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Cornerstones of the Judicial Process

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Under our federated system of government, each state and the federal government have their own criminal justice processes. The federal system must comply with the constitutional prerequisites set forth in the Bill of Rights, and the state systems must comply with those Bill of Rights' provisions made applicable to the states by the Fourteenth Amendment,[1] but those constitutional prerequisites allow considerable room for variation from one jurisdiction to another. In many respects, the fifty states and the federal government have used that leeway to produce considerable diversity in their respective criminal justice processes. At the same time, however, one can readily identify certain common notions that run through the fifty-one American criminal justice processes. Those notions are the subject of this article.

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A small group of "cornerstone" objectives shape both the basic structure and the governing legal principles of the process in each state and in the federal system. Various elements of these cornerstone objectives are mandated by the federal constitution, but their widespread acceptance was not a product of the Constitution. The state processes were not subject to federal constitutional prerequisites until the adoption of the Fourteenth Amendment after the civil war, but the objectives were established long before then. Indeed, most of the cornerstone objectives existed in the criminal justice processes of the original states and the initial federal system, both of which borrowed largely from English common law. Two centuries later, the premises underlying these objectives continue to be at the core of the American criminal justice process, notwithstanding major modifications in specific procedures and in institutions of administration.

Though the cornerstone objectives themselves are well established, there has always been considerable disagreement as to the precise scope of each objective and the weight accorded a particular objective when balanced against another. These disagreements explain in large part the differences in the content of each jurisdiction's implementation of the criminal justice process. The disagreements also are reflected in the frequent divisions within the United States Supreme Court as to the interpretation of the constitutional limitations shaped by the objectives. This article does not reach those disagreements, but concentrates on the prerequisites for their analysis -- identifying the general character of the criminal justice cornerstones, and identifying the major elements of the process that reflect their general influence.

Implementing the Enforcement of the Substantive Law

Roscoe Pound noted long ago that "legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action."[2] While a procedure may promote values independent of the aims of substantive law, Pound was correct in characterizing the *raison d'etre* of any procedural system as accomplishing the practical

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implementation of the substantive law. As applied to the criminal justice process, this universal starting point mandates a process that promotes effective enforcement of substantive criminal law -- that is, a process through which the government can detect, apprehend, prosecute, convict, and impose punishment upon those who have violated the prohibitions of substantive criminal law. However, as illustrated by the variety of criminal justice systems throughout the world, a process may be shaped in many different ways despite the universal objective of effectively enforcing substantive criminal law. The choices made in implementing that objective are what distinguish one system from another.

Initially, choices must be made among alternative procedural structures, all of which are designed to further effective enforcement of substantive criminal law. The alternatives reflect disagreements as to the procedures needed to achieve effective enforcement and the allocation of authority to administer those procedures.[3] The prevailing issue in this debate is to decide which structure achieves the best enforcement of substantive law when resources allocated to that task are limited.[4]

A second group of choices, relating to interests independent of effective enforcement, operate to make enforcement more difficult to achieve. As Robert Summers notes, "in legal ordering man does not live by results alone," for procedural systems also seek to serve values that stand apart from achieving "result-efficacy."[5] These independent values commonly are said to aim at achieving "fairness" in the process. While this amorphous concept of "fairness" may have a somewhat different connotation in different societies, its fundamental elements are fairly uniform in democratic societies.[6] Fairness imposes both substantive and procedural norms that restrain state power in criminal law enforcement. Substantive norms recognize such interests as human dignity and personal autonomy, while procedural norms reflect values such as community participation, a prescribed procedure, regularity, integrity, and promptness in application, and equality of treatment of like cases.[7]

Because the precise content of these independent values is derived in large part from political ideology, tradition, and culture, restraints imposed on the criminal justice process in service of such values will vary from one country to the next. Yet general agreement exists that some "fairness" restraints are needed, even when they reduce the efficient enforcement of substantive criminal law through the criminal justice process. For example, although it is conceivable that the use of torture to extract confessions could add to the effectiveness and efficiency of criminal law enforcement, employment of torture is now universally condemned.[8]

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The following subsections discuss the choices that have been made for the American criminal justice process as reflected in the cornerstone objectives that shape it. There are nine such objectives: (1) achieving reliable factfinding (i.e., discovery of the "truth"); (2) utilizing an adversarial process of adjudication; (3) utilizing an accusatorial system of proof; (4) minimizing erroneous convictions; (5) minimizing the burdens of accusation and litigation; (6) providing for lay participation; (7) respecting the dignity of the individual; (8) maintaining the appearance of fairness; and (9) achieving equality in administration.

While the general framework provided by these goals is well accepted, the specifics of their implementation are not. In part, the divisions on implementation stem from disagreement on the precise substance of individual goals. They also stem from an ongoing controversy concerning the precise relationship between the goals and effective enforcement of substantive criminal law. There are two major facets of this controversy.

The first facet relates to achieving the aims of the criminal law through its effective enforcement. The appropriate scope of goals thought to serve that end may be assessed solely by determining the content of the goal itself. There is no need to balance the interests served by the goal against the societal interest in effective enforcement of the criminal law because the goal has been selected as a means of achieving effective enforcement. The problem is that there is disagreement as to which of the process' foundational goals, if any, are properly viewed as a means of achieving effective criminal law enforcement. The second facet concerns goals that are acknowledged to serve interests that run contrary to the societal interest in effective enforcement. Conflict resolution clearly is needed in this area, but there is disagreement as to what is called for in resolving the conflict.

The Aims of Effective Law Enforcement

Some commentators suggest that each of the nine objectives noted above, at least as they are traditionally implemented, detract from achieving effective enforcement of substantive law.

According to these commentators, the acceptance of each of these goals rests upon a balancing process in which the particular goal outweighs the societal interest in effective law enforcement.[9] The validity of this characterization depends in large part on how the aims of effective law enforcement are defined.

One definitional starting point is that the basic function of criminal law enforcement is to repress criminal conduct, primarily through a combination of deterrence and incapacitation. Consistent with the classical utilitarian justification for criminal law, this argument states that effective enforcement rests on preventing future crime, ideally by maximizing efficient use of resources. Herbert Packer, in his classic article on the goals of the criminal justice process,[10] explored the procedural needs of a criminal justice system that focuses solely on efficient repression of crime. Packer compared two models of the criminal justice process, a "crime control model" and a "due process model." The crime control model seeks to control crime by achieving a sufficiently high rate of apprehension and conviction through deterrence and incapacitation. The due process model, in contrast, concentrates on the fairness of the procedure and on the achievement of goals such as respect for individual dignity and equality of treatment of individuals.

