non-adversarial or inquisitorial model of proof.⁶³ Again, it is often claimed that these contrasting models of proof typify Anglo-American procedures on the one hand and continental procedures on the other, but they are better viewed as two sets of contrasting features that can be found within Anglo-American and continental legal systems as a whole.⁶⁴ A closer look at the features of the contest model and the inquest model will help us analyze the status of nonjury criminal trials in Anglo-American jurisdictions.⁶⁵

61. Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1017 (1994) [hereinafter Seigel, *Pragmatic Critique*]. See generally Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

62. DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 11.

63. Cf. Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016-17 (1974) (contrasting the adversary process as a method of finding facts and implementing norms with the accusatorial system, which is a procedural model encompassing the adversary process but also normative ideals such as keeping the state out of disputes).

64. See Damaska, *Evidentiary Barriers*, *supra* note 57, at 562-64, 577 (clarifying the meanings attributed to the expressions "inquisitorial" and "accusatorial").

65. The following depiction of contest and inquest models of proof is attributable in large part to the work of Professor Damaska. See generally DAMASKA, *FACES OF JUSTICE*, *supra* note 58 (exposing the confusion in opposing the adversarial system against the inquisitorial system); Damaska, *Atomistic and Holistic*, *supra* note 12 (explaining how Anglo-American

1. *The Contest Model of Proof.*—The contest model of proof emphasizes the role of contestants and regulates what contestants may or may not do, with much less attention being given to the activities of inquirers. A party must first prepare its case, which will involve inquiry, but few controls are exercised over inquiry at this stage. Control only becomes significant when a claim or charge is made. At this point, rules govern how the claimant and respondent are to proceed in their preparation for trial. A contrast can therefore be made between preparation or investigation of the case, which is relatively unregulated, and preparation for trial, which is closely regulated.

Emphasis on the regulation of the parties is important in this ideal model because, if each side were allowed to strive self-interestedly to win over the other, truth-finding could easily become skewed. Parties could conceal vital information and resort to unfair tactics, such as intimidating witnesses and each other. The contest thus has to ensure that parties are given an equal opportunity to prepare and present their cases without undue interference. This result requires more than the formal equality of each party being subject to the same rules. It requires substantive equality in the sense that the rules themselves enable the parties to investigate and present their cases as effectively as possible. This is sometimes known as the requirement of “equality of arms,” under which the parties have the same access to information that is relevant to the case and have equal opportunity to present evidence and contradict the evidence produced by the other.⁶⁶ An ideal contest model, therefore, puts great store in the principle of disclosure of information and in the provision of effective legal representation to all concerned. Even when adversariness is viewed as an ideal mode of proof, it is recognized, as Justice Traynor once wrote, that “truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.”⁶⁷ Only then can the clash of arms ensure that the truth will win out.

In the preliminary stages between the announcement of the contest and the trial itself, an adversarial model of proof has little room for nonpartisan inquirers. There is an important need, however, for an independent

and Continental evidentiary laws require partially conflicting assumptions about how individuals find facts in adjudications); Damaska, *Evidentiary Barriers*, *supra* note 57 (discussing the ways in which the opposition of the adversarial and the inquisitorial models can be conceived).

66. See FRANCIS G. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 99-101 (1980) (noting that the fairness of a trial must be evaluated on the basis of the proceedings in their entirety).

67. Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1962).

umpire to ensure that the pretrial rules of disclosure are enforced, to determine whether there is a sufficiency of proof to make it worthwhile to continue with the case, and to make preliminary rulings on questions of law.⁶³

The contest takes the form of a trial, at which the proponent of the claim or charge has the burden of proving what is alleged. As in all contests, there have to be rules of fairness to ensure that each party has an equal opportunity to participate. The complaining party will have to prove the claims it makes to a required standard of proof, and the opponent will have the task of preventing that standard being met. To ensure parity of treatment, it is fairest to adopt a standard that allocates the risk of errors being made by the ultimate tribunal of fact as evenly as possible, which means that the claimant has the burden of showing that the evidence for his claim is more probable than not—the preponderance of probability standard.⁶⁹ Reasons of policy may, however, dictate that the standard of proof be heavier. The high standard in criminal cases may be justified on the ground that the consequences of wrongful conviction are worse than the consequences of a wrongful acquittal, but it may also be justified simply on the ground that the greater resources of the state make it reasonable to impose a higher standard of proof on it than on the defendant who may not have the resources to muster an effective defense.⁷⁰

Other rules are required to ensure that each party is given an equal opportunity to present its own case and contest its opponent's case effectively. These are sometimes known as presentation rules.⁷¹ Because of the importance attached to the parties' being able to test each other's evidence, parties are encouraged to produce witnesses who have direct knowledge of the facts.⁷² Each witness is then examined by the party

68. Preliminary hearings are now required in serious fraud cases in England and Wales under the Criminal Justice Act, 1987, ch. 38, §§ 9-11 (Eng.), and the Royal Commission on Criminal Justice recommended that, in complex cases, either party should be able to require a preliminary hearing in front of a judge to secure rulings on the main issues. ROYAL COMM'N ON CRIMINAL JUSTICE REPORT, 1993, CMND 2263, at 200-01.

69. For discussion of risk distribution within the process of proof, see generally Alex Stein, *Bentham, Wigmore and Freedom of Proof*, 22 ISRAEL L. REV. 245 (1987) (reviewing WILLIAM L. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985)); Adrian A.S. Zuckerman, *Law, Fact, or Justice?*, 66 B.U. L. REV. 487 (1986) [hereinafter Zuckerman, *Law, Fact, or Justice?*].

70. Andrew J. Ashworth, *Concepts of Criminal Justice*, 1979 CRIM. L. REV. 412, 414-415.

71. See Johannes F. Nijboer, *Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective*, 41 AM. J. COM. L. 299, 302 (1992) (discussing the difference between presentation rules and argumentation rules).

72. This is encouraged by means of the hearsay rule, a primary aim of which is to ensure that parties present their best evidence at trial. See Dale A. Nance, *The Best Evidence*

calling the witness and cross-examined, if this is desired, by the opposing party. Parties must present only relevant evidence to prevent the factual tribunal from becoming confused by a proliferation of issues.⁷³ A number of other rules are also devised to prevent parties from presenting prejudicial and unreliable evidence to the trier of fact.⁷⁴

The trial is presided over by a judge whose role is confined largely to umpiring the contest and ensuring that the parties abide by the rules.⁷⁵ The judge may decide the contest, or a separate tribunal of fact—a jury—may be impanelled to do so. The tribunal must come to its decision on the evidence presented to it at the contest and not on evidence it has discovered beforehand.⁷⁶ The tribunal's opportunities for active inquiry during the trial and for generating new evidence on its own initiative are strictly limited.⁷⁷

The fact-finding role of the tribunal is therefore restricted for the most part to weighing the evidence adduced by the various parties and deciding the issues on the basis of the burden of proof. In addition, some of the rules of evidence will tell the tribunal how to use certain kinds of evidence,⁷⁸ and the tribunal may even have to apply certain rules of

Principle, 73 IOWA L. REV. 227, 233 (1988) (explaining that litigants must present the most probative evidence because they are the source of information used by the trier of fact); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 898 (1992) (stating that the primary purpose of the rule against hearsay is to assist the fact-finder in ascertaining an accurate picture of the truth). In criminal cases in the United States, direct knowledge is also promoted by the Confrontation Clause. U.S. CONST. amend. VI; Seigel, *supra*, at 943-44.

73. *E.g.*, FED. R. EVID. 401 & 402 (stating that only relevant evidence is admissible at trial).

74. *E.g.*, FED. R. EVID. 403 (excluding relevant evidence on grounds of prejudice, confusion, or waste of time); FED. R. EVID. 801 & 802 (regulating the admission of hearsay evidence).

75. For discussion of the role of the judge in the adversarial trial, see generally Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978).

76. *E.g.*, *Tanner v. United States*, 483 U.S. 107, 122-26 (1987) (acknowledging the exception to the general prohibition against impeaching a jury verdict of allowing evidence of external interference); see Saltzburg, *supra* note 75, at 12 (noting that the court is unable to acquire information not disclosed by the parties).

77. In *Jones v. National Coal Board*, 2 Q.B. 55 (1947), Lord Justice Denning warned against excessive judicial intervention.

78. For the view that the law of evidence consists of rules of use rather than rules of exclusion, see Philip McNamara, *The Canons of Evidence: Rules of Exclusion or Rules of Use*, 10 ADELAIDE L. REV. 341, 347 (1985). Juries are frequently directed to use evidence for certain purposes (e.g., to go to the credibility of a witness) but not for others (e.g., to go to the truth of an issue in dispute). For criticism of this distinction, see ADRIAN A.S. ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 94-97 (1989) [hereinafter

weight, such as corroboration rules for dealing with certain kinds of unreliable witnesses or evidence.⁷⁹ This requires the tribunal to take an atomistic view of the evidence whereby probative force is attributed to distinct types of evidence, and the final determination is made by aggregating these separate informational units by an additive process and, if necessary, by disregarding certain items or certain chains of inference if told to do so.⁸⁰ The determination is supposed to be less an inner acceptance of the truth of certain facts in issue than an acceptance that the bits of evidence either meet the standard of proof or do not. The result is frequently (and, if the tribunal of fact is a jury, almost invariably) presented in the form of an enigmatic verdict. As a result, once the decision of the tribunal is reached, there is minimal scrutiny of it. As Damaska has put it, in an adversary contest, input control may be considerable, but output control is limited.⁸¹

2. *The Inquest Model of Proof.*—The inquest model of proof shifts the focus of activity from the contestants to the inquirers. Even in cases involving private disputes, the aim is to involve a judicial inquirer as early a stage as possible. Contestants may bring their dispute to the inquiry in the first place, but it is the inquirer who determines the contours of the dispute within the ambit of the substantive law.⁸² This, in turn, gives inquirers the primary responsibility for gathering, testing, and evaluating evidence relevant to the dispute.

The role of contestants is relegated to being merely the object of inquiry rather than the subject of the action. Contestants may suggest that certain lines of inquiry be followed and that certain witnesses be questioned; and they may even have some freedom to present evidence, but they have nothing like the central role they occupy in the contest model. In addition, whereas the contest model requires that parties take full charge

ZUCKERMAN, CRIMINAL EVIDENCE].

79. Corroboration rules are diminishing in importance and have been superseded by guidelines warning triers of fact to treat certain kinds of evidence with caution. See LAW COMM'N, CRIMINAL LAW: CORROBORATION OF EVIDENCE IN CRIMINAL TRIALS, 1991, CMND 1620, at 3-7 (recommending that corroboration rules be abolished). Corroboration rules relating to children, accomplices, and complainants in cases involving sex offenses have recently been abolished in England and Wales. Criminal Justice and Public Order Act, 1994, ch. 33, §§ 32-33 (Eng.); Criminal Justice Act, 1988, ch. 33, § 34 (Eng.).

80. Damaska, *Atomistic and Holistic*, *supra* note 12, at 93.

81. MIRJAN R. DAMASKA, REFLECTIONS ON THE CHARACTER OF EVIDENCE IN CONTINENTAL AND ANGLO-AMERICAN SYSTEMS 36-37 (1988) (unpublished manuscript on file with John D. Jackson); DAMASKA, FACES OF JUSTICE, *supra* note 58, at 59.

82. For an overview of German civil procedure, see generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (contending that the German system of fact-finding avoids the most troublesome aspects of the adversarial system).

of their own cases and cooperate with other parties only insofar as deemed necessary to enable the parties to know each other's case, the inquest model is much less tolerant of parties who refuse to disclose information. Generally speaking, contestants have a duty to disclose everything that is asked of them and to submit to any judicial questioning.

The inquest model of proof takes a layered approach to fact-finding. There are different phases of unilateral investigation taking place consecutively, with different inquirers at each phase and with the evidentiary material ripening at each phase as the inquirer records the results of his activity in an investigative file, or dossier. The dossier is handed down from inquirer to inquirer with additions and corrections made to it along the way. At the final phase of the investigation, a decision is rendered. Although this last phase may take the form of a formal hearing and be called a trial, it is really the last part of a continuous process rather than a seminal event.⁸³

Just as control is necessary to transform a free-for-all contest into a model of proof, so must an inquest be regulated in the interest of securing accurate outcomes. In the contest model, the main danger is that one side may dominate the process of proof disproportionately and unfairly. In the inquest model, the absence of direct competitors means that there is no adversary to dominate. But the supremely dominant position of the inquirer can easily lead to abuse. The ideal inquirer is a judicial appointee, nonpartisan and independent of the parties, who is an expert investigator trained to ferret out the truth. The danger is that, over time, such an official may come to favor certain kinds of litigants over others—to become “case-hardened.” Aside from this, psychological studies suggest that it is very difficult for active investigators to suspend judgment and weigh evidence dispassionately.⁸⁴ There is a distinct risk that one particular hypothesis will be favored and pursued relentlessly to the exclusion of others.⁸⁵

Control over the process is exercised by a new inquirer in each phase of investigation with a bit more authority than the last and empowered to add to the dossier that was built up in preceding phases. Control is also exercised by providing for a career judiciary in which the judicial tasks of fact-gathering and opinion-writing are constantly evaluated and reviewed by peers.⁸⁶ But it is essential that even at the relatively more formal final

83. See Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 498 (1987) (highlighting the salient features of the American civil procedure centered around the judge's power and function).

84. See, e.g., ARNE TRANKELL, *THE RELIABILITY OF EVIDENCE* 25-27 (1972) (providing a method for interpretation and assessment of witness statements).

85. *Id.*

86. See Langbein, *supra* note 82, at 848-51 (explaining the German judicial system where

phases of investigation, including the hearing before the decision, the inquirer is unimpeded by rigid evidentiary rules. These rules are necessary in the contest model to allocate what must be proved by whom and to ensure that the parties contest against each other fairly. In the inquest model, however, such rules only impede the inquirer in the quest for truth.

Rules on the burden of proof, for example, are essential for a bilateral contest in order to determine who has won. But they are less appropriate for unilateral fact-finding where inquirers are themselves required to piece together the evidence and construct a unitary view of what happened. Their job is less aptly described as considering whether a claimant's version of events matches up to the required standard of proof. Rather, inquirers must themselves form a subjective belief about what has happened or, as it is put in continental procedure, an *intime conviction*.⁸⁷ This requires the trier of fact to take a "holistic" rather than an "atomistic" view of the evidence. The evidence formally presented in court is only part of a broader informational picture that sways the adjudicator's mind, and the final determination arises from the total production of information and not from individual items of information.⁸⁸

The need to form a subjective belief about what happened is incompatible with rules of evidence that exclude evidence on generalized grounds of unreliability and that accord low probative weight to particular kinds of evidence. In the contest model, such rules are justified on grounds that they prevent parties from basing their cases on evidence that cannot be properly tested and they protect parties from a relatively unaccountable tribunal of fact. In the inquest model, they interfere with the duty of judicial inquirers to assess the evidence, and they are not required as a mechanism of control because the decision-making of inquirers is subject to review.

An ideal inquest model relies very little on oral evidence. The principle of immediacy requires inquirers to insist on original rather than

a career judiciary evaluates and promotes its members).

87. A good illustration of this approach is to be found in the formal warning that the president of the *cour d'assises* in France has to read to the jurors:

The law . . . stipulates that [judges] must search their conscience in good faith and silently and thoughtfully ask themselves what impression the evidence given against the accused and defence's arguments have made upon them. The law asks them only one question which sums up all of their duties "Are you personally convinced?"

CODE DE PROCEDURE PENALE [C. PR. PEN.] art. 353 (Fr.). See Jean Pradel, *France*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 105, 129 (Christine Van Den Wyngaert ed., 1993) (describing how evidence is assessed in France) [hereinafter CRIMINAL PROCEDURE SYSTEMS].

88. Damaska, *Atomistic and Holistic*, *supra* note 12, at 91.

secondary sources of evidence when possible.⁸⁹ But, unlike the tribunal of fact in the contest model, inquirers do not come "cold" to the evidence. They are expected to read and digest the dossier and are permitted to base their findings on it. This is because the statements in it have been accurately recorded in earlier inquiries, and their credibility may have been vouched for by other officials who heard the witnesses first-hand. Because these officials are independent and not partial to either party, statements accredited by them are entitled to much greater weight than out-of-court statements related by parties in the course of a contested trial. While entitled to take the dossier into account, inquirers are equally entitled to recall witnesses if in doubt about their credibility, as it is the inquirer's own mind that must be satisfied.

Control in the inquest model is, therefore, exercised in a very different way from the contest model. The contest model, with its emphasis on the trial, exercises considerable input control to ensure that the tribunal of fact acts only on admissible evidence, but exercises little output control on the actual decision that is arrived at by the tribunal of fact. The position is reversed in the inquest model. The inquirer has considerable freedom to decide what information to hear, but the information gathered and any conclusions reached are closely scrutinized at later phases of the investigation.

There is, however, a shift away from presentation rules toward rules of decision or argumentation.⁹⁰ The contrast is perhaps most striking regarding the final decision, which is subject to appeal. As noted above, the classic judgment in the contest model is an unexplained verdict, but the inquest model requires the final decision to be rendered as part of a "reasoned judgment."⁹¹ This requirement facilitates careful and critical appellate review.⁹²

89. Damaska, *Evidentiary Barriers*, *supra* note 57, at 517-18.

90. See Nijboer, *supra* note 71, at 302 (discussing Dutch procedure where the emphasis in the regulation of evidence is not on the presentation of evidence, but on the later decision-making process).

91. See *infra* Part VI.

92. Thus the parties are able to exercise some *ex post facto* control over the investigative process and are, in effect, able to supervise the court's method of inquiry after the event. This is known in Germany as the process of *Aufklarungsruhe*. Karl H. Kunert, *Some Observations on the Origins and Structure of Evidence Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122, 160-63 (1966).

B. *Adversariness Within the Anglo-American Criminal Process*

Thus far we have identified adversariness as an ideal procedural process that functions best as a method of resolving disputes between parties and as an ideal proof process that maximizes the ability of individuals to participate in legal processes designed to determine historical reality. Whether a particular governmental process will turn out to be adversarial depends on many factors, including the degree to which adversariness is seen by members of the society as compatible with (or necessary to) the aims of the procedure, the degree to which individuals are considered to have an important stake in the process, and the economic costs incurred.⁹³

It can be argued that enforcement of the criminal law involves the implementation of state policy, thereby justifying the use of inquisitorial procedures. In fact, much of Anglo-American criminal procedure has been characterized as inquisitorial,⁹⁴ particularly at the stage of police investigation and interrogation.⁹⁵ Nevertheless, the Anglo-American contested trial is adversarial in nature because at this stage the matter is viewed primarily as a dispute between the prosecution and the defense (the "State" versus the "accused") that requires impartial resolution. At this point, the focus shifts to the plight of the individual defendant. Concerns about the importance of appropriately implementing state policy yield in large part to concerns about protecting the rights of the accused, not the least of which is the right not to be falsely convicted.⁹⁶

Indeed, some Anglo-American theorists have gone further and argued that the right to be heard is not merely an instrumental means of protecting

93. See DENIS GALLIGAN, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* 326-37 (1986) (arguing that procedural participants, at first, seek to find rational outcomes in an effective manner, but other concerns such as economic costs, the desire for proportionality between interests and accuracy, and the ideal of participatory decision-making put restraints on the procedures and may even reduce their rational basis).

94. It not surprising that criminal procedure exhibits both inquisitorial and adversarial features. As Professor Damaska has said:

As the function of government includes both the maintenance of social equilibrium and programs of social transformation, rather than only one or only the other, so actual legal proceedings exhibit both conflict-solving and policy-implementing forms, often in complex and ambiguous combinations.

DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 12.

95. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149, 1163-69 (1960).

96. See RONALD M. DWORKIN, *A MATTER OF PRINCIPLE* 79-84 (1985) (arguing that state policy in a cost-efficient society yields to the right of a person not to be falsely convicted only when that right means avoiding intentional conviction as opposed to avoiding, at all costs, accidental conviction of an innocent person).

individuals against inaccurate verdicts; it is bound up integrally with the purpose of the criminal process. Professor Duff, for instance, has contended that the criminal trial process should be a "participatory attempt to establish and communicate a justified judgment on the defendant's conduct."⁹⁷ This ought to involve a "communicative process of argument and justification which seeks the participation and the assent of the defendant, and which addresses him as a rational and responsible agent."⁹⁸ This view is closely related to liberal theories of criminal law, which address individuals as moral, rational agents and not simply as tools for the implementation of state policy.⁹⁹ In addition to all this, Professor Damaska has made the compelling point that the preference for party-oriented procedures in the Anglo-American world was inspired by an attitude of distrust of public officials, including judges, which bred an unwillingness to give them a monopoly over the proof process or to enable guilt to be determined in an inquest-style public inquiry.¹⁰⁰

In any event, Anglo-American criminal procedure at the trial stage has historically been a process closely resembling the ideal adversarial model of proof outlined above. Over time it has engendered numerous procedural safeguards to ensure the fairness of the adversarial process and the accuracy of its outcome. A major problem with structuring the criminal proof process in the form of a contest, for instance, is that the balance of power and resources is inevitably weighted greatly in favor of the police and prosecution; any attempt to structure the process in terms of a contest between the prosecution and defense risks being extremely one-sided.¹⁰¹ Thus, strong rules are in place during the investigative and pretrial phases

97. ANTONY A. DUFF, TRIALS AND PUNISHMENTS 142 (1986).

98. *Id.* at 143.

99. *See, e.g., id.* at 74-98; HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 32-33 (1979) (emphasizing the importance of moral matters in the administration of criminal justice); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 46-50 (1968) (arguing that it is morally important in criminal law to recognize the individual as a "choosing being"); Ian H. Dennis, *Reconstructing the Law of Criminal Evidence*, 42 CURRENT LEGAL PROBS. 21, 35 (1989) (noting that the principle of criminal law is a moral concern to treat citizens with respect, which is why they are treated as autonomous agents); John D. Jackson, *Getting Criminal Justice out of Balance*, in LAW, SOCIETY AND CHANGE 114, 123 (Stephen Livingstone & John Morison eds., 1990) (suggesting that criminal law seeks to influence behavior by addressing citizens as moral agents).

100. Damaska, *Evidentiary Barriers*, *supra* note 57, at 583. Professor Damaska provides another explanation for the development of adversarial processes in Anglo-American countries and inquisitorial processes in continental ones. He theorizes that these processes flow from a difference in the structure of judicial hierarchy in these two realms. DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 38-46.

101. *See* DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 104-09 (noting problems inherent in balancing the advantages to parties); Ashworth, *supra* note 70, at 414-15 (seeking justification for the social and legal arrangements in criminal law).

of a case to ensure an equality of arms. For instance, the defendant is protected against the risks of involuntary self-incrimination or of entering a coerced and uninformed guilty plea.¹⁰² At trial, defendants are protected through the imposition of equally robust input controls. These take the form of evidentiary barriers that enable the defendant to confront and challenge the prosecution's evidence effectively, to prevent the prosecution from relying on particularly prejudicial evidence that may warp the impartiality of the tribunal of fact, and to guard against governmental abuse in earlier phases of the process.

The evidentiary barriers have traditionally been effected by rules of evidence that exclude whole classes of evidence.¹⁰³ These exclusionary rules are divided into two types: rules that exclude evidence because of the belief that it may impede the pursuit of truth and rules that exclude evidence for reasons extraneous to truth-finding considerations. Rules of the former kind include limitations on the admissibility of certain kinds of prejudicial evidence, particularly evidence related to the accused's past (such as proof of a defendant's prior crimes), hearsay rules, and, in the case of the United States, the Confrontation Clause.¹⁰⁴ These rules are designed to enable the defense to counter and test the prosecution's case effectively. Rules of the latter kind include exclusionary rules devised to ensure that confessions have been obtained in a fair manner (for instance, without physical violence) and that evidence has been obtained without unnecessary intrusion into a defendant's privacy.¹⁰⁵

In addition to exclusionary rules, triers of fact are directed on how to approach certain kinds of evidence. Apart from directions on the burden and standard of proof, triers of fact are directed not to draw inferences of guilt from an accused's silence before or at trial, to treat certain kinds of evidence as weighing on to collateral issues of credibility rather than on guilt, and to treat certain kinds of evidence or witnesses with caution and in need of corroboration. Although many question the effectiveness of these directions in obtaining accurate trial verdicts,¹⁰⁶ few doubt the need

102. U.S. CONST. amend. V ("No person . . . shall be compelled . . . to be a witness against himself . . .").

103. Damaska, *Evidentiary Barriers*, *supra* note 57, at 514-25; *see supra* notes 72-74 and accompanying text.

104. U.S. CONST. amend. VI.

105. An important point of terminology must be stated here. In the United States, rules prohibiting illegal searches and involuntary confessions are constitutional and are classified as matters of criminal procedure rather than evidence. *See* U.S. CONST. amends. IV, V. In other common-law countries, including England and Northern Ireland, these rules are considered part of the law of evidence. In this paragraph of the text, and in the remainder of this Article, we employ the term "evidentiary rules" in the latter, broader, context.

106. *See, e.g.*, Seigel, *Pragmatic Critique*, *supra* note 61, at 1021-22 (conceding that empirical evidence indicates that admonitions to the jury are not effective in enhancing

to put the prosecution to full proof, before an independent and impartial tribunal, on the basis of probative evidence fairly obtained and able to be meaningfully tested by the defense.

IV. The Nonjury Context

We have seen that adversariness is shaped in the Anglo-American criminal process by a contest between prosecution and defense in which defendants are given a full and meaningful opportunity to challenge the prosecution's evidence presented against them, as well as the proper assurance that any decision against them is based on this evidence. As an ideal model of dispute resolution, the contest is thought to encourage greater acceptability of verdicts;¹⁰⁷ as an ideal model of proof, the contest is thought to further the accuracy of outcomes.¹⁰⁸

In this Part we shall consider how the substitution of the judge as the trier of fact in nonjury trials adversely affects the adversarial protections of defendants. This may happen in three important respects. The first concerns the nature of the fact-finding function that triers of fact are required to discharge. At first blush it appears that, when judges take on fact-finding responsibilities, their fact-finding role is no different from that of jurors—essentially, to determine whether the prosecution has proved the guilt of the accused on the charges brought. In fact, this is not all that there is to decide. Criminal proceedings are taken on behalf of the community, and the decisions reached, therefore, have to be taken either by the community or by persons acting on its behalf. When lay triers are involved, the decision-makers are acting as the community, and they can afford to take a wider view of both the merits of the proceedings and the merits of convicting the defendant on the basis of the proceedings.¹⁰⁹ Professional triers of fact cannot take such a wide view of the case. They are accountable, first, to the legal system and, ultimately, to the community for the decisions that are reached. This requires them to apply the criminal law strictly on the basis of the evidence relevant to the specific charge

accuracy of verdicts); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 98 (1990) (citing empirical studies that indicate that admonitions to the jury do not effectively increase accuracy of decisions). Professor Seigel points out, however, that admonitions may serve important functions other than pursuit of the truth, such as bringing closure to a sustained objection and showing that the system has done its best to make things right. Seigel, *Pragmatic Critique*, *supra* note 61, at 1022.

107. See *supra* text accompanying notes 60-62.

108. See *supra* text accompanying notes 62-65.

109. Zuckerman, *Law, Fact, or Justice?*, *supra* note 69, at 487; ZUCKERMAN, *CRIMINAL EVIDENCE*, *supra* note 78, at 32-40.

brought against the individual.