The crime control model seeks to control crime by achieving a sufficiently high rate of apprehension and conviction through deterrence and incapacitation.

While the dichotomy drawn by Packer may have some shortcomings, it clearly illustrates the distinctions between a criminal justice process that focuses solely upon "crime control" and a process that considers countervailing interests in procedural "fairness."[11] As Packer noted, a process aimed solely at achieving crime control could readily dispense with such goals as providing for lay participation in adjudication or ensuring that investigative methods are consistent with respect for individual dignity. Indeed, Packer questioned whether such a process would even demand a formal adjudication process or insist upon a factfinding process as accurate as that usually thought to be needed in the American criminal justice process.

From a perspective of crime control, Packer noted, the "informal administrative factfinding activities" of the police and prosecutor should be dominant. The system must "produce a high rate of apprehension and conviction and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited." This, in turn, produces a need for "speed and finality," which is best satisfied by relying primarily upon the police and prosecutor and their "administrative expertness" in separating the innocent and the guilty. Of course, the crime control objective requires that administrative factfinding provide "adequate guarantees of reliabil[ity]," but the perfect accuracy sought by a more formal adjudication structure is not needed.[12] In a process aimed at repressing future crime, the punishment of an innocent person or the release of a guilty person can be tolerated, provided there are not frequent mistakes. As for measuring the tolerable level of mistake, Packer described it this way:

> The stumbling-block is this: how much reliability is compatible with efficiency? Granted that informal factfinding will make some mistakes that will be remedied if backed up by adjudicative factfinding, the desirability of providing this backup is not affirmed or negated by factual demonstrations or predictions that the increase in reliability will be *x* percent or *x* plus *n* percent. It still remains to ask how much weight is to be given to the competing demands of reliability (a high degree of probability in each case that factual guilt has been accurately determined) and efficiency (a process that deals expeditiously with the large numbers of cases that it ingests). The Criminal Control Model is more optimistic about the improbability of error in a significant number of cases; but it is also, though only in part therefore, more tolerant about the amount of error that it will put up with. The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Criminal Control Model accepts the probability of mistakes up to the level at which they interfere with the goals of repressing crime, either because too many guilty people are escaping or, more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law. In this view, reliability and efficiency are not polar opposites but rather complementary characteristics. The system is reliable *because* it is efficient; reliability becomes a matter of independent concern only when it becomes so attenuated as to impair efficiency.[13]

Thus, as Packer recognized, if the aim of criminal law enforcement is simply to achieve crime control, then the goal of obtaining reliable factfinding is consistent with, and need not be balanced against, the implementation of substantive criminal law. As Packer also points out, however, this perspective of the

reliability goal has distinct limits. The criminal justice process can implement the goal of reliable factfinding in a manner inconsistent with effective crime control. This occurs if (1) the process requires an additional quantum of reliability beyond that necessary to regulate crime control and does so inefficiently (e.g., through the unnecessary use of scarce resources), or (2) the procedures utilized provide the appropriate level of reliability, but can be replaced by other sufficiently reliable procedures that expend fewer resources (or, arguably, the same expenditure at a more rapid pace).

Interestingly, if the purpose of substantive criminal law is perceived to be retribution rather than crime control, then a broader range of basic process goals are consistent with the implementation of substantive law. If the primary function of criminal law is to ensure that those who transgress the basic community norms of the criminal law receive their "just desserts," and effective law enforcement is judged in reference to that end, then reliable factfinding is not only a consistent goal, but a goal that has no limits. From this perspective, the process fails if an innocent person is punished or a guilty person is not punished. Complete truthfinding becomes an essential element of the process, and all structural choices aimed at making the process more effective in discovering the truth are consistent with effective implementation of substantive criminal law.

Thus, from a "just desserts" perspective, if an adversarial system of adjudication provides the most accurate means of determining the truth, then adversarial adjudication also implements, rather than detracts from, the underlying process objective of achieving effective law enforcement. Because substantive criminal law rests upon a moral evaluation of the actor's culpability and because criminal statutes often defer to community judgments rather than precisely define culpability, the participation of lay persons in the adjudication of guilt or innocence is consistent with the aims of the substantive law.[14] The process goal of avoiding the imposition of undue burdens on the accused is also consistent with the substantive law under a just desserts approach, at least insofar as it reduces the burdens imposed upon the innocent accused.[15] Of course, the retributive view of effective law enforcement does not eliminate conflicts between achieving effective enforcement and other goals of the American criminal justice process. Those process goals that impair the process' ability to determine the truth are inconsistent with imposing just desserts upon the guilty. Their acceptance, under this view of the aims of the criminal law, can be explained only as the result of a choice that gave them priority over the objective of achieving effective law enforcement.

A few commentators advance a long-term instrumentalist view of the aims of criminal law that would render even the truth-deflecting goals of the criminal process consistent with the effective implementation of substantive criminal law.[16] According to this view, the effective enforcement of criminal law necessarily includes an element of moral education.[17] Criminal law can be an effective deterrent only if it persuades and educates the public as to its underlying values, including respect for individual dignity and autonomy. The moral force of criminal law is undermined, however, if the enforcement process fails to recognize those same values. Like criminal law itself, the criminal justice process must reflect the basic lesson that "the ends do not justify the means."[18] To gain the public's acceptance of the moral values of substantive criminal law, the process must demonstrate the legitimacy of the results of its enforcement. Proponents believe this can be achieved only through an enforcement process that convinces the public of its "fairness." Indeed, they argue the same conclusion follows from an even narrower perspective that focuses solely upon the successful apprehension and conviction of offenders. The key to this success depends predominantly upon public cooperation which rests on the public's acceptance of the fairness of the process.[19]

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Commentators and courts generally reject such a long-range instrumentalist view of the relationship between substantive law and procedure. These critics regard cornerstone objectives that impair the discovery of the truth to be inconsistent with the achievement of effective enforcement of substantive criminal law.[20] Acceptance of these competing goals is based on a determination that they outweigh society's interest in effective enforcement of criminal law. Accordingly, a lawmaker must determine what content should be given to those goals by examining the nature of the process used to reach that determination.