It would seem, therefore, to be an inevitable consequence of allocating the task of guilt determination to professional judges that the nature of the proceedings shifts away from resolving a dispute between the State and the accused toward a more tightly controlled forum for determining the defendant's guilt.¹¹⁰ Although the proceedings may maintain an adversarial form, it is a form that is more akin to the kind of hypothesis-testing that Professor Damaska and Professors Thibaut and Walker have referred to when policy-implementing procedures are reducible to two contradictory scenarios.¹¹¹ Adversarial protections may be encapsulated within procedures that are formulated primarily to implement policy, but the more the procedure is viewed as one of conflict resolution, the greater the scope the parties have to determine the ambit of the dispute.

It does not necessarily follow that defendants are disadvantaged by professional triers of fact. There is a tendency to think that professionals adopt prosecution-minded or case-hardened attitudes over time, with inevitable increases in guilty plea and conviction rates.¹¹² But much would seem to depend on the context in which the professional trial is operating and on the ideological considerations and societal and institutional pressures that motivate professional decision-makers. The fact that trials are conducted in the full glare of publicity may encourage judges to uphold legal standards such as the rule of law and the principle of proof beyond a reasonable doubt.¹¹³ Conversely, judges deciding less serious cases

110. The degree to which judicial triers of fact feel compelled to narrow the boundaries of the contest may depend on the structure of authority within which they are organized. See DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 26 (asserting that coordinate distribution of power in a decision-making system leads to decisions made on the basis of fine distinctions and detail, whereas a hierarchical decision-making apparatus relies on rough similarities and differences and simple ordering schemes). But whether professional officials are organized into a hierarchy or into a single level of authority, they are accountable to others and are subject to the constraints imposed by accountability.

111. See DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 163 (discussing a hypothetical proceeding where two state officials predicate effects of independent fact gathering on different hypotheses and independently develop evidence before a trier of fact based on these hypotheses); JOHN THIBAUT & LAURENS WALKER, *A PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 26-27 (1975) (discussing the "Double Investigator" model of adjudication where two investigators, who are employed by the decision-maker to assist in investigating contentions of disputing parties and report facts to the decision-maker).

112. This claim has been the center of controversy over the record of the Diplock courts in Northern Ireland. See generally JOHN D. JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* (1995) [hereinafter JACKSON & DORAN, *DIPLOCK TRIALS*].

113. In the context of Northern Ireland Diplock trials, one former Lord Chief Justice of Northern Ireland has commented:

I need hardly stress the point that the judge will be aware that he is operating in

may be encouraged to put quantitative output above qualitative output.¹¹⁴ Whatever approach is taken, however, it is undeniable that the scope of the contest is more restricted, and judges are likely to apply stricter standards of relevance to the defense than they would do in a jury trial.

The second respect in which the accused suffers an adversarial deficit concerns the reduced effectiveness of the evidentiary rules and barriers that are erected to protect defendants in court proceedings. Evidentiary barriers are designed to keep sources of prejudicial information away from the trier of fact, and it is much easier to keep information away from a lay tribunal than from a professional tribunal. Juries generally come to the trial ignorant about the details of the case. Professor Damaska has said that jurors are the paradigmatic fact-finders in a contest between parties because they enter the contest unprepared, with a "virgin mind, . . . tutored only through the bilateral process of evidentiary presentation and argument."¹¹⁵

In contrast, judges, as insiders of the system, are likely to have much greater knowledge about the case. They may become involved in sentencing discussions with counsel before the trial.¹¹⁶ They may have access to the prosecution papers on which the accused was committed for trial.¹¹⁷ Even if all sources of information have been kept away from the

the glare of publicity and that not only the general public but well-informed and potentially hostile critics will scrutinise his deliberations. You will not be surprised to hear that observers by the score are to be found at Diplock trials, especially in notorious cases.

Lord Robert Lowry, *National Security and the Rule of Law*, 26 *ISR. L. REV.* 117, 131 (1992).

114. The proposal to put justices' clerks in English magistrates' courts on fixed term contracts with performance-related pay has been criticized on the ground that it induces them to maximize quantitative output. MICHAEL MANSFIELD & TONY WARDLE, *PRESUMED GUILTY* 208-09 (1994).

115. DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 137-138. This need not always be the case, of course. Some cases provoke massive media coverage that makes it very difficult, if not impossible, to find jurors who are totally ignorant about the case. For comment on the difficulties in selecting an ignorant jury in the recent O.J. Simpson trial, see Newton N. Minow & Fred H. Cate, *The Best Jury Is Not An Ignorant Jury*, *WASH. POST*, Sept. 11, 1994, at C7.

116. See JOHN BALDWIN & MICHAEL MCCONVILLE, *NEGOTIATED JUSTICE* 20-24 (1977) (reporting on a study examining the extent to which plea bargaining occurred in the Birmingham Crown Court); LYNN M. MATHER, *PLEA BARGAINING OR TRIAL* 30-40 (1979) (reporting on a study of settlement of criminal cases in Los Angeles County Superior Court (Central District)). There has been considerable controversy in England about the extent to which judges do or should become involved in plea bargaining. There are strict rules governing the extent to which trial judges should get involved in discussions with counsel about sentencing. See *Regina v. Turner*, 2 Q.B. 321, 326-27 (1970) (holding that while a defendant may be advised in strong terms to change his plea, it must be clear that the choice is the defendant's and that advice given does not reflect the judge's views).

117. This is the practice in England, Wales, and Northern Ireland. See JACKSON &

judge before the trial, the professional judge's experience makes him or her much better equipped than a lay trier to pick up information about the case that may not be apparent to lay minds. Judges can very quickly work out, for example, whether a defendant has a good or bad character.¹¹⁸ Apart from this, of course, judges can more easily become privy to inadmissible evidence during the trial. The process of exclusion works much less effectively when the trier of fact is exposed to inadmissible evidence, which can happen frequently when judges are both the triers of fact and the triers of law.

The jury system also ensures that the nonexclusionary rules on burdens and standards of proof and rules on how certain kinds of evidence are to be used are given a particular force when they are issued in the form of mandatory instructions to a group of persons (the jury) that has not had cause to apply them before and that can be expected to act on them. The danger with a tribunal in perpetual session is that these instructions may lose their immediacy over time. We explore this point later when we consider the role of the summing-up in jury trials.¹¹⁹

The third respect in which the accused suffers an adversarial deficit concerns the change in the character of the trial that occurs when the jury

DORAN, DIPLOCK TRIALS, *supra* note 112, at 169 (reporting the approaches of judges in Northern Ireland to reading the papers in Diplock and jury cases in advance of trial); MICHAEL ZANDER & PAUL HENDERSON, ROYAL COMM'N ON CRIMINAL JUSTICE, CROWN COURT STUDY 42-43 (1993) (research study no. 19) (reporting judges' questionnaire responses about the receipt of prosecution papers). In Scotland, on the other hand, judges do not receive details of the prosecution case before the trial. In a personal communication with author Jackson on April 15, 1994, Gerry Maher stated:

In Scotland the judge is given nothing prior to trial, on the basis that as the procedure is adversarial, the judge's role is essentially imperial and it is for the parties to establish facts by leading evidence in open court. That principle applies whether or not the judge is sitting with a jury.

For details of Scottish criminal procedure, see generally ROBERT W. RENTON & HENRY H. BROWN, CRIMINAL PROCEDURE ACCORDING TO THE LAW OF SCOTLAND (Gerald H. Gordon ed., 5th ed. 1983); ALBERT V. SHEEHAN, CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE (1979); Christopher Gane, *Scotland*, in CRIMINAL PROCEDURE SYSTEMS, *supra* note 87, at 339-82.

118. As one judge in Northern Ireland has put it: "It's a bit like the Sherlock Holmes story of the dog that didn't bark in the night—if no mention is made of the defendant's clear record, it can be assumed that he has not got one." JACKSON & DORAN, DIPLOCK TRIALS, *supra* note 112, at 244.

119. See *infra* Part VI. Americans tend to use the term "jury instructions" to refer to the moment when the judge provides the jury with the information it needs to decide the case, while other common-law jurisdictions use the term "summing-up." Summing-up carries slightly different nuances, as it tends to indicate the judge's summary of the facts in addition to his instructions on the law. To some degree, the terms reflect the prevalent practice in the respective jurisdictions. See *infra* text accompanying notes 211-216. In this Article, we use the terms interchangeably.

is replaced by a professional trier of fact. The role of lay triers in the contested trial is essentially passive, which enables both the prosecution and defense to lay out their cases before it. There is, of course, the risk that judges may intervene excessively in jury trials. But, for a variety of reasons, the risk of excessive judicial intervention is much higher in bench trials. First, judges as triers of fact are given the added responsibility of reaching the ultimate decision in the trial. Judges often react to this by trying to bring the hearing into some order and coherence by following their own partial lines of inquiry, which may prevent the parties from having a sufficient opportunity to present their cases.¹²⁰ Second, even if judges were disposed to act in such a way in a jury trial, the jury imposes its own constraints on them. Quite apart from the question of appellate review, any excessive interference on behalf of one side or the other runs the risk of alienating the jury.¹²¹

Without question, some judges will try to resist taking an openly activist position in the courtroom during a bench trial. But it is probably inevitable that their assumption of the role of trier of fact will push them to take a more interventionist—even inquisitorial—stance, whether they like it or not.¹²² Importantly, excessive judicial passivity is equally debilitating to the fact-finding process in bench trials. A single fact-finder is likely to begin to form an opinion of the case before all the evidence is in. If this view is not communicated to the parties in any fashion, the loser may be denied the opportunity to present a case most likely to persuade the closing mind. The jury provides a natural protection against this problem because it cannot, as a unit, have an opinion of the case prior to deliberations.

As a whole, then, a bench trial takes on a more inquisitorial form than a classic trial by jury. With a single expert fact-finder at its core, it has the tendency to become more of an inquest by a state official and less of a contest between opposing parties. A possible response to this phenomenon, and the one most consistent with the ideology of the criminal trial process in common-law countries, is to take special steps to redress the adversarial deficit of such trials. It is to this issue that we next turn our attention.

120. See Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 35-48 (Harold J. Berman ed., rev. ed. 1971) (discussing roles that should be played by advocates, judges, and juries in the decision of a controversy).

121. See David Wolchover, *Should Judges Sum Up On The Facts?*, 1989 CRIM. L. REV. 781, 792 (discussing judges' note-taking, summing-up of facts, and presentation to the jury compared to the American system and noting criticisms of judges' summing-up facts).

122. See *infra* text accompanying notes 169-170.

V. Maintaining Adversariness in Bench Trials Through (More or Less) Traditional Means

A. *Enforcing the Rules of Evidence*

As we saw above in Part III, the rules of evidence in criminal trials are predicated on the need to protect defendants who would otherwise be disadvantaged in an adversarial process. These rules are justified by the need to require the prosecution to prove guilt on the basis of nonprejudicial evidence that can be effectively challenged. We have also seen that the defendant suffers an adversarial deficit when the jury is removed from the trial setting. One of the ways of minimizing this deficit is to ensure that the evidentiary rules are strictly enforced in criminal bench trials.¹²³

Unfortunately, this is currently not the case. Even more disturbing, courts have generally leaned in the opposite direction, loosening the constraints of the evidentiary rules in nonjury trials. In many jurisdictions in the United States, for example, the practice in bench trials is to admit arguably inadmissible evidence for what it is worth.¹²⁴ This is not an alternative when a jury sits as the trier of fact because the judge in those cases necessarily must decide what the jury shall and shall not hear. When the judge, himself, is the trier of fact, however, the failure to rule becomes a convenient means available to a judge for avoiding error. But it means, of course, that the criminal defendant does not truly receive the benefit of the evidentiary protection.

A similar practice that has been established in Northern Ireland Diplock courts is for judges to determine the issues of admissibility and weight of pretrial confessions together at the voir dire. Witnesses testifying about the circumstances surrounding a confession are not cross-examined again, or the accused does not give evidence again, when the

123. Professor Alschuler would apparently disagree with our approach. He looked at bench trials from the other direction, that is, from the view of one who wants bench trials, even "imperfect" ones, to take the place of guilty pleas entered as the result of a bargain. Thus, he has made the claim that the rules of evidence should be simplified for nonjury criminal trials. See Alschuler, *supra* note 14, at 1020-22.

124. Levin & Cohen, *supra* note 3, at 908; Davis, *supra* note 2, at 1362-63. As McCormick puts it:

[J]udges possess professional experience in valuing evidence greatly lessening the need for exclusionary rules. The feeling of the inexpediency of these restrictions as applied to judges has caused courts to say that the same strictness will not be observed in applying the rules of evidence in judge only trials as in trials before a jury

MCCORMICK ON EVIDENCE § 60 (John W. Strong et al. eds., 1992) [hereinafter MCCORMICK].

issue of weight comes to be evaluated in the trial proper.¹²⁵ As a result, these two distinct issues become inextricably intertwined. Issues of weight heard at the voir dire may affect the decision on admissibility, and the decision on admissibility may affect the decision on weight. The bottom line is that the defendant loses some of his protection against both the erroneous admission and the improper use of his confession in Diplock cases.

The practice of loose enforcement of the rules of evidence in bench trials is made even worse in the United States by a corresponding presumption made by many appellate courts that, in coming to factual conclusions, an experienced trial judge has ignored inadmissible evidence and decided the case only on evidence properly in the record.¹²⁶ While this presumption strains credulity with respect to evidence that the trial court has properly ruled inadmissible,¹²⁷ it is downright absurd when applied to evidence that the trial court has erroneously ruled admissible. Nevertheless, the general rule in the nonjury context is that "the admission of incompetent evidence over objection will not ordinarily be a ground for reversal if there was competent evidence received sufficient to support the findings."¹²⁸

*United States v. Menk*¹²⁹ involved a classic use of the presumption. Menk was charged with selling amphetamine drugs to a government agent. He was convicted by the trial judge sitting without a jury.¹³⁰ During the case, the judge admitted, over objection, testimony by the government's main witness implicating Menk in numerous other crimes, including "prostitution, a prior drug offense, [a] threat to kill a past informer and any future informer, an incident where [Menk] attacked two excise men, and dealing in stolen goods"¹³¹ The appellate court stated unequivocally that "the admission of such evidence constituted error, and if this

125. JACKSON & DORAN, DIPLOCK TRIALS, *supra* note 112, at 28-29, 75.

126. MCCORMICK, *supra* note 124, § 60; *State v. Hadd*, 619 P.2d 1047, 1052 (Ariz. Ct. App. 1980).

127. *See infra* text accompanying notes 128-154.

128. MCCORMICK, *supra* note 124, § 60; *see State v. Brewer*, 826 P.2d 783, 800 (Ariz. 1992) (holding that, pursuant to presumption, the trial judge did not consider inadmissible evidence in finding aggravating circumstances to impose death penalty, even though the trial judge apparently stated that he relied on the inadmissible evidence), *cert. denied*, 113 S. Ct. 206 (1992); *N.C. v. Florida*, 478 So. 2d 1142, 1144 (Fla. Dist. Ct. App. 1985) (holding the trial judge's error in admitting evidence of prior crimes harmless given the sufficiency of the evidence in bench trial). *See generally* Note, *Improper Evidence in Non-Jury Trials: Basis for Reversal?*, 79 HARV. L. REV 407 (1965) [hereinafter Note, *Improper Evidence*] (discussing the rationale behind not reversing for admission of improper evidence in bench trials).

129. 406 F.2d 124 (7th Cir. 1968).

130. *Id.* at 125.

131. *Id.*

had been a jury trial we would be compelled to reverse.”¹³² Nevertheless, the court upheld the verdict, stating:

We . . . hold that a trained, experienced Federal District Court Judge, as distinguished from a jury, must be presumed to have exercised the proper discretion in distinguishing between the improper and proper evidence introduced at trial, and to have based his decision only on the latter, in the absence of a clear showing to the contrary by appellant.¹³³

The appellate court’s decision is ridiculous in light of the district court’s determination to admit the inadmissible evidence. The presumption from such an act ought to be the exact opposite from the one articulated by the court. Why would a judge listen to evidence, over objection, if he did not intend to use it? Although the *Menk* court worked hard to demonstrate affirmatively that the trial court did not rely on the other crimes as evidence, it is clear that the record is, at best, ambiguous on this point.¹³⁴ Moreover, it is also clear that the case came down to a question of credibility, and the other-crimes evidence probably influenced the trial judge’s view of who was telling the truth. The direction of the presumption very likely dictated the outcome of the appeal—an outcome that does not appear defensible.¹³⁵

132. *Id.* at 126.

133. *Id.* at 127.

134. The court of appeals used the trial judge’s statement that, in judging credibility of the witnesses, “I am, of course, talking primarily about the essential elements of the crimes charged in these various counts of the indictment,” to show that “the only evidence used to determine [the issue of credibility] was that adduced from the testimony of the defendants themselves.” *Menk*, 406 F.2d at 126. This appears to be a non sequitur. In any event, the appellate court essentially concedes the ambiguity on this point by stating, “Although we cannot probe the mind of the trial judge any more thoroughly, we likewise cannot presume error by inferring that he considered the improperly admitted evidence in reaching his findings.” *Id.*

135. The Texas experience in relation to this doctrine is quite illuminating. For many years, Texas adhered to the majority view that bench trial errors are, in effect, presumed harmless. *See Tolbert v. State*, 743 S.W.2d 631, 633 (Tex. Crim. App. 1988) (noting that the presumption on appeal is that the court in a bench trial “disregarded any inadmissible evidence admitted at trial”); *Arnold v. State*, 277 S.W.2d 106, 106 (Tex. Crim. App. 1955) (holding that, in a bench trial the presumption is that the trial judge disregarded any inadmissible evidence admitted at the trial). In *Tolbert*, however, Judge Teague dissented, pointing out that the *Arnold* presumption conflicted with Texas Rule of Appellate Procedure 81(b)(2), which provides for a reversal “unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction. . . .” *Tolbert*, 743 S.W.2d at 637. In an apparent response to Judge Teague’s analysis in *Tolbert*, the majority of the court attempted to combine the two doctrines in *Deason v. State*, 786 S.W.2d 711, 716 (Tex. Crim. App. 1990). The marriage of two essentially contradictory presumptions was predictably unhappy, leading the court just two years later to hold that the *Arnold* presumption

Reversing this presumption, or at least eliminating it, would not cost a great deal in terms of money or efficiency. Unlike the situation presented by jury verdicts that are reversed, a reversal in a case like *Menk* would not necessarily require a new trial. Rather, the appellate court could make its ruling on the law and, unless the error was clearly harmless,¹³⁶ send the case back to the trial judge for reconsideration in light of the appellate court ruling. If, upon reflection, the trial judge concluded that the outcome of the case should be the same without the inadmissible evidence, the judge would simply enter an order so stating, which would probably be the most common occurrence. On occasion, however, a trial judge might conclude that the inadmissible evidence did affect the verdict, in which case the judge could take whatever steps appeared appropriate to rectify the harm—from the entry of a judgment of acquittal to recusal and a new trial before another judge.¹³⁷

Appellate courts in Northern Ireland have appeared more anxious to uphold the formal rules of evidence. Despite the practice of combining issues of admissibility and weight in the *voir dire*, the courts have strongly maintained the distinction between these issues. In one case, the trial court excluded confession statements admitting a large number of crimes but proceeded to admit for purposes of trial the accused's testimony during the *voir dire* that he was a member of the Irish Republican Army (IRA).¹³⁸ The court convicted the accused on the basis of this testimony.¹³⁹ The trial judge admitted the evidence on the grounds that the admission was not strictly relevant to the *voir dire* and not essential to the central question in the *voir dire*.¹⁴⁰ The Court of Appeal and the House of Lords, however,

was implicitly voided by Rule 81(b)(2). *Gipson v. State*, 844 S.W.2d 738, 741 (Tex. Crim. App. 1992).

136. The test for harmless error would be the same in criminal bench trials as it is in criminal jury trials. Just what constitutes harmless error is a complex question beyond the scope of this Article. Suffice it to say that no version of the test for harmless error in the jury setting starts with a presumption that the jury disregarded the inadmissible evidence. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 26.6 (2d ed. 1992) ("To determine harmless error concerning the admissibility of evidence, courts look to such factors as the weight of the evidence and the likely impact of the error upon a juror's evaluation of the case.").

137. Some jurisdictions attempt to avoid this problem by requiring judges at the end of the trial to state that they have disregarded improper evidence. Quite apart from the question whether judges can disregard inadmissible evidence, there can be no assurance from such a statement that the judge has disregarded any particular evidence that he has erroneously ruled admissible. Note, *Improper Evidence*, *supra* note 128, at 411-12.

138. *R. v. Brophy*, 1981 N. Ir. 79, 79 (J.B.).

139. *Id.* For in-depth discussion of this case, see JOHN D. JACKSON, *NORTHERN IRELAND SUPPLEMENT TO CROSS ON EVIDENCE* 12-13 (5th ed. 1983); Dennis Boyd, *Justice in the Voir Dire: Two Cheers for R. v. Brophy*, 33 N. Ir. L.Q. 70 (1982).

140. *Brophy*, 1981 N. Ir. at 79.

ruled that the judge was wrong to admit the evidence from the voir dire for purposes of the trial.¹⁴¹ The Lord Chief Justice of Northern Ireland stated that the case involved two cardinal principles of the criminal law.¹⁴² The first was the principle that a confession must be voluntary at common law, and the second was that an accused is not obliged to incriminate himself.¹⁴³ In order to safeguard both principles, it was necessary that defendants be free to challenge a confession on the voir dire without the fear of their testimony being used against them at a later stage. The fact that the trial was conducted without a jury was not a reason to alter these principles.¹⁴⁴

B. *Minimization of Taint*

The fact that judges may find it difficult to ignore what was said at the voir dire is no argument for admitting what was said at the voir dire in the trial proper if there are good reasons in principle for excluding such evidence. But the judge's candid admission in the *Brophy* case¹⁴⁵ of the difficulty of ignoring evidence that a tribunal of fact has heard is a welcome expression of the problems that may arise with rules of evidence in nonjury trials and of the fallibility of trial judges. The idea that judges can disregard inadmissible evidence or irregularities that occur in the course of trial was also questioned in *R. v. Foxford*,¹⁴⁶ an early case that came before the Court of Appeal from a Diplock conviction. The prosecution had asserted at the outset of the case that it would rely on certain witnesses but then closed the case without calling them, thereby conveying the impression that they were unworthy of belief. The Lord Chief Justice said on appeal that the case perfectly exemplified the difficulty attendant in a procedure in which the judge was also the judge of fact:

According to one theory, if an irregularity occurs or inadmissible evidence is given and has to be ignored, the trained mind of a judge is less vulnerable to its harmful effects than that of a juror. This may not always be true when one considers that if there is a jury, the judge assumes the duty of warning them as to what they may take into account, and the context and significance of an irregularity may fade from the lay mind when it has ceased to be part of the case but sticks firmly in the mind of the judge, who is trained to marshal and evaluate

141. *Id.*; *R. v. Brophy*, [1981] 2 All E.R. 705 (H.L.).

142. *Brophy*, 1981 N. Ir. at 92.

143. *Id.*

144. *Id.* at 94.

145. *See supra* notes 138-144 and accompanying text.

146. 1974 N. Ir. 181 (Crim. App.).

evidence.¹⁴⁷

This statement makes the important point that, whereas the judge's training and experience may occasionally be thought sufficient to safeguard accused persons against the risks of prejudicial evidence, these qualities may also operate as a handicap where the judge can be assumed to recognize the significance of certain matters that may be lost on lay minds. As we have noted, for example, it may not be difficult for trial judges to work out from the tactics of the defense that the defendant has a previous record,¹⁴⁸ whereas a jury may be ignorant of such tactics.

Even when appellate courts apply formal doctrine to nonjury trials, it is difficult to resist the conclusion of one commentator that because the trial judge must give the initial evidentiary ruling, as well as make the finding of guilt or innocence, there remains the taint in the judge's mind from evidence ruled to be inadmissible.¹⁴⁹ This taint threatens the process of adversariness because the accused is less able to challenge the case against him and to raise a reasonable doubt if the trier is influenced by inadmissible evidence.

Unlike their counterparts in Northern Ireland, American courts uniformly reject the notion that judicial fact-finders may not always be able to conquer the influence of prejudicial evidence that they have ruled inadmissible or of prejudicial information that comes to them in some other form. Rather, the rule in U.S. courts is that "a judge, as fact-finder, is presumed to disregard inadmissible evidence and consider only competent evidence."¹⁵⁰ Time and again, American appellate courts have stated and restated this presumption.¹⁵¹ In one particularly telling case, an appellate

147. *Id.* at 212.

148. *See supra* notes 117-118 and accompanying text.

149. Note, *Improper Evidence*, *supra* note 128, at 414.

150. *Commonwealth v. Davis*, 421 A.2d 179, 183 n.6 (Pa. 1980) (noting that the judge was not prejudiced in convicting the defendant because the judge disregarded inadmissible evidence of a prior conviction); *see supra* notes 126-135 and accompanying text.

151. *See, e.g.*, *United States v. Dillon*, 436 F.2d 1093, 1095 (5th Cir. 1971) (reiterating that reversal is not necessary where the trial judge heard evidence of a past crime because "it is presumed that the experienced trial judge distinguished between proper and improper evidence"); *State v. Fierro*, 804 P.2d 72, 81 (Ariz. 1990) (holding that the defendant was not prejudiced during the penalty phase of his murder case when the judge read inadmissible evidence because the judge expressly stated he did not rely on it); *Wythers v. State*, 348 So. 2d 390, 391 (Fla. Dist. Ct. App. 1977) (holding that the prosecution's introduction of the defendant's post-*Miranda* silence does not necessitate reversal because the trial court recognized that the evidence was inadmissible); *People v. McKinley*, 124 A.D.2d 752, 752 (N.Y. App. Div. 1986) (ruling that the fact that the judge heard evidence of prior bad acts is not prejudicial because judge is presumed to decide the case on competent evidence); *State v. Astley*, 523 N.E.2d 322, 326 (Ohio Ct. App. 1987) (rejecting the argument of general prejudice from a bench trial procedure where the judge hears evidence it later rules

court in Pennsylvania upheld the creation of a special court for recidivists despite the fact that trial judges sitting as fact-finders in such a court would automatically know that those on trial before them had serious criminal records.¹⁵²

Willful ignorance, however, is not the only possible response to this problem. In the Northern Ireland Diplock courts, for example, the defense may request that the judge discharge himself from the trial when he hears inadmissible evidence or is exposed to irregularities in the course of the trial. The emergency legislation in Northern Ireland gives explicit recognition to this option in relation to confessions ruled inadmissible by the judge.¹⁵³ The danger that judges may resist ruling that their judgment has been tainted by exposure to prejudicial evidence is mitigated somewhat by the fact that the defense can appeal the decision of the judge not to discharge himself. The value of this protection, of course, is dependent on the degree to which the appellate courts are willing to be candid about the effect of prejudice on judges.

Another device suggested by commentators would be for a judge to determine issues of admissibility where possible at a preliminary hearing and for a different judge to preside at trial.¹⁵⁴ This may work well for admissibility issues that can be defined before trial, and it should be used in criminal bench trials to the extent possible. Such a procedure would, of course, cause bench trials to be more time consuming and costly than the alternative of having one judge preside over the entire proceeding. But in the United States, these additional costs would probably be recovered by making the option of choosing a bench trial more attractive to defendants, thereby reducing the number of even more expensive jury trials.