Resolving Conflicts

When a cornerstone objective is in conflict with the core process function of achieving effective law enforcement, the question arises as to how that conflict was resolved and the objective justified notwithstanding the

sacrifice in effective enforcement. The answer to this question can have an important bearing on how a lawmaker approaches a decision to adopt or reject a procedural limitation which would serve a cornerstone objective, but only at the expense of effective enforcement. Two different approaches to the resolution of the conflict have been suggested. One is a utilitarian cost-benefit balancing approach that reduces the interests in conflict to a common denominator and weighs the costs and benefits of a particular limitation (empirically established where possible) against the common denominator. The second approach gives priority to values essential for fairness and allows for the weighing of the negative effects on enforcement only when a particular limitation does not truly rest on the basic fairness concern underlying a cornerstone objective.

The utilitarian cost-benefit balancing approach starts from the premise that the same basic societal concerns underlie both effective law enforcement and those cornerstone objectives that operate as a counterpoint to effective enforcement. The counterpoint goals seek to preserve individual freedoms by restricting government authority to procedures that comply with norms of "fairness." Effective law enforcement also seeks to protect against invasions of freedom, although the approach contemplates invasions not by the government, but by criminals.[21] Thus, both effective law enforcement and counterpoint process goals deal with the same common denominator: the preservation of individual freedom. This common foundation provides a single measure for evaluating legal standards that contribute to one value but detract from another.[22] Ultimately, the conflict is not between two inherently contradictory concerns of "crime control" versus "individual liberty," but between two different modes of protecting individual liberty.[23]

In determining whether a process limitation should be imposed upon government under a cost-benefit approach, a lawmaker must determine what measure of individual freedom would be gained by imposing a limitation and balance that gain against the measure of individual freedom that would be lost as a result of the limitation's impairment of effective law enforcement. Indeed, the lawmaker arguably can adopt a more generalized cost-benefit analysis, as suggested by the philosopher Sydney Hook in discussing the rising crime rate of the 1970s:

> I submit that at the present juncture of events, because our American cities have become more dangerous to life and limb than the darkest jungle, we must give priority to the rights of potential victims. I am prepared to weaken the guarantees and privileges to which I am entitled as a potential criminal, or as a defendant, in order to strengthen my rights and safeguards as a potential victim. Purely on the basis of probabilities, I am convinced that I run a greater danger of suffering disaster as a potential victim than as a potential criminal or defendant. It is these probabilities that shift from one historical period to another that must be the guide of wise, prudent, and just administration of law.[24]

Application of a cost-benefit analysis requires a series of empirical judgments that are likely to be the subject of considerable disagreement. Initially, one must evaluate the threat to individual liberty posed by crime. Because crime has always been considered a serious problem in this country, the focus in this evaluation is on the increasing severity of the threat to our collective security. This threat is reflected in increasing rates of victimization and decreasing clearance rates, particularly as to violent crimes.[25] If the evaluation shows a significant increase in the threat of crime, it must then be determined whether more effective law enforcement will significantly reduce the severity of that threat.

Some commentators maintain that crime is primarily a product of social ills and that the only means of reducing crime is to attack these root social causes.[26] They contend that more effective law enforcement will have only a minor impact upon the rate or nature of crime.[27] Others argue that more effective law enforcement can significantly reduce (or at least slow the growth of) general or particular types of criminal activity.[28] If one concludes that more effective enforcement significantly reduces crime, the question then becomes whether change in the process itself can contribute substantially to increased effectiveness or whether the key to effectiveness is the quantity and quality of the resources devoted to the enforcement task.[29]

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Assuming that process changes can have considerable impact, conflict may arise in assessing the influence of a particular procedural change in achieving more effective enforcement. This, in turn, leads to what is probably the most difficult inquiry in this analysis: judging the impact upon individual liberty when altering the restrictions imposed upon government. With this preliminary analysis completed, the lawmaker then turns to the final task of balancing the costs and benefits of the particular change as

it bears upon individual liberty.

Although the application of a cost-benefit analysis is filled with uncertainties, its proponents argue that the inquiry is worth the effort. Though the lawmaker is likely to find few choices that are incontrovertible, the inquiry should produce distinctions in degree and identify those balances that are more readily drawn than others. Proponents also reject the contention that the "politics of crime" will inevitably convert the cost-benefit analysis into a tool to reduce restrictions upon police and prosecutors.[30] Indeed, they suggest that the inquiry required for such an analysis may well serve to fortify basic liberties against political pressures. As Alfred Conard stated: "Every human value is bought at the price of some other human value, and we are destined to squander our patrimony of liberties, like spendthrift heirs, unless we find out what we are giving for what we are getting."[31]

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An alternative approach to justifying cornerstone objectives that detract from enforcement efficiency largely rejects balancing. This approach sees the loss of liberty through criminal victimization or through governmental action as different in character and significance. As a result, these interests cannot be weighed appropriately against one another.[32] Proponents of this view argue that a choice in values must be made and, for several reasons, protection against misuse of governmental authority must be given the higher priority. They note that "[t]he basic political problem of a free society is the problem of controlling the public monopoly of force."[33] All liberty is lost under a totalitarian regime and the misuse of the criminal justice process has been a basic tool in the establishment and perpetuation of such regimes.[34] Accordingly, the paramount goal of the criminal justice process is to serve as a bulwark against governmental oppression.[35] The government cannot be allowed to subvert the dignity of individual criminals even though the criminal may harm his victim's dignity. Failure in this regard will carryover to other aspects of governmental regulation and threaten the democratic fiber of government. As Justice Holmes noted, the criminal justice process must be guided by the principle that "it is a less evil that some criminals should escape than that the government should play an ignoble role."[36]

With priority automatically given to guarding against governmental abuse of the criminal justice process, adherents to the above position argue that the critical determination for the lawmaker lies not in balancing a safeguarding cornerstone objective against effective enforcement, but in assessing the relationship of a particular governmental practice to the underlying concern of that objective. If a practice is deemed to violate a safeguarding objective, then it should not be allowed as part of the criminal justice process, regardless of its positive impact upon the effective enforcement of substantive law. Conversely, if a practice does not undercut a safeguarding objective, then balancing is appropriate to maximize efficiency (i.e., in determining whether resources expended through the practice are justified by its enforcement results).