Pretrial screening by another judge, however, does not address the problem of having the finder of fact in a bench trial also rule on admissibility issues that inevitably arise during trial itself. Ought these to be heard before another judge as well? Such a recommendation is difficult to make because of its obvious monetary cost and administrative inconvenience. In addition, installing a separate admissibility judge would do nothing to counter the problems inherent in having an insider deciding the case, nor

inadmissible).

152. *Commonwealth v. Carter*, 501 A.2d 250, 253-54 (Pa. Super. Ct. 1985).

153. Northern Ireland (Emergency Provisions) Act, 1991, Part I, ch.24, § 11 (Eng.) (suggesting the use of this procedure for questions regarding coerced confessions).

154. Levin & Cohen, *supra* note 3, at 918-919; STANDING ADVISORY COMM'N ON HUMAN RIGHTS, FOURTEENTH REPORT 103-04 (1989); STANDING ADVISORY COMM'N ON HUMAN RIGHTS, TENTH REPORT 73 (1985). The Royal Commission on Criminal Justice has recommended that judges in England and Wales should be empowered during preparatory hearings to rule on any question regarding the admissibility of evidence. ROYAL COMM'N ON CRIMINAL JUSTICE REPORT, 1993, CMND 2263, at 201 (recommendation 147).

would it protect against prejudicial evidence that may come to the attention of the finder of fact unbeknownst to the defense.

The procedural devices suggested in this section have their limitations. Some appear not to go far enough in protecting defendants, others are unrealistic because of their administrative costs and inconveniences. Another way of stating this conclusion is that there are practical limits on the extent to which traditional adversarial-type input controls, or evidentiary barriers, can be used to ensure fairness in criminal bench trials.

C. *Encouraging Judicial Fact-Finders to Adopt a Position of Relative Passivity*

As noted above, the structure of proof in an ideal adversary system is predicated on a conflict between two parties who exercise control over the matters at issue and the proof presented.¹⁵⁵ The role of the judge in all of this is classically considered to be that of an umpire, ensuring that the contest is fair.¹⁵⁶ The judge's primary task is to rule on objections raised by either side. This role of ensuring evenhandedness between the parties is incompatible with entering the "dust of the conflict," which may skew the proceedings unfairly in favor of one side or another.¹⁵⁷

In practice, however, Anglo-American appellate courts have licensed considerably more judicial intrusion than would appear warranted by the umpire ideal in both jury and nonjury cases.¹⁵⁸ This is partly because judges are seen to have truth-finding responsibilities that may require intervention, particularly in criminal cases. For instance, English judges historically played much more than an umpiring role in the criminal trial.¹⁵⁹ Although lawyers came eventually to dominate the proof process, little attempt was made to enforce the umpiring ideal.¹⁶⁰ According to Wigmore, the trial judge has never ceased to perform an active role as

155. See *supra* Part III.

156. 3 JOHN H. WIGMORE, EVIDENCE § 784 (James H. Chadbourn ed., 1970).

157. See Frankel, *supra* note 75, at 1042 (noting that cases have been reversed on appeal where the judge acted as more than a moderator at trial); Saltzburg, *supra* note 75, at 55 ("[T]he judge's questioning may confer an unintended advantage upon one party that the lawyer could not have obtained otherwise and that the opposing party cannot counteract during trial.").

158. See Saltzburg, *supra* note 75, at 7-9 (noting a trend toward greater judicial activism).

159. See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 307 (1978) (noting that in 16th and 17th century trials, the trial judge also acted as defense counsel).

160. See WIGMORE, *supra* note 156, § 784 (claiming that the sporting tendency of the common law never dominated—so far as the judge's functions were concerned—in the English practice).

a director, rather than as a mere umpire, of the proceedings with an interest of his own in investigating the truth.¹⁶¹ The result has been that, at common law, judges were able to question witnesses freely, call new witnesses on their own motions, and seek to inform themselves of evidence.¹⁶²

Courts have generally supposed that the judge's assumption of fact-finding responsibilities does not fundamentally affect her role during the trial.¹⁶³ Indeed, it was in a nonjury civil case that Lord Denning delivered his classic statement of the umpire ideal:

The judge's part in all of this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise interventions that he follows the points the advocates are making and can assess their worth, and at the end to make up his mind where the truth lies.¹⁶⁴

Nevertheless, appellate courts occasionally hint that judicial intervention might be more warranted in nonjury trials when the judge assumes the role of trier of fact.¹⁶⁵ In the context of Diplock trials in Northern Ireland, where judges assume this role in very serious cases, one such comment came in a case where the defendant alleged on appeal of conviction that interventions by the judge indicated bias that disabled him

161. *Id.*

162. These judicial powers are the norm in the United States. *See, e.g.,* FED. R. EVID. 614 (permitting the court on its own motion or at the suggestion of a party to call and interrogate witnesses); FED. R. EVID. 201 (governing the exercise of judicial notice); *see also* ZUCKERMAN, *supra* note 78, at 72-84 (explaining the doctrine of judicial notice). For the differences between the power to question witnesses and the power to take judicial notice, *see* Saltzburg, *supra* note 75, at 53 n.220.

163. *But see* *Herring v. New York*, 422 U.S. 853 (1975). *Herring* involved a criminal bench trial during which the trial judge, pursuant to New York law, refused to listen to any of defense counsel's closing argument. The Supreme Court reversed, holding that such extreme intervention denied defendant his Sixth Amendment right to effective assistance of counsel. *Id.* at 865. The Court specifically rejected the argument that judges ought to have more leeway to eliminate defense summations in a nonjury versus jury trials. *Id.* at 863 n.15.

164. *Jones v. National Coal Board*, 2 Q.B. 55, 64 (1974).

165. One commentator has argued that greater intervention is, in fact, warranted: "In bench trials, then, a major role in the interrogation of witnesses should be taken by the judge who should explore the issues of importance to him to the extent he deems necessary for his own illumination." H. Richard Uviller, *The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1069 n.1 (1975). For further discussion, *see* JOHN D. JACKSON & SEAN DORAN, *JUDICIAL FACT-FINDING IN THE DIPLOCK COURT IN NORTHERN IRELAND* (1990) (unpublished Working Paper No. 2 on file at the Faculty of Law University of Manchester).

from forming a true view of the evidence. In the course of his judgment dismissing the appeal, the Lord Chief Justice commented:

In a non-jury trial it is inevitable that the judge as tribunal of fact will seek to inform himself on the facts which look like being relevant and he will be more inclined to tidy points up as he goes along in situations where, with a jury, he might be more passive.¹⁶⁶

More importantly, the boundary that appellate courts have set between acceptable and unacceptable intervention by trial judges has had less to do with enforcing the umpire ideal in the abstract than with ensuring that judicial conduct has not prejudiced the defendant so as to deprive him or her of a fair trial.¹⁶⁷ A main source of prejudice, mentioned by both American and English courts, is the possibility of the judge's appearing biased in front of the jury.¹⁶⁸ The result is that judges would seem to have greater latitude to intervene in nonjury trials.

Empirical research supports the view that judges are, in fact, more interventionist when a jury is not present. Professor Schulhofer's study of bench trials in Philadelphia concluded that judges typically played an active role in questioning witnesses and during closing statements by counsel.¹⁶⁹ In the very different context of Diplock trials in Northern Ireland, authors Jackson and Doran made a comparison between judicial behavior in these trials and judicial behavior in jury trials and noted more interventionist tendencies in the former.¹⁷⁰ Jackson and Doran found that in Diplock trials there were constant opportunities for judges to make their views

166. *R. v. Thompson*, 1977 N. Ir. 74, 82 (Crim. App.).

167. *See* *United States v. Cassiagnol*, 420 F.2d 868, 878 (4th Cir.), *cert denied*, 397 U.S. 1044 (1970) (finding that extensive interrogation of the accused by the trial judge before the case was fully presented showed that the trial judge had prejudged the case and was reversible error).

168. *See, e.g.*, *United States v. Kidding*, 560 F.2d 1303, 1314 (7th Cir.) (noting that a judge in a jury trial must assure that his questioning not give the appearance of partiality to the jurors), *cert. denied*, 434 U.S. 872 (1977); *Pollard v. Fennell*, 400 F.2d 421, 424 (4th Cir. 1968) (holding that a judge occupies a position of preeminence and special persuasiveness in the eyes of the jury and must therefore govern the trial dispassionately, fairly, and impartially); *R. v. Hamilton*, *Crim. L. Rev.* 486 (1969) (Eng.); *see also* Sean Doran, *Descent to Avernus*, 139 *NEW L.J.* 1147, 1147 & 1160 (1989) (arguing that excessive judicial intervention upsets the delicate balance of the adversary trial); *cf.* *R. v. Matthews & Matthews*, 78 *Crim. App.* 23, 30 (1983) (Eng.) (emphasizing the importance of a judge not indicating to the jury that he had formed some adverse view of the defendant or the case); *R. v. Gunning*, 98 *Crim. App.* 303 (1980) (Eng.) (explaining that judicial interventions during the defendant's presentation of evidence may prove to be disastrous).

169. Schulhofer, *supra* note 16, at 1070-71.

170. JACKSON & DORAN, *DIPLOCK TRIALS*, *supra* note 112, at 130-63; John D. Jackson & Sean Doran, *Conventional Trials in Unconventional Times: The Diplock Court Experience*, 4 *CRIM. L.F.* 503, 519 (1993).

known to counsel, and counsel admitted that they generally had a clear idea of what judges were thinking.¹⁷¹ There was, however, considerable variation in judicial style. Certain judges made their views known quite openly. Some questioned in an inquisitorial fashion, others commented on the evidence and on the case as a whole as it unfolded, others made their views very clear at the application for a direction stage, and others kept quiet until the closing speeches.¹⁷² Other judges were noticeably less interventionist. But even in the case of less interventionist judges, counsel could usually predict what the judicial attitude toward a particular case was going to be because, over time, the defense bar had become very familiar with the general orientation of each of the judges.¹⁷³

Counsel's ability to gauge the likely outcome of a case in nonjury trials affected the way the cases were conducted. Certain defense counsel said they would be more inclined to advise their clients to plead guilty in nonjury cases because the outcome was often more predictable than in jury cases.¹⁷⁴ Once a decision was made to contest, there was a greater tendency for Diplock trials to be aborted early. Over a third of the Diplock trials observed ended early (ten of twenty-six), as opposed to under a quarter of jury trials (four of seventeen).¹⁷⁵ It would be wrong to think that all these trials were aborted because of the intervention of the judge. But counsel were able to make a much more informed judgment in Diplock cases about whether to continue with the trial or not.

This is not to say that nonjury trials are nonadversarial. Much will depend on the context and attitudes of the participants. In his study, Professor Schulhofer concluded that, despite the fact that the judges may have taken a step toward the nonadversary role of the continental judge during bench trials, these trials remained true adversary proceedings because they "were genuinely contested, with vigorous efforts by opposing counsel and decisions based on applicable law and the testimony given in court."¹⁷⁶ The Jackson-Doran study revealed that Diplock trials that were conducted by very senior and experienced counsel, though vigorously contested, were conducted in a different adversarial context from jury trials.¹⁷⁷ The battle lines were no longer drawn simply between two sides. Because counsel knew the kind of arguments that would impress the

171. JACKSON & DORAN, DIPLOCK TRIALS, *supra* note 112, at 123-125, 196.

172. *Id.* at 179-96.

173. *Id.* at 86.

174. This view was not particularly reflected in the statistics on plea rates. One reason would seem to be because a number of defendants in Diplock trials ignored counsel's advice. *Id.* at 42, 170-71.

175. *Id.* at 185-86.

176. Schulhofer, *supra* note 16, at 1073.

177. JACKSON & DORAN, DIPLOCK TRIALS, *supra* note 112, at 203-04.

judge, there was no point in contesting every piece of evidence. There was therefore a tendency to agree to evidence more frequently and to contest only one or two key issues. In more than a quarter of the Diplock trials observed (seven of twenty-six), only one issue was ultimately contested, whereas this only happened in one of the seventeen jury trials observed.¹⁷⁸

Our own view of Diplock trials was that the contest itself changed from an all-out forensic battle between prosecution and defense toward a more limited skirmish between the parties on key points, often supplemented by argument directly with the judge after the judge chose to raise a point himself.¹⁷⁹ Some judges in Diplock trials cited the counsel's opportunity to engage in direct fact-based discussions with the trier of fact as the single most important difference between jury and bench trials.¹⁸⁰ Even in cases where the judge maintained a stony silence, the battle was much more restrained and more pointedly directed toward convincing the judge. But the more focused, calmer atmosphere that seemed to characterize Diplock trials did not mean that there was not an adversary contest going on. The emphasis shifted away from a no-holds-barred battle between opposing counsel and witnesses, to a quieter, but no less intense, contest between the judge and counsel. As one attorney put it:

I would hesitate to describe either the atmosphere or more particularly the interaction between the judge and counsel in a Diplock trial as informal. Diplock trials are still very formal and as counsel you feel that academically you are pinned more to the tip of your collar than in a jury case. There's just you and him and you've got to be on your toes, as it were, academically and intellectually because there's no waffle. All the theatricals and the advocacy tends to get side-lined. It's "Let's get to the main issue and get it dealt with," be it a legal issue or a factual issue. It's not so much a case of informality, it's a case of reading each other's minds in a colder and much more focused way. Whereas in a jury case it's much more relaxed and you need to think [about the judge], it only takes two of those jurors to get upset about something. I don't care what you think really because after all those people are here and they're going to protect me.¹⁸¹

In sum, the absence of a jury affects the process of proof in criminal trials much more radically than is commonly assumed. The conventional

178. *Id.* at 200.

179. All the judges in our sample were male, and indeed, all full-time judges in Northern Ireland are male (at the time of writing). For comment on this, see Sean Doran & John D. Jackson, *The Judicial Role in Northern Ireland*, in SENTENCING, JUDICIAL DISCRETION AND TRAINING 33, 36 (Colin Munro & Martin Wasik eds., 1992).

180. JACKSON & DORAN, DIPLOCK TRIALS, *supra* note 112, at 192.

181. *Id.* at 195.

structure presupposes a contest between prosecution and defense presided over by a third neutral party. The jury's neutral stance is not merely underwritten by the fact that it participates very little in the proceedings.¹⁸² The fact that it consists of twelve persons also means that even if it could speak, it would be unlikely to speak with one voice because, ideally, it is composed of a mix of persons representing a variety of experiences, views, and backgrounds. More importantly, a jury is unable to reach a collective judgment of guilt until it has received its instructions from the judge at the end of the case. All this makes its attitude toward the case difficult to predict, despite the immense effort that is expended in certain American trials towards trying to select a sympathetic jury.¹⁸³ The judge, by contrast, is better known. For one thing, the judge speaks with one voice. Even if the judge maintains the conventionally neutral stance in the course of the proceedings, the judge has a known record and therefore exercises much greater dominance over the proceedings than a jury is ever able to do. Although the trial may maintain the formal structure of a contest between prosecution and defense, in reality the judge becomes a third player in the contest.

With this important change in the trial process, there is a risk the defendant's interests will not be sufficiently protected. The risk is not just that an interventionist judge may so dominate the proceedings as to prevent the defense from effectively contesting the prosecution's case. There is also a risk in the nonjury trial that the defense will be prevented from contesting the judge's view of the case. Importantly, this danger stems from judicial passivity even more so than from judicial intervention. Intrusive judges will at least make their feelings known, and counsel may

182. Recent research in England and Wales has shown that jurors are reluctant, or unaware of their right, to ask questions during the trial. ZANDER & HENDERSON, *supra* note 117, at 174-213; JOHN D. JACKSON ET AL., CALLED TO COURT: A PUBLIC REVIEW OF CRIMINAL JUSTICE IN NORTHERN IRELAND 126-27 (1991).

183. There is vast literature on this point. *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 79-94 (1986) (noting that experienced trial lawyers and social behavioralists cannot accurately predict how a juror will decide a case based on the juror's unique individual characteristics); SAUL M. KASSIN & LAURENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 45-64 (1988) (arguing that the vast majority of verdicts are determined by the evidence and not by the individual traits of the jurors). English lawyers do not have the same opportunity to influence the selection of the jury. In a recent English study, lawyers admitted that it is often difficult to gauge what was transpiring in jurors' minds during a trial. PAUL ROCK, THE SOCIAL WORLD OF AN ENGLISH CROWN COURT 75-76, 86 (1993). According to one barrister quoted in the study, "The problem for counsel whether you're prosecuting or defending is that he doesn't know what the jury is like." *Id.* at 76; *see* JOHN MORISON & PHILIP LEITH, THE BARRISTER'S WORLD AND THE NATURE OF LAW 152 (1992) ("[A]ttempting to read a jury is a highly dangerous exercise [and] a most inexact science . . .").

get a chance to counter them. Passive judges, however, do not disclose their hand, so counsel does not get the opportunity to contest their view of the case until judgment is delivered.

Of course, a jury also does not disclose its hand during the forensic contest. The critical difference, however, is that the jury has no hand to disclose. Because deliberations are not permitted until the end of the case, the jury as an entity cannot form a hardened view prior to that time, even if individual jurors form a predisposition for or against one side of the contest along the way.¹⁸⁴ The parties are thus protected from the worst harm of passivity—an undisclosed closed mind. On the other hand, a judge can form a view earlier during the course of a trial and, although counsel may have some sense of what the judge is thinking, passivity may result in an inability to engage the fact-finder in an effective way.

Our prescription here is thus one of "relative passivity." In the course of criminal bench trials, judges should be careful not to intervene excessively; they should make certain that the parties have ample opportunity to put on their cases. Appellate review of judicial intervention ought to be strict in ensuring that the atmosphere in the court was not so hostile that defense counsel was intimidated into self-censorship. On the other hand, a policy of tolerating, and perhaps even encouraging, reasonable judicial intervention makes a great deal of sense. Ideally, a trial judge can tell counsel when he disagrees with or is not persuaded by counsel's presentation. If this is delivered as an invitation to counsel to do better, it can improve counsel's opportunity to persuade.

Naked exhortation, however, is probably not sufficient to alter the behavior of trial judges. One might argue, though, that the problems associated with persuading a sole fact-finder might be effectively countered by borrowing from inquisitorial systems an essential output control—the requirement that the fact-finder provide written reasons for her decision that are reviewable on appeal. But, as we shall see, careful analysis makes clear that the reasoned judgment, though important, is not adequate to the task. We will thus urge the adoption in criminal bench trials of a novel process wherein the judge renders a preliminary set of conclusions and opens them up for criticism and debate. These matters form the subject of the next section.

184. Professors Reid Hastie, Steven D. Penrod, and Nancy Pennington have argued that there are two contrasting styles of jury deliberation: the "verdict-driven" style and the "evidence-driven" style. REID HASTIE ET AL., *INSIDE THE JURY* 163-65 (1983). The former is more adversarial than the latter, with less vigorous evaluation of the evidence. In any case, the individual views of each of the jurors have to be pooled together by means of deliberation in order to reach a collective verdict.

VI. The Reasoned Judgment and Beyond

A. *Importance of the Reasoned Judgment in Bench Trials*

In the foregoing discussion, it has been suggested that the absence of the jury from the adversarial criminal trial, even if unaccompanied by a formal modification of the process of proof, effectively produces a shift in the balance of protection ordinarily accorded to the accused. While evidentiary safeguards lose some of their strength when removed from their natural habitat of jury trial, the judge is cast ineluctably in a more powerful position vis-à-vis both parties to the dispute. The implications of all this for the accused in the criminal trial are, of course, far-reaching. Given that in the criminal trial context, evidentiary rules and relative judicial passivity are viewed largely as fulfilling a protective function against prejudice to the accused, the question arises of how to compensate the accused when such protections are compromised.

The most obvious method of restoring equilibrium would be to require that the judge give a clearly reasoned judgment in support of conviction. The corollary to this is the notion of enhanced "appealability": the more clearly articulated the grounds for a decision, the greater the opportunity to challenge that decision, by reference to the record, on appeal.¹⁸⁵ Although we conclude below that the reasoned judgment is not sufficient protection for criminal defendants subjected to bench trials, there is no question that the reasoned judgment should form a critical part of the process.

We have seen that in the context of the adversarial criminal trial, it is essential for decisions about guilt to be based on admissible evidence against a defendant in accordance with the relevant rules and evidentiary principles.¹⁸⁶ In jury trials this is achieved through exclusionary rules and cautionary instructions, and a great deal of effort is expended to avoid prejudice through the enforcement of these evidential protections. These mechanisms, however, are less effective when the judge is sole arbiter of law and fact and is therefore routinely exposed to inadmissible and prejudicial evidence, with the attendant risk that any decision on guilt will

185. The accused may also be offered greater access to appellate review through the provision of an automatic right of appeal. This approach has been adopted in Diplock cases. Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, § 10(6). In the United States, although technically there is no constitutional right to direct appeal in a criminal case, such a right is in fact granted every criminal defendant in every state and federal criminal case. *McKane v. Durston*, 153 U.S. 684, 687 (1894). See LAFAVE & ISRAEL, *supra* note 136, § 27.1(a) (explaining that every jurisdiction gives a criminal defendant a right to a collateral appeal at least on limited grounds).

186. See *supra* Part V.A.

be tainted thereby. In this context, it is not sufficient merely for the judge to invoke the evidentiary rules and principles during the trial. Rather, what is required is a reasoned demonstration that these have been adhered to in substance as well as in form. A written judgment, containing findings of fact and conclusions of law, provides a natural vehicle for the accomplishment of this task. Such a judgment converts evidentiary barriers from input controls to output controls. Their failure to serve as a barrier to the flow of information to the fact-finder is made up by requiring the fact-finder to use them to shape the contours of his or her final decision.

In addition, the judgment requirement follows the logic of our earlier observation that, although the adversarial or contest-oriented character of the trial is not necessarily lost in a nonjury trial, the judge is in reality cast in a more dominant (and, in practice, a more inquisitive) role. As in a typically inquisitorial process, where the trier of fact is effectively given a freer role to pursue his own lines of inquiry in the course of the trial, such freedom is granted on the understanding that his decision will be readily open to review at the appellate level.¹⁸⁷ In this respect, then, the requirement that a judge give a reasoned judgment is an implicit recognition that the sense of finality that attaches to the jury's verdict is of less force in the nonjury context.

In light of the foregoing, it should come as no surprise that in Diplock cases in Northern Ireland, the trial judge is obliged to give a reasoned judgment in support of a conviction.¹⁸⁸ What is astonishing, however, is that reasoned judgments in criminal bench trials appear to be the exception rather than the rule in the United States. At best, American jurisdictions, including the federal government, provide for specific findings of fact in nonjury criminal trials only if the defendant requests them before a verdict is rendered.¹⁸⁹ This rule has been interpreted quite strictly. One federal court held that, absent a specific request, findings are not required even when the result is an unclear or confused appellate

187. See DAMASKA, *FACES OF JUSTICE*, *supra* note 58, at 48-49 ("There are few aspects of lower authority's decision making that are accorded immunity from supervision; fact, law, and logic are all fair game for scrutiny and possible correction.").

188. Northern Ireland (Emergency Provisions) Act, 1991, ch.24, § 10(5).

189. FED. R. CRIM. P. 23(c) states:

In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specifically. Such findings may be oral. If an opinion or memorandum decision is filed, it will be sufficient if the findings of fact appear therein.

A defendant's request for specific findings must be granted, "and the Court's findings, reasoning, and conclusions must be adequate to enable intelligent appellate review of the basis for the decision." *United States v. Silberman*, 464 F. Supp. 866, 869 (M.D. Fla. 1979); see *United States v. Pinner*, 561 F.2d 1203, 1206 (5th Cir. 1977) (noting that speech findings must be clear for intelligent appellate review).

record.¹⁹⁰ Even worse, many states do not provide for specific findings in nonjury criminal trials under any circumstances.¹⁹¹ For example, in *Hernandez v. Texas*,¹⁹² the defendants complained that the trial court had ignored their request to make factual findings, and they claimed this as error on appeal. The Texas Court of Criminal Appeals disposed of this issue in two sentences: "The failure of the trial court to make findings of fact and conclusions of law as the appellants requested was not an error. Such procedure is not provided for in the Texas Code of Criminal Procedure."¹⁹³

Absent a requirement that findings of fact be made at the conclusion of a bench trial, a criminal defendant is at the mercy of the whim of the trial judge, and the judge has a strong incentive to leave the record vague.¹⁹⁴ Without factual findings, all of the presumptions that are designed to sustain the trial court's judgment of conviction—for example, the presumption that it ignored erroneously admitted evidence—come into full force.¹⁹⁵

The state of the law in criminal cases is even more difficult to accept when one compares it to the rule in civil litigation. Federal Rule of Civil Procedure 52(a) requires that the trial court, in all actions tried without a jury, "find the facts specifically and state separately its conclusions of law thereon." If this requirement is necessary to protect the parties in civil cases, surely it ought to be viewed as essential to protect the rights of a convicted criminal defendant. The pertinent rules of criminal procedure should thus be amended to require findings of facts and conclusions of law in all criminal trials where the verdict has been rendered by the court sitting without a jury.

190. *United States v. Bolles*, 528 F.2d 1190, 1191 (4th Cir. 1975) (stating that no findings are needed even where the court admitted evidence subject to a condition but never ruled on whether the condition was ever satisfied).

191. For instance, OHIO R. CRIM P. 23(c) states: "In a case tried without a jury the court shall make a general finding." This means what it says: a trial court is never required to state specific findings in its verdict. *See State v. D'Ambrosio*, No. 57448, 1990 Ohio App. LEXIS 3781, at *42 (Ohio Ct. App. Aug. 30, 1990) (stating that the trial court record and transcript are adequate to aid a meaningful review of the case); *see also* ARIZ. R. CRIM. P. 26.1.a ("The term judgment means the adjudication of the court based upon . . . its own finding following a non-jury trial, that the defendant is guilty or not guilty.").

192. 420 S.W.2d 949 (Tex. Crim. App. 1967).

193. *Id.* at 952.

194. In his study of Philadelphia bench trials, Professor Schulhofer found that the judges only "sometimes" announced a reason for their decision. Schulhofer, *supra* note 16, at 1065.

195. *See supra* text accompanying notes 150-152; *see also* *United States v. Ochoa*, 526 F.2d 1278, 1282 n.6 (5th Cir. 1976) (stating that given that the defendant waived special findings, "[o]n appeal, findings will be implied in support of the judgment if the evidence, viewed in the light most favorable to the government, warrants them").

B. *Limitations of the Reasoned Judgment*

There is a certain attraction in the suggestion that a reasoned judgment fully and effectively compensates the accused for the loss of adversarial protection that flows from the removal of the jury in criminal cases. Tight control over the jury's access to and treatment of evidence, coupled with relative freedom in its ultimate arrival at a decision, appears well matched by judicial freedom over the evidence and control over the judge's formulation of the decision. Indeed, those skeptical of the institution of the jury might go further and argue that there are distinct advantages in the concluding stages of the nonjury trial. One observer of the jury system has remarked that "complicated and occasionally insoluble factual disputes have the appearance of being settled with ease when wrapped in the silent garb of a verdict returned in supposed compliance with strict legal rules."¹⁹⁶ Although the prime target of this remark is the impenetrable verdict of the jury, which cuts through all legal niceties and factual uncertainty that have unfurled in the course of the trial, criticism is implicitly leveled at the entire closing phase of the criminal trial. In particular, the reference to "supposed compliance" with legal rules calls into question the effectiveness of the judge's instruction in ensuring the jury's adherence to the relevant rules of evidence and provisions of substantive law in reaching its decision.¹⁹⁷ Under this view, the summing-up followed by closed, inscrutable deliberations offers no guarantee to defendants that the ultimate verdict is based on the evidence adduced at trial and on the relevant rules of law.