Of course, the sticking point under this analysis is the determination of whether a particular practice runs counter to a safeguarding objective, thereby placing it beyond the realm of utilitarian balancing. The first step is to identify general principles of fairness, derived from historical traditions and widely shared values of a democratic society, that underlie those cornerstone objectives which are designed to safeguard against government abuse. The second step is to assess the particular procedure in light of those principles. Proponents argue that while there is room for disagreement among reasonable persons, particularly as to the second inquiry, such definitional ambiguity is less dangerous than a general application of utilitarian balancing. The symbolic placement of safeguards against governmental abuse beyond the realm of balancing ensures, as Justice Brandeis agreed, that "fundamentals" must prevail "no matter the ends."[37]

As an illustration of this approach, consider the question of whether police may follow a practice of using undercover agents to befriend and then exploit suspects to obtain damaging admissions. Some decisionmakers might conclude that such deception by the government poses an unacceptable threat to liberty because of its chilling effect on the individual's right of association. For others, the government's use of such deception is acceptable because it poses no greater threat than similar deceptions inherent in all personal relationships. A "friend" who turns out to be a government agent is no worse than any other supposed "friend" who turns out to be disloyal. A third position, falling somewhere in the middle, suggests that governmental "planting" of a friend compares to a search for criminal evidence. Such government actions, therefore, should be accepted only on conditions traditionally applied to searches (i.e., upon the basis of probable cause and, possibly, the approval of a magistrate).

The key from the perspective of opponents of general utilitarian balancing is that each of these positions is based upon an

analysis of the threat posed by the practice to the individual's dignity. Unlike general utilitarian balancing, the inquiry is not based on the weighing of such factors as the seriousness of the threat of crime in general or of a particular crime being investigated, the effectiveness of governmental deception in solving crimes, the comparative effectiveness of alternative modes of investigation that are less threatening to individual privacy, or the capacity of the community to exercise control over the police through means other than legal regulation of this practice. Admittedly, for some lawmakers, these considerations may slide in at the edges in assessing the character of the practice as it relates to general principles of fairness, but the critical distinction is that they do not become controlling elements in determining what governmental practices are acceptable.[38]

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THE NINE CORNERSTONES

Discovery of the Truth

Depending upon how one views the goals of substantive criminal law, discovery of the truth can be characterized as either indispensable to the enforcement of the substantive law or as largely necessary to achieving that end.[39] When one focuses on fair treatment of the accused, discovery of the truth remains an important goal insofar as it serves to protect the innocent defendant against false conviction.[40] Accordingly, it is not surprising that the Supreme Court has described the discovery of the truth as a "fundamental goal" of the criminal justice system[41] and the "central purpose of a criminal trial."[42] Lower courts and commentators regularly echo such characterizations.[43]

Several commentators, however, question the truthseeking goal on epistemological grounds.[44] They note that while truthfinding is commonly described as aimed at serving "the dual aim of our criminal justice system . . . that guilt shall not escape or innocence suffer,"[45] the determination of guilt or innocence relies on more than the discovery of the truth of historically objective facts. It also involves application of "normative judgments" measured by such mens rea elements as recklessness and negligence and by assessing such justifications as self-defense and duress.[46] Some argue that even as to historical fact, the search for truth is fruitless because "the truth concerning any given prior event is unknowable" and the findings of fact are in reality "educated guesses."[47] These objections, however, do not preclude a goal of ensuring that the determination as to guilt or innocent is made as reliably as possible.[48] It is in this regard that truthfinding becomes a basic goal of the process. Focusing primarily on historical fact, it seeks to create a factfinding process that can minimize errors in the enforcement of criminal law.[49]

Various elements of the criminal justice process specifically promote such discovery of the truth. Initially, the process tries to provide an investigatory capacity to uncover both the commission of crime and the identity of the offender. It seeks to provide police and prosecutors with the authority to identify potential sources of information and to obtain evidence even when the sources are not cooperative. The police, therefore, are allowed, subject to certain limitations, to question possible witnesses and suspects, to search persons and property, to require suspects to participate in identification procedures, and to utilize informers and undercover agents. Prosecutors are granted investigative authority that is even broader in some respects than that of police through the use of the investigative grand jury.

Discovery of the truth also requires an adjudication process that is reliable both in the convicting the guilty defendant and exonerating the defendant who is erroneously accused. Trial aspects aimed at ensuring the reliability of the adjudication process include the trial's adversary structure, prohibitions against certain deceptive adversarial actions, evidentiary rules promoting the production of reliable evidence, legal standards designed to eliminate biased jurors and judges, and restrictions limiting the scope of issues in a single trial to prevent confusing the factfinder. Various pretrial procedures, such as discovery of the opponent's evidence, bolster the capacity of the trial to produce a reliable verdict.[50] Legal restrictions upon adjudication through a guilty plea also serve to ensure the reliability of convictions produced by that process.

Despite its importance, the truthfinding objective of the criminal justice process is, in certain respects, sacrificed for the benefit of other values. As one court put it: "[T]ruth, like all other good things, may be loved unwisely -- may be pursued too keenly -- may cost too much."[51] Consequently, there comes a point at which factfinding precision must give way to other values that are truth deflecting. As discussed earlier, there is considerable disagreement as to how truth-deflecting values should be weighed against truthfinding. All agree, however, that the commitment to other values will sometimes prevail.

Most of the values prevailing over the truthfinding function relate to substantive norms of "fairness," such as the preservation of human dignity and personal autonomy. Some values give rise to legal norms that operate to prevent the discovery of reliable, relevant evidence. For example, the Fifth Amendment prohibits the state from compelling a defendant to give self-incriminating testimony and the Fourth Amendment bars unreasonable searches and seizures by the state and prohibits the use of illegally obtained evidence.[52] Other fairness standards bar criminal convictions despite ample evidence of guilt that was properly obtained. For example, the Fifth Amendment's double jeopardy prohibition and Sixth Amendment's speedy trial requirement may bar convictions even though a retrial or delay casts no doubt upon the accuracy of the conviction.[53]

Although truth-deflecting values commonly operate to benefit the defendant, that is not always the case. Respect for such values also may operate to keep the defendant from obtaining exculpatory testimony or evidence. This usually arises where a witness is excused from testifying because of the exercise of a privilege.

Another factor sometimes balanced against the truthseeking function is the limitation of available administrative resources. In most jurisdictions, the criminal justice process is burdened with heavy caseloads. These pressures are reduced by broad discretion of law enforcement agencies to allocate their efforts according to the significance of the offense and the likelihood of a successful investigation and prosecution. The end result, however, is that at least some guilty parties may escape detection. Limited resources also may preclude a full investigation, by both prosecution and defense, in cases that are prosecuted. Neither side may have the resources to explore problematic avenues that could conceivably produce relevant evidence.