From this perspective, the provision of a reasoned judgment for the court's decision offers more than adequate compensation for the jury's absence. The mystique of the fact-finder's closed deliberations is peeled away, and the accused and the public are presented with an open justification of a finding of guilt. A variant of this argument is that giving reasons ought to be required, whatever the composition of the tribunal of fact. In

196. Dale W. Broeder, *The Functions of the Jury: Fact or Fictions?*, 21 U. CHI. L. REV. 386, 417 (1954).

197. A considerable amount of attention has been focused on the impact of mandatory instructions on the jury. See, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1314-60 (1979) (presenting the results of the first empirical objective linguistic study of standard jury instructions and proposing a methodology to determine if a document is comprehensible by its intended audience); Tanford, *supra* note 106, at 95-108 (arguing that admonitions—judicial instructions that the jury should disregard evidence—do not work, may be counterproductive, and should no longer be given even if asked for). For an English perspective on the need for simplification of such instructions, see Edward Griew, *Summing up the Law*, 1989 CRIM. L. REV. 768.

any proceedings, however, the form in which a decision is handed down will be dictated to some extent by the composition of the decision-making body, and it would not be viable in practice to demand a reasoned judgment from a collective body of twelve jurors.¹⁹⁸ The nonjury trial format is, of course, wholly conducive to the presentation of reasons for the decision. Taking this view a step further, one could contend that judgment in a nonjury trial is intrinsically more compatible with the adversarial ideals of the criminal process. We noted before that the ideal trial process may be depicted as one that accords primacy to the status of the accused and is centered on the need to justify itself in a positive way to the accused.¹⁹⁹ Viewed from this perspective, the verdict should reflect more than simply a finding of guilt:

A verdict of "Guilty" does not simply express a judgment on the defendant's past conduct: it communicates that judgment to him and to the community; and it expresses a condemnation of his conduct which he should accept as justified by the trial which preceded it. What makes that verdict just is not simply the fact that he did commit the offence charged, but that the charge has been proved against, and to, him by a rational process of argument in which he was invited to participate. Like moral blame, a criminal conviction must justify to the accused the condemnation which it expresses.²⁰⁰

It could be argued, then, that the judgment in a nonjury trial is more conducive to the above aims than the jury verdict in that the judgment provides a more rational vehicle to express condemnation of the accused's conduct.²⁰¹ As stated before, the jury's verdict per se offers no insight into the process of decision-making by the fact-finder.

In reality, however, the judgment does not do enough to preserve the adversariness that we have identified as central to the Anglo-American criminal process.²⁰² In fact, the argument that the judgment is adequate as compensation for the jury's absence may be shown to be flawed in the following respects. First, it is doubtful whether in reality the judgment

198. See GLANVILLE WILLIAMS, *THE PROOF OF GUILT* 309 (3d ed. 1963) ("It seems to be in the nature of a jury as a composite lay tribunal that it is unable to give a reasoned opinion."). It does not necessarily follow, however, that a jury system incorporating some method of conveying reasons could not be devised. See Lempert, *supra* note 11, at 51 n.40 (suggesting the possibility of designing a jury system similar to that of Japanese judges following guidelines to provide reasons for their decisions).

199. See *supra* text accompanying notes 187-196.

200. DUFF, *supra* note 97, at 118.

201. See MICHAEL BAYLES, *PROCEDURAL JUSTICE* 76 (1990) ("One is more apt to accept a decision when reasons are given, even if one disagrees with them. One at least thinks that one's concern was not arbitrarily dismissed and that one received consideration.").

202. See *supra* Part III.B.

makes for greater "appealability." Second, the judgment possesses none of the adversarial elements that are brought to the closing phase of a criminal trial by the requirement that the judge instruct the jury on the law pertinent to the case. Third, judgment in its present form simply falls short of countering the potential threats to the adversarial protection that come from the role of the judge as the fact-finder, outlined above in Part III. We take these issues up in turn.

1. *Appealability.*—Let us first consider the argument that the judgment offers enhanced opportunities for appellate scrutiny of the decision reached at trial. The greater the extent to which the decision-maker is called upon to justify a finding, the more susceptible to challenge the basis of that decision becomes. The proposition is true, however, only if appellate courts are in the habit of scrutinizing fact-finding carefully and are inclined to be even more careful when the facts have been found by a single judge. This is simply not the case in Anglo-American jurisdictions. As a general matter, appellate courts have shown themselves to be unwilling to interfere with the findings of jurors who have seen and heard witnesses give evidence and thereby had a full opportunity of gauging the strength of the evidence presented at trial.²⁰³ Appellate courts tend to be just as deferential to the factual assessments of trial judges. The Northern Ireland Court of Appeal, for example, has adopted a pragmatic approach to appeals from Diplock trials drawing upon an amalgam of the principles that have been developed to deal with jury and nonjury appeals. The mainstay of this approach has been a wariness of intruding upon the area of the judge's fact-finding responsibility.²⁰⁴

In the context of civil trials, deference to the original fact-finder not only makes economic sense,²⁰⁵ but also appears to be fair. Plaintiffs and defendants are afforded equal access to evidence in advance of trial, and they proceed in the knowledge that a finding in favor of either side will

203. See Nobles et al., *supra* note 22, at 2 ("The Court's primary concern is its reluctance to substitute its own judgement for that of the jury, when assessing matters of fact.").

204. John D. Jackson & Sean Doran, *Miscarriages of Justice: The Role of the Court of Appeal in Northern Ireland*, in STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, SEVENTEENTH REPORT 275-80 (1992) [hereinafter Jackson & Doran, *Miscarriages of Justice*].

205. The point is well made by the Supreme Court of Canada in *Fletcher v. Manitoba Pub. Ins. Co.*, [1990] 3 S.C.R. 191:

The very structure of our judicial system requires this deference to the trier of fact. Substantial resources are allocated to the process of adducing evidence at first instance and we entrust the crucial task of sorting through and weighing that evidence to the person best placed to accomplish it.

Id. at 204; see FED. R. CIV. P. 52(a) (Advisory Committee note to 1985 amendment) (arguing that judicial economy dictates deference to trial court factual findings by courts of appeals).

attract the same measure of protection on appeal. This argument does not translate to the criminal process, where only a finding of guilt is subject to be reopened, because of the much higher premium attached to the risk of convicting the innocent than of acquitting the guilty. As we have seen, it is this factor that has prompted the adoption of a process that accords a high level of adversarial protection for the accused at trial. If it is the case that such protection is undermined by the judge's more powerful role, then it is arguable that appellate courts should be expressly directed to take issue more readily with the judge's findings and even to assume a more investigative role themselves.²⁰⁶ Although such a suggestion evokes images of a typically hierarchical system of authority not commonly associated with the Anglo-American adversary tradition,²⁰⁷ it should be stressed that the aim would be to redress the undermining of adversarial protection at trial by allowing a convicted defendant to take issue (albeit indirectly) with the judge's conclusions more forcefully than is at present possible.

2. *Jury Instructions*.—In the context of a jury trial, the judge's instructions to the jury represent an important vehicle through which the various issues, both legal and factual, arising in the course of the trial are finally conveyed to the jury in advance of its decision on guilt or innocence. But mandatory legal instructions simply do not carry the same force in a bench trial when they are conveyed by a single person claiming to have adhered to them in the course of arriving at a decision. For example, even the basic articulation of the burden of proof sits less easily in the context of an *ex post facto* justification for a finding of guilt than in the context of a delineation of the issues in a case to the fact-finder. In pressing such fundamental principles upon the jury, the judge directly injects into the decision-making process the commitment of the criminal justice system to protecting the innocent from conviction.²⁰⁸ The delivery of jury instructions, therefore, plays an important symbolic role in satisfying the defendant that these principles will be followed.²⁰⁹ An

206. Authors Jackson and Doran have suggested a more interventionist approach by the appellate court in reviewing the factual findings of judges in Diplock cases in Northern Ireland. Jackson & Doran, *Miscarriages of Justice*, *supra* note 204, at 284-85.

207. See Damaska, *Faces of Justice*, *supra* note 58, at 49-50 (discussing the impact of hierarchical review).

208. ZUCKERMAN, *CRIMINAL EVIDENCE*, *supra* note 78, at 125-134.

209. See generally Sean Doran, *The Symbolic Function of the Summing Up in the Criminal Trial: Can the Diplock Judgment Compensate?*, 42 N. IR. LEGAL Q. 365 (1991) (arguing that jury instructions are a vehicle for value expression, such as fairness to the accused and integrity of the system). A related point has been made by author Seigel with respect to admonitions to the jury to disregard certain evidence. Although the practical

after-the-fact statement by the judge that she is satisfied that the requisite standard has been met, on the other hand, carries none of the solemnity of the message to the jury. The point here is not that a judge is not equipped to make a determination of guilt on the standard of proof beyond reasonable doubt.²¹⁰ Rather, the difficulty is that when the standard is declared after the fact as having been met, the defendant has less assurance that it has truly been met than when the standard is issued before the deliberative process begins.

The scope of permissible judicial comment on matters of fact varies across jurisdictions. In England, for example, judges have traditionally enjoyed a fairly broad latitude to comment on the facts of the case,²¹¹ while in the United States, their role is more limited in this regard because the majority of states do not permit comment on the facts.²¹² In either case, and whether or not one views the ability to comment as a beneficial aspect of the trial process, it is significant that the judge's putting the issues to the jury is still an integral part of the argumentative process that has continued throughout the trial. While it is always possible for a judge to have formed a view of a case from a very early stage of the trial and to gauge all subsequent evidence by its impact on that view, the jury cannot form a collective opinion until it retires at the end of the evidence, with the judge's instructions as the final external input into its process of decision-making. In a sense, then, the instructions could be described as a crystallization of the debate that has been conducted throughout the course of the trial.

Jurisdictions also vary in the extent to which they recognize the adversarial potential of this closing phase of the trial. Generally speaking, parties in the United States are given a significant formal opportunity both to contribute to and to take issue with the judge's formulation of the instructions.²¹³ In England and Wales, however, although it is accepted

effectiveness of such instructions has been called into question, Seigel has argued that this may be beside the point:

[A]dmonitions are probably best understood as part of the ritual associated with the trial process. . . . An admonition brings closure, a sense that the system has done its best to make things right. Viewed in this light, the jury's incapacity to abide by the admonition is simply irrelevant.

Seigel, *Pragmatic Critique*, *supra* note 61, at 1022.

210. It may be, however, that there is a qualitative difference in the task of convincing a single judge from that of convincing twelve jurors. Schulhofer, *supra* note 16, at 1065 n.106.

211. WILLIAMS, *supra* note 198, at 303-304; Wolchover, *supra* note 121, at 783-784.

212. WIGMORE, *supra* note 5, § 8; Saltzburg, *supra* note 75, at n.22-23; Wolchover, *supra* note 121, at 784-86.

213. For instance, FED. R. CRIM. P. 30 states, in pertinent part:

At the close of the evidence . . . any party may file written requests that the court

that the judge may ask counsel (in the jury's absence) for submissions on how he should direct the jury on certain aspects of the case, dialogue between judge and counsel after the summing-up is discouraged.²¹⁴ Interestingly, however, the Law Commission has recommended that in all cases involving difficult or controversial points, the judge should engage in discussion with counsel in advance of the summing-up (and closing speeches) with a view to clarifying those matters.²¹⁵ Although the Law Commission's primary concern was avoiding error and groundless appeals, its recommended procedure would conform more than the present position to the participatory ideal whereby the accused is given a full opportunity to question the strength of the case against him. The Law Commission's proposal would in effect ensure a greater degree of adversarial protection in the context of jury trials.

In jury trials in Northern Ireland, adversarial protection is built into the summing-up through a procedure whereby counsel may "requisition" the judge after his address to the jury.²¹⁶ When the jury has retired, the judge invites representations from both counsel on the content of the summing-up. If the judge accepts that he has made an error or omission or that he has not explained something clearly to the jury, he will then ask the jury to return in order to rectify the matter before they deliberate. This procedure imposes joint responsibility on both judge and counsel and recognizes that, right up to the point when the issues are finally in the hands of the jury, the argumentative basis on which the trial has proceeded

instruct the jury on the law as set forth in the requests. . . . The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. . . . No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury

The rule in Florida courts is identical in substance. FLA. R. CRIM. P. 3.390.

214. *R. v. Charles*, 68 Crim. App. 334, 339 (1976) (citing error where the judge discussed matters of law with counsel after the summing-up); *R. v. Cocks*, 63 Crim. App. 79, 82 (1976) (same). It should be noted that prosecution counsel is under a duty to draw any possible errors of law or fact to the judge's attention at the end of the summing-up. Code of Conduct of the Bar, Annex H (Standards Applicable to Criminal Cases) ¶ 1.7; see *R. v. Donoghue*, 86 Crim. App. 267, 271-72 (1987) (urging counsel for the prosecution to take some responsibility for ensuring the judge properly instructs the jury). It would seem that defense counsel does not have such a duty. *R. v. Edwards*, 77 Crim. App. 5, 7 (1983); *Cocks*, 63 Crim. App. at 82 ("[D]efending counsel owes a duty to his client and it is not his duty to correct the judge if a judge has gone wrong.")

215. LAW COMM'N, CORROBORATION OF EVIDENCE IN CRIMINAL TRIALS, 1991, CMND 1620, ¶¶ 4.19-4.30.

216. BARRY VALENTINE, CRIMINAL PROCEDURE IN NORTHERN IRELAND ¶ 13.23 (1989); EDWARD F. RYAN & PHILIP P. MAGEE, THE IRISH CRIMINAL PROCESS 362-63 (1983).

should continue. Until the very end, the issues remain "up for grabs," and the resulting decision will have been made on the basis of the fullest possible exchange of views as to the merits of the respective cases.

It is fair to say that, although the instructions in jury trials are not always fully exploited as a vehicle for adversarial protection, they do at least encapsulate the issues on which any conviction is based. In a nonjury trial, by contrast, the usual procedure whereby a judge presides over the trial and gives a reasoned judgment for the decision does not allow a genuine opportunity for the parties to influence the final decision of the trier of fact. It is true that the parties may address the judge at the close of the evidence but, as we have argued, by the time this stage of the proceedings is reached, the adversarial benefits of trial by jury have already been compromised by an easing of evidentiary constraints and an expansion of the judicial role. Given these shifts, would it not be preferable to require the judge to reveal his thinking *prior* to the final decision so that the accused may challenge the basis of his findings in the context of the trial itself? Such a course appears all the more attractive when one considers the third respect in which the written judgment falls short on the measure of adversarial protection.

3. *Threats to Adversarial Protection.*—In Part IV, we identified three distinct threats to adversarial protection when the jury is removed from the traditional adversarial criminal process. First of all, the fact-finding function takes on a more limited scope when it is performed by a professional judge rather than a jury. Second, evidentiary barriers are not fully effective; professional triers inevitably gain insights into a case that are independent of the formal process of proof. Third, the character of the trial is significantly altered in the jury's absence, with the judge playing a much more leading role, whether or not actively stepping into the arena. In short, the judge's loyalty to the formality of the law, professional expertise and position as arbiter of admissibility as well as trier of fact, and relative freedom to explore all avenues of inquiry place the judge in a position of strength that no jury could possibly attain.

It can be argued that the requirement of a judgment does little, if anything, to address these distinct threats. On the first point, it may even be counterproductive. The requirement that the judge give reasons is an expression of judicial accountability to the legal system and the community, but it serves to reinforce (rather than counter) the limited scope of the judge's fact-finding role. The judge's justification of the decision has to be couched within the strict legal standards that judges must apply. The judgment requirement, therefore, serves to remind the judge to apply strict legal standards and eschew equitable considerations that might do more justice to the individual accused.

If the judgment requirement is effective in inducing judges to apply the law strictly—to the detriment of defendants—it is at the same time much less effective in constraining judges on questions of fact—also to the detriment of defendants. Indeed, the nonadversarial character of the process of judgment serves to accentuate the judge's dominance over questions of fact. Although the requirement of a reasoned judgment means that the careful judge will explicitly base her decision on prejudicial facts only very rarely, it does nothing to counter the fact that the judge necessarily relies on a multitude of unarticulated factual assumptions when reaching any stated conclusion. Given that these assumptions are not articulated, they are neither subject to argument at the trial stage nor reviewable on appeal.

C. Toward an Adversarial Process of Judgment

The upshot of these arguments is that the powerful nature of the judge's position in nonjury trials requires a counterweight at trial that the requirement to give a reasoned judgment cannot of itself achieve. What course ought to be prescribed for the judge to follow at the close of the evidence? The following proposal is motivated by a belief that it is preferable to confront directly the implications of the transition to nonjury trial and to evolve practices and procedures that are best suited to maintaining the adversarial values integral to the criminal trial, whatever its composition. The essential aim is to reconcile the inevitably more dominant role of the judge with the preservation of basically adversarial norms. Our proposal is simple: if inclined to convict the defendant, the judge should be obliged to issue at the close of the evidence a provisional statement of reasons for arriving at this tentative conclusion, rather than delivering a verdict and judgment "package" at the end of trial. This statement would then be subject to study and argument by counsel in advance of the judge's final decision on guilt.²¹⁷

The judge's statement would be aimed at arguing positively toward justification of the conclusion that the accused is guilty of the offense charged and at negating any reasonable explanations that are consistent with the innocence of the accused. Following the statement would be an exchange of views between both counsel and between judge and counsel, an adversarial-style debate on the strength of the judge's preliminary conclusions. In particular, the defense would be given the opportunity to question the judge's approach to the evidence. This phase of the process

217. If the judge determined that the accused should be exonerated, there would be no need for this two-tiered process. The judge would simply announce the "not guilty" verdict at the close of the case.

completed, it would then fall to the judge to make a final pronouncement on the accused's liability. In the event of conviction, the final judgment would seek to justify rejection of the defense response to the preliminary statement. In this way, the notion of the judge as having a freer rein over the evidence at trial would find a corollary in greater latitude for the defense to challenge the results of the inquiry.

A possible objection to such a procedure is that it is contrary to principle for the decision-maker to reveal how his mind is working in advance of the final decision. As we have stressed before, any appearance of prejudgment is an unsavory one. In the present context, however, such an objection does not hold great force. First, if at the end of the evidence the judge is inclined to acquit the accused, the matter would stop there, and an acquittal would follow. It would admittedly be repugnant if an express inclination toward acquittal were to be transformed into one toward guilt through the persuasion of prosecution counsel. In the event of a provisional finding of guilt, however, the accused surely stands to gain from a final opportunity to instill a reasonable doubt in the mind of the fact-finder. Moreover, this would challenge the judge to justify a finding of guilt beyond a reasonable doubt—the elimination of doubt being expressly subject to an argumentative process.

Authors Jackson and Doran's survey of Diplock trials contained some precedent for this form of procedure. One judge would invite discussion at the close of the evidence by setting out his train of thought in a provisional manner, and the ensuing exchange with counsel would provide both parties with a last chance to affect the outcome.²¹⁸ A similar approach was adopted by some of the judges in Professor Schulhofer's study of bench trials. Specifically, one judge would sum up his own analysis to counsel and ask them to refute it; others would specifically direct counsel to the issues that they found most troublesome.²¹⁹ Conducted in an informal manner, however, such deliberations may not be fully effective in isolating the core elements of the dispute as to the accused's guilt. Further, if placed on a formal footing, the proposed procedure, in at least some measure, would approach the ideal of justifying the verdict to the accused and to the public.

Perhaps a more helpful analogy can be found in the practice mentioned earlier wherein counsel in jury trials in Northern Ireland requisition the judge after his summing-up.²²⁰ The context is different, but the practice illustrates how the participatory element may be maximized at a point following delineation of the issues by the judge but prior to the ultimate

218. JACKSON & DORAN, *DIPLOCK TRIALS*, *supra* note 112, at 193, 266-68.

219. *See* Schulhofer, *supra* note 16, at 1071.

220. *See supra* text accompanying note 216.

decision on guilt or innocence. It may be useful to look at a fairly typical example of requisitioning taken from an actual case in our survey in which counsel objected to the way the judge had presented the prosecution evidence in relation to one of the counts on the indictment.²²¹ The question for the jury was whether the accused or another person accompanying him had struck the victim, causing bodily harm. The victim's evidence implicated the accused, but another witness had cast doubt on this by her uncertainty as to the order in which the two potential assailants had arrived at the location of the assault.

The exchange went as follows:²²²

- Counsel: Your Honour three short points. In relation to the third count [assault occasioning actual bodily harm] your Honour reminded the jury of the evidence of [the victim] as to could [the accused] come up [to the victim] and that he didn't get very far and so on. In my respectful submission your Honor should have mentioned the evidence of [witness A] . . . that both men did go into the house at or about that time and that she couldn't say which of them went first or whether they went in side by side.
- Judge: I think she said she didn't know which came up the path first, wasn't it, not into the house. Now I may be wrong.
- Counsel: In fact, I think maybe that was a question your Honour asked her?
- Judge: Oh yes I asked her as they were coming up the path, mind you I could be wrong.
- Counsel: "I couldn't say who went into the house first . . .," is my note, ". . . or whether they were side by side."
- Judge: Sorry, I've got the wrong place.
- Counsel: Your Honour, I asked her . . . it's right at the end of all her evidence, "I can't say who went into the house first or whether they were side by side."
- Judge: I didn't make a note because I think I thought the answer was not helpful.
- Counsel: It wasn't really but . . . all I am saying is that your Honour has given the account of one witness entirely accurately but has not mentioned other evidence that there was on that point, that's the only other evidence on that point.
- Judge: It seems to me just ambiguous evidence, it doesn't really put it much further.

221. JACKSON & DORAN, *DIPLOCK TRIALS*, *supra* note 112, at 259-60.

222. Allowance should be made for the oral context and the possible errors in transcription.

Counsel: On the evidence that your Honour has reminded the jury it could be [the accused] alone that went into the house at that stage because [the victim] only refers to seeing [the accused] come up whereas there is some other evidence about that suggesting that both went in.

Judge: Yes.²²³

Although the judge chose not to act upon two other matters that counsel raised, he did recall the jury and gave them further direction on this point. Interestingly, the jury acquitted the accused on the third count while convicting him on the other charges that he had contested.²²⁴ It would be impossible to gauge the impact of the requisition on this particular decision, and it should be remembered that it is entirely a matter for the judge's discretion as to whether he accepts the submissions of counsel in the first place. However, the example illustrates the value of a free-ranging discussion on the content of the summing-up at a time when error is still remediable.

A similar procedure could arguably be adapted to suit the nonjury trial. Such a development would enhance the adversarial quality of the proceedings and repay in some measure the adversarial deficit that the accused suffers through the removal of the jury. The guilt of the accused would have to be justified through a process of argument and debate in which the accused's representative would play an active part in challenging any assumptions that the fact-finder may have formed in advance of, or in the course of, the trial. It is not suggested that this would entirely restore the protections afforded to the accused in the jury context, nor that it would withstand the threats to adversariness that arise in the nonjury setting.²²⁵ It does, however, mark a recognition that the character of the criminal trial inevitably changes in the jury's absence and that the difficulties inherent in the transition should be confronted in a direct manner. In brief, formal prescription rather than informal presumption is the key to preservation of adversarial protection.

VII. Conclusion

If presented with the task of devising an ideal trial process from that

223. JACKSON & DORAN, *DIPLOCK TRIALS*, *supra* note 112, at 259-60.

224. *Id.*

225. In particular, our proposal most directly attacks the problems associated with having at the center of the trial a lone professional fact-finder who is also responsible for screening inadmissible evidence. It does little to counter the problem that professional fact-finders are generally less able to take account of equities in applying (or perhaps nullifying) the law.

mythical state of the original position,²²⁶ behind what John Rawls has termed "the veil of ignorance,"²²⁷ it is unlikely that one would be inclined to adopt a system of trial by jury as we currently know it. Less attractive still would be a process with rules, practices, and procedures predicated on the existence of a lay fact-finding tribunal but from which that tribunal has been extracted. Such, however, is the character of the nonjury criminal trial that has become a widely used forum for the resolution of serious criminal matters in many jurisdictions. In this Article, we have not sought to analyze the merits and demerits of juries and juryless trials. Rather, our aim has been to suggest that the contextual differences that set the two apart warrant a discrete approach to the protection of the accused's interests in the nonjury trial.

At the root of this approach is the preservation of adversarial protection that has traditionally been constructed on the basis of the jury's presence. As we have suggested, the removal of the jury entails an adversarial deficit for the accused. The accused is disabled from fully challenging the case against him, and he lacks assurance that a determination of guilt will be based solely on admissible evidence presented at trial. Before a jury, a picture of guilt is built up slowly, piece by piece, with an opportunity at each stage for this emerging picture to be challenged. Only at the end of the contest is this body formally charged to withdraw and to determine collectively, on the basis of the relevant principles that have been communicated to it, whether the picture of guilt has been completed.

It has been argued that no matter how hard professional triers of fact may try to simulate this process of proof by closing their minds to any extraneous knowledge that they inevitably acquire and by affecting, insofar as possible, the passive role of the jury, the bench trial is not a two-way contest between the prosecution and the defense. Rather, the judge becomes another player in the contest. Litigators must treat the judge as a member of the community of professional insiders with whom they have done business in the past and with whom they will have to do business in the future. Although the trial does not necessarily assume an overtly inquisitorial character—because particular judges may not seek to enter the arena with enthusiasm—the adversarial context of the trial nonetheless changes quite perceptibly to incorporate a tripartite channel of communication. Dominance is derived from the professional strength of the judicial

226. JOHN RAWLS, A THEORY OF JUSTICE 17 (1972) ("[T]he original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair.").

227. *Id.* at 136 (stressing the need for contingencies to set aside selfish considerations and consider principles of justice on the basis of general considerations). For Rawls's more recent views, see JOHN RAWLS, POLITICAL LIBERALISM (1993).

position and not just from the extent of an individual judge's propensity to intervene.

Given this essential shift in emphasis, we are faced with a choice of whether to attempt to simulate jury norms in a nonjury context or to reexamine the conventional process with a view to evolving a scheme of protection specifically geared to trials by professional judges. In part, we have suggested that some of the traditional protections can and should be recreated in the nonjury context by, for instance, enforcing evidence rules in bench trials more formally and having pretrial hearings on the exclusion of evidence before a judge other than the ultimate fact-finder. We have also urged that a basic inquisitorial control, the requirement of "reasoned judgment," be incorporated into all nonjury criminal cases. Ultimately, though, we call for something more. We propose that the judge deliver, before the conclusion of trial, a provisional statement of guilt that remains open to challenge and debate. This proposal is a modest one, and it may well be that in the criminal setting one should look further than the trial itself toward greater judicial control over pretrial procedures and toward an invigorated appellate approach to judicial fact-finding. We leave these issues for another day.