Some commentators suggest that even basic truthfinding safeguards in the adjudication processes are weakened by caseload pressures. These pressures play a significant role in shaping the law governing subjects such as plea bargaining, the joint trial of offenders, and the provision of appointed counsel in misdemeanor cases. Arguably, the law does not do all it could to ensure the reliability of adjudications.[54]

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Adversary Adjudication

The American criminal justice process is structured to provide adversarial proceedings for adjudicating guilt. Although courts sometimes attribute characteristics of an accusatorial system to the concept of adversarial adjudication,[55] the key to an adversary system is the division of responsibilities between the decisionmaker and the parties.

An adversarial system vests decisionmaking authority, both as to law and fact, in a neutral decisionmaker rendering a decision in light of the materials presented by the parties. In an adversarial criminal proceeding, there often will be two such neutral decisionmakers, the jury (as to factual issues) and the judge (as to legal issues). The decisionmaker in a pure adversary system operates as "a generally silent referee, determining the case as it is presented, and leaving it very much to the parties to choose the battleground."[56] The adversarial parties are the state and the defendant. The adversarial model gives to the parties the responsibility of investigating the facts, interviewing possible witnesses, consulting possible experts, and determining what will or will not be told. Each party is expected to present the facts and interpret the law in the light most favorable to its side and, through counter-argument and cross-examination, to challenge the soundness of the presentations made by the other side. The judge and jury then impartially adjudicate the issues raised by the parties.

The American criminal justice process actually seeks a "modified" or "regulated" adversary system as opposed to the "pure" adversary model described above. It does not provide for a totally silent or inactive judge; it imposes limits upon counsel designed to prohibit "excesses" in adversary presentations; and it imposes a duty on one party to assist the other in gathering information under certain circumstances.[57] Even with these controls, the American criminal justice process remains sufficiently adversarial in its overall character and stands in sharp contrast to the "inquisitorial" or "nonadversary" systems prevailing in continental Europe. Under European systems, the responsibility for the initial development of relevant facts lies with a judicial officer or a prosecutor who collects all relevant evidence (both incriminating and exculpatory) in a comprehensive dossier and brings charges against the suspect if that evidence establishes a likelihood of guilt.[58] Once the

accusation is filed, the trial court assumes responsibility for the continued development of the case and the presentation of evidence, including a predominant role in questioning witnesses.[59] Although the prosecutor and defense counsel have an opportunity to contribute, their role is far more limited than the role of counsel in the American trial.[60]

The American adversarial system is adopted from the English common law. Why the English developed an adversarial, rather than an inquisitorial, system of adjudication remains a matter of considerable speculation. Some commentators suggest that the adversarial system is an outgrowth of theological concepts, reflected previously in the practices of compurgation and trial by battle.[61] Others view it as a logical extension of different aspects of English criminal procedure, such as trial by jury and the practice of private prosecution.[62] Still others see the influence of the same concerns for individualism and competitiveness that prevailed in the establishment of the free enterprise system.[63] Today, only the latter thesis plays a significant role in the common understanding of the grounding for the adversarial character of the American criminal justice process. Adversarial adjudication is supported on two grounds: (1) as the system of adjudication most likely to produce accurate verdicts, and (2) as a system that respects individual autonomy and reflects the proper relationship between the individual and the state.[64]

The Truthfinding Justification

The superiority of the adversarial process in producing accurate verdicts rests on two premises. First, it is argued that self-interested adversaries will uncover and present more useful information to the decisionmaker than would be developed by the judicial officer in an inquisitorial system. The self-interests of the parties will ensure that all relevant evidence is produced. As each side challenges the soundness of the opposing party's case, the strengths and weaknesses of the evidence are fully explored.[65] Second, it is argued that the adversarial system precludes biased decisionmakers who are more likely to exist in inquisitorial proceedings. Because decisionmakers in the adversarial system are not themselves involved in the development of the facts, they are more likely to approach the evidence at trial in a disinterested fashion and withhold judgment until the case is fully explored.[66] It is said that an adversarial presentation is the "only effective means for combatting [the] natural human tendency to judge too swiftly in terms of the familiar that which is not fully known."[67]

An adversarial presentation, it is said, is the "only effective means for combatting [the] natural human tendency to judge too swiftly in terms of the familiar that which is not fully known."

While both of the above premises are subject to challenge, critics of the adversarial system focus primarily on the first premise, that partisan advocacy on both sides will enhance the discovery of all relevant information. Critics contend that adversaries have incentive to suppress and distort evidence, utilize surprise to ambush their opponents, and cajole and intimidate witnesses.[68] Thus, the critics conclude that adversaries' self-interests lead to the suppression of relevant information and attempts to deceive the decisionmaker.

Most critics acknowledge that the adversarial system, coupled with appropriate regulation to curb such excesses, might well deliver on the claim that it provides the "best means of ascertaining truth."[69] Critics contend, however, that the American criminal justice process falls far short of providing that regulation.[70] The American process is said to permit regular use of "devices of adversarial litigation . . . [that] are not geared for, but are often aptly suited to defeat the development of the truth."[71] Further, critics argue that the adversarial ethos, particularly defense counsel's overriding obligation to his or her client, naturally fosters an incentive "to win at all costs."[72] To combat this inclination and make truth "paramount" requires substantially more than the limited and loosely formulated restraints currently imposed upon deception and obfuscation.

Critics of the traditional adversarial system offer a variety of proposals to place greater emphasis upon its truthseeking function. In large part, however, these proposals have met with considerable resistance. While there is widespread support for the proposition that the prosecution's responsibility in an adversarial system is to "do justice" rather than "gain victory,"[73] considerable disagreement exists as to the types of restraints to place on prosecutors to ensure adherence to that responsibility.[74] There is similar disagreement over limits to place on defense counsel in advancing the client's cause.[75] Some argue that restraints designed to preclude misleading the decisionmaker undermine the truthseeking function of the adversarial system in the long run because they chill client willingness to confide in the attorney[76] Further, disagreements exist as to whether certain obligations imposed upon both sides (e.g., providing pretrial discovery to the opponent) detract from or add to the effectiveness of the adversarial system's truth-

seeking function. Finally, rules of the adversarial system that, to some, seem to encourage adversary excesses are seen by others as serving independent values of the criminal justice process that override the search for the truth.[77]

A second criticism of the truthfinding capacity of the adversarial system focuses on the premise that each side will have the equal capacity to challenge the other. Critics argue that there is a serious imbalance in the resources available to each side.[78] They note, in particular, that the "[s]tate has in the police an agency for the discovery of evidence superior to anything which even the wealthiest defendant could employ."[79] These critics see many of the accused's truth-deflecting constitutional rights as a method of redressing this resource imbalance by giving added protection to the "weaker party."[80] They argue further that the expansive interpretation of these rights is essential to serving this purpose. The need to compensate for the defense's comparative weakness is also cited as justification for other procedural obligations imposed upon the prosecution, such as pleading requirements that narrowly frame the state's case,[81] and a prosecutorial duty to assist the defense in gaining access to key information.[82]

[S]ome argue that the adversarial system is "misdescribed as a search for the truth," and that alternative justifications offer the only true support for the use of adversarial rather than inquisitorial adjudication.

Many such claims for "compensatory" procedural restrictions are challenged as ignoring the underlying truthseeking function of the adversarial system and promoting, instead, what Roscoe Pound described as the "sporting theory" of adversarial adjudication. This theory characterizes adversarial adjudication as a sporting battle between two contestants, each given an equal chance of winning as they take the field, with victory awarded to the side that displays superior skills.[83] As Pound and others have argued, that is not the objective of the adversarial trial and should not be the perspective from which the criminal justice process is evaluated.[84] Succinctly summarizing this objection, Joseph Grano stated:

> The belief that prosecution should be made difficult for its own sake can be premised only on the view that a criminal trial is analogous to a . . . boxing match, in which we are indifferent about the outcome. . . . Such indifference is inappropriate in the administration of criminal justice: if a defendant is guilty, he should be convicted; if he is innocent, he should be acquitted. We may tolerate an erroneous acquittal that stems from an effort to protect the innocent or from an effort to protect human dignity, but when these concerns are not evident, an erroneous acquittal should be a source of substantial dismay, not indifference.[85]

According to this line of analysis, the defense may be given special protection, based on the cornerstone values of the process, such as the furthering of the accurate truthfinding and protecting the dignity of the individual. An imbalance in resources is not, however, a concern as such; the function of the adversarial system is considered to be served adequately if the defense has sufficient resources to successfully challenge an erroneous prosecution.

Other Justifications

Although courts tend to stress the truthfinding justification for the adversarial system, commentators often stress other values of adversarial adjudication.[86] Indeed, some argue that the adversarial system is "misdescribed as a search for the truth," and that alternative justifications offer the only true support for the use of adversarial rather than inquisitorial adjudication.[87]

One such alternative justification values the adversarial system for its views of the defendant as an individual. Consistent with the premise that the individual is the source of the government's sovereignty, the adversarial system treats the defendant as an equal to the prosecution. As Thurmond Arnold noted:

> When a great government treats the lowliest of criminals as an equal antagonist, strips itself of the executive power which it possesses, and submits the case to twelve ordinary men, allowing the judge only the authority of an umpire, we have a gesture of recognition to the dignity of the individual which has an extraordinary dramatic appeal.[88]

The adversarial system also respects individual autonomy in its commitment to the individual's control over the "basic mode of his participation in the adjudicatory process."[89] The defendant may play an active role in his own defense. Indeed, he may decide to forego his defense and plead guilty. As noted by the Supreme Court, the adversarial system recognizes the "inesti-

mable worth of free choices."[90] This, in turn, increases the defendant's level of confidence in the process and acceptance of even adverse results.[91]

The adversarial system also is justified as the system best suited to vindicate the rights granted to the defendant in the interest of procedural "fairness." This "rights theory" of adversarial adjudication holds that the "adversar[ial] system is inspired by an attitude of distrust of public officials and its complementary demand for safeguards against abuse."[92] Accordingly, the adversarial system rejects the hierarchial model of an inquisitorial process in favor of a coordinate model that sharply divides authority and places an adversarial check on the decisionmaker. It provides the defendant with a "champion" (the defense counsel) and, in aligning that champion solely with the client, creates a strong incentive to take full advantage of all the protections the law offers to the defense.

The heavy reliance on plea bargains, in particular, is criticized as creating an enormous gap between the "ideal of the adversarial system" and the "reality" of criminal justice practice.

The combined justifications for the adversarial system resulted in its extension to various stages in the criminal justice process. As originally adopted in this country, the concept of adversarial adjudication applied to the criminal trial alone. Thus, the Sixth Amendment's guarantees of assistance of counsel, confrontation of opposing witnesses, compulsory process, and notice of charges contemplated trial.[93] Gradually, however, the reach of the adversarial system was extended. Courts and legislatures recognized that effective advocacy required the creation of pretrial rights, such as the right to pretrial discovery of at least part of the opponent's case.[94] The role of defense counsel in protecting the accused's rights was also extended to pretrial proceedings in which the state seeks to obtain evidence from the accused.[95] Indeed, in some jurisdictions, legislatures even extended the adversarial process to the grand jury, the historical bastion of inquisitorial inquiry, by allowing target witnesses to be accompanied by counsel when testifying before the grand jury.[96]

The adversarial system has also been carried over to pretrial screening. Most states now use the adversarial preliminary hearing either in addition to or as a substitute for the nonadversarial screening by the grand jury.[97] Hearings affecting the pretrial status of the accused, such as incompetency hearings and preventive detention hearings, also use what essentially amounts to an adversarial process.[98] In the post-trial stages, adversarial adjudication is now employed in certain aspects of sentencing, in parole hearings, and in probation revocation proceedings.[99]

Although the adversarial system has been extended to other stages in the criminal justice process, the trial clearly remains the centerpiece for adversarial adjudication. Thus, it is not surprising that commentators speak of a "decline" in the adversarial system due to the small percentage of final adjudications produced by trials.[100] In nearly all jurisdictions, the vast majority of charges are disposed of by dismissals on motion of the prosecution or by guilty pleas.[101] The heavy reliance on plea bargains, in particular, is criticized as creating an enormous gap between the "ideal of the adversarial system" and the "reality" of criminal justice practice. Whether this is the case, however, depends upon how plea bargaining is conducted. Though plea bargaining may have certain inherent flaws,[102] it is not necessarily inconsistent with the premises of adversarial adjudication. The concept of party control over the direction of the litigation necessarily includes the authority of the parties to resolve their dispute through settlement.[103] Of course, a settlement will not be consistent with the adversarial system if the defendant is coerced or is denied in the negotiation process the same zealous representation by counsel that would be available at trial. Whether these prerequisites are commonly met in plea bargaining is subject to question. Where they are met, however, the acceptance by both parties arguably produces a result as consistent with the objectives of the adversarial system (including its truthfinding function) as the trial.[104]

Accusatorial Burdens

The American criminal justice process is designed to be accusatorial as well as adversarial. The concepts of adversarial adjudication and accusatorial procedure complement each other, but are not virtual equivalents.[105] An accusatorial procedure requires the government to bear the burden of establishing the guilt of the accused, as opposed to requiring the accused to bear the burden of establishing his innocence. As the Supreme Court noted, an accusatorial system requires the "government in its contest with the individual to shoulder the entire load."[106] The prosecution must produce sufficient evidence to convince the trier of fact of the accused's guilt, and it must do so with "evidence independently and freely secured," without compelling the accused to assist in this prosecution responsibility.[107]

Although England's adoption of an accusatorial system probably grew out of the early English view of the criminal prosecution as a victim's private action seeking personal redress, the modern accusatorial system is justified on grounds consistent with the recognition of crimes as public wrongs, with prosecutions brought by the state on behalf of the community as a whole. Foremost among these grounds is the view that criminal sanctions are so severe that extra care must be taken to ensure they are not imposed upon innocent persons.[108] Also involved is a distrust of governmental authority based on a recognition that public officials may seek to invoke the criminal justice machinery to serve their own ends, rather than to protect the public.[109] Some argue that the accusatorial process also responds to a governmental capacity to gather and preserve evidence that far exceeds the capacity of the defense.[110]

The accusatorial character of the criminal justice process is revealed in various elements of the process, including placing upon the government the ultimate burden of persuasion and the burden of going forward with the introduction of evidence, the presumption of the defendant's innocence, and the defendant's privilege against self-incrimination.[111] Requiring the government to make the initial presentation of evidence strengthens the safeguard against wrongful conviction and ensures that the government carries the central burden of the litigation. It gives to the accused the right "to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion."[112] If the prosecution fails in its case-in-chief to establish a prima facie case for conviction, the defense is entitled to a directed acquittal without ever producing its own evidence. Additionally, by requiring the state to establish the defendant's guilt, the accusatorial system assigns to the state the burden of bearing the "margin of error" in factfinding.[113]

The presumption of innocence, while often characterized as a mere restatement of the allocation of the burden of persuasion, conveys a special admonition that also strengthens the accusatorial nature of the process. When the jury is informed of the presumption, it is told, in effect, "to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody."[114] It may well be "known to every intelligent person that the vast majority of accused persons are guilty,"[115] but the presumption of innocence prohibits the jury from relying on any such general confidence in the police and prosecutor in reaching its decision.

Finally, the privilege against self-incrimination serves the prong of the accusatory process that forces the government to establish its case using its own resources.[116] It prohibits the state from easing its burden of proof simply by calling the defendant as its witness and forcing him to make the prosecution's case or by compelling a confession prior to trial.

As with other basic themes reflected in the criminal justice process, the accusatorial mode of shifting burdens to the state is subject to limitations. Thus, American jurisdictions commonly impose upon the defense the burden of initially introducing evidence of "defenses" that could relieve the defendant of liability.[117] Many jurisdictions go further by placing on the defendant the ultimate burden of persuasion as to those defenses that do not negate elements of the crime.[118] The defendant may also bear the burden of establishing that he is incompetent to stand trial or that adverse evidence was obtained illegally and is therefore inadmissible.[119] The principle that the state establish its case independently, without the accused's assistance, is confined largely to the historical and constitutional prohibition against the state's use of "coercion [to] prove its charge against an accused out of his own mouth," as reflected in the self-incrimination privilege.[120] The accusatorial system does not prevent the state from offering the accused an opportunity to confess guilt or even using certain types of deception or encouragement to acquire confessions. Nor does it bar using the accused's person in obtaining identification evidence or taking evidence from his possession by search and seizure. Although all of these investigative procedures involve, to some extent, the assistance of the accused, they are accepted as consistent with the basic tenets of an accusatorial process.[121]

Requiring the government to make the initial presentation of evidence strengthens the safeguard against wrongful conviction and ensures that the government carries the central burden of the litigation.

Minimizing Erroneous Convictions

Protecting the innocent from erroneous conviction is an important goal of the criminal justice process. Indeed, many argue that this goal is of the highest priority.[122] Where a conflict exists between protecting the innocent and other objectives of the criminal justice system, protection of the innocent almost always prevails.[123]

Although the goal of minimizing erroneous convictions is closely tied to the truthfinding function of the process, it extends substantially beyond that function. Reliable factfinding, as a goal in itself, seeks to ensure the accuracy of both guilty verdicts and acquittals.[124] Protecting the innocent, however, places greater priority on the accuracy of the guilty verdict. It seeks to minimize the risk of convicting an innocent person even if it increases the chance that a guilty person may escape conviction.[125] Accordingly, while the Supreme Court stated that "the basic purpose of the trial is the determination of the truth,"[126] it also noted that impairment of the trial's "truthfinding function" is of primary concern where "serious questions [are raised] about the accuracy of guilty verdicts."[127] For, as the Court also observed, it is "a fundamental value determination of our system . . . that it is far worse to convict an innocent person than let a guilty man go free."[128]

The goal of minimizing the risk of an erroneous conviction is advanced by the various rules designed to ensure factfinding accuracy. Most of these rules apply in an even-handed fashion. Rules excluding evidence that is unreliable or likely to be given too much weight by the jury commonly apply to both prosecution and defense.[129] Also, both sides can challenge the impartiality of jurors or judges.[130] Other standards relating to factfinding accuracy, however, are aimed specifically at protecting the innocent accused. Thus, the prosecution is required to disclose material exculpatory evidence within its possession or control.[131] Similarly, the defendant's right to a face-to-face confrontation with opposing witnesses partially rests on the premise that such a confrontation "reduc[es] the risk that a witness will wrongfully implicate an innocent person."[132] Protection of innocence also underlies special rules that give the defendant-witness greater protection when testifying than that given to other witnesses.[133]

Protection against erroneous convictions is also provided by legal standards that accord to the defendant the benefit of doubts as to his guilt. The most substantial protection of this type is the requirement that the state establish guilt by proof beyond a reasonable doubt. The Supreme Court described the reasonable doubt standard as the "prime instrument [in the 'American scheme of criminal procedure'] for reducing risk of convictions resting on factual error"[134] and characterized its "stringency" as operating to "impose almost the entire risk of error" upon the state.[135] The requirement of a unanimous jury verdict does not similarly shift the burden to the state, as it applies to both acquittals and convictions. It does, however, provide assurance that the state will have made its case fully when it gains a conviction.[136]

The defendant is given the benefit of the doubt in a less direct fashion by other legal standards. The double jeopardy bar gives absolute finality to an acquittal even where it appears to be based on error. As the Supreme Court noted, "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources might wear down the defendant so that 'even though innocent' he may be found guilty."[137] Further, in determining whether a trial error requires reversing a conviction, appellate courts traditionally require a new trial when there is a likelihood that the error affected the jury's judgment, thus rejecting the position that a conviction should stand if the jury's finding of guilt appears to be "correct," notwithstanding error.[138]

Like other goals in the criminal justice process, protection of the accused from erroneous conviction has its limitations. The prosecution's burden of persuasion is proof beyond a reasonable doubt, not a higher standard that requires absolute certainty in the mind of the jurors.[139] Moreover, in many jurisdictions the burden does not apply to some defenses or mitigating factors that do not directly contradict the elements of the offense.[140] Similarly, while eyewitness identification poses a recognized risk of mistake, convictions based upon such identifications are acceptable, subject to limited restraints.[141] While "[r]ecognizing a real, if slight, danger of false self-condemnation, we allow evidentiary use of confessions, subject to constitutional safeguards."[142]

[I]t is "a fundamental value determination of our system . . . that it is far worse to convict an innocent person than let a guilty man go free.

Minimizing the Burdens of Accusation and Litigation

Even if eventually acquitted, an innocent person charged with a crime suffers substantial burdens. The accusation casts doubt on the person's reputation that is not easily erased. As Judge Frank once noted: "In the public mind, the blot on a man's escutcheon, resulting from such a public accusation, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation and still suspects guilt even after an acquittal."[143] Even if the public should accept an acquittal as full vindication of the accused, other burdens borne by a defendant in the course of gaining that acquittal remain unaddressed. Unless indigent, defendants must finance their defense as successful defendants are not entitled to reimbursement of expenses

upon acquittal. Perhaps more significant, however, are costs that cannot be readily measured in dollars. Once accused, a defendant must await trial. This waiting period brings with it a certain degree of anxiety and insecurity that disrupts the daily flow of life. This disruption is even greater if the accused is incarcerated pending trial. When the trial actually occurs, the ordeal of litigation takes a further emotional toll.

In light of these substantial burdens, a criminal justice process concerned with the protection of the innocent cannot limit itself to ensuring against erroneous convictions. It must also reduce, to an acceptable level, the risk that accusations will be brought against innocent persons. Because the burdens of an accusation are not as great as the burdens of erroneous conviction, the acceptable degree of risk is somewhat greater. It is not necessary to limit accusations to cases in which conviction is almost certain, for the prosecution would then be deprived of many otherwise valid convictions. Adequate protection against erroneous accusations does require, however, that accusations be supported by sufficient evidence to produce a substantial likelihood of conviction.

Because may of the safeguards provided by lay juror participation are directed towards the exceptional case, the availability of a jury at the defendant's election is the critical in meeting most of the objectives of lay participation

In limiting the number of erroneous accusations, the system does not solve the problem of the accused who is appropriately charged but later acquitted (and therefore viewed as possibly innocent). Some defendants inevitably will fall in this category. No matter how careful the screening, predicting the outcome of litigation is too uncertain to avoid mistakes. While the system cannot avoid imposing substantial litigation burdens on properly accused defendants who are eventually acquitted, it can minimize their burdens if such efforts are consistent with preserving a practicable system of adjudication. Because the defendants who fall in this category cannot be identified at the outset, the system must minimize litigation burdens for all defendants, including those who will be found guilty.

Minimizing the risk of erroneous accusations is achieved through various screening procedures. Initially, the police officer must have probable cause of guilt before taking a person into custody for the purpose of charging him with a crime.[144] Moreover, the officer's probable cause determination is subject to *ex parte* screening by a magistrate, either in the issuance of an arrest warrant or in the subsequent review of a warrantless arrest.[145] In most jurisdictions, felony charges are subject to further review by a magistrate at an adversarial preliminary hearing.[146] In many jurisdictions, as an alternative or additional felony screening procedure, a grand jury reviews the prosecution's evidence to determine whether it is sufficient to justify the proposed indictment.[147]

The goal of eliminating unnecessary litigation burdens is reflected in other rights of the accused. Bail provisions seek to avoid pretrial incarceration when there is an alternative means of reasonably assuring defendant's presence at trial.[148] The defendant's right to a speedy trial is designed, in part, to limit the length of pretrial incarceration (where bail is not available) and to "minimize the anxiety and concern" of the accused pending trial.[149] Venue requirements, in part, ensure that the defendant will be tried in a convenient forum.[150] The double jeopardy prohibition, supplemented by joinder requirements, also reduces litigation burdens by restricting the use of multiple trials for closely related offenses.[151]

Providing Lay Participation

Another cornerstone of the American criminal justice process is the use of lay persons as decisionmakers. Traditionally, lay participation was provided through the trial jury, the grand jury, and lay magistrates. Today, the trial jury stands alone as the only universally available source of lay participation. While a substantial majority of states continue to have some lay magistrates in their judiciaries, the bulk of the criminal cases in those states come before lawyer-magistrates.[152] As for the grand jury, only nineteen states continue to require grand jury participation (through a defense right to prosecution by indictment) for all felony cases.[153]

Because dismissals and guilty pleas account for far more dispositions than do trials, juries are often not used.[154] Even when a case proceeds to trial, many defendants elect to have bench trials.[155] The defendant, however, does have a *right* to a jury trial in all jurisdictions on felony and serious misdemeanor charges.[156] In most states, the prosecution also has an independent right to insist upon a jury trial.[157] Because many of the safeguards provided by lay juror participation are directed towards the exceptional case, the availability of a jury at the defendant's election is the critical feature in meeting most of the objectives of lay participation.[158]

Lay juror participation in the criminal justice process is designed to serve several distinct functions,[159] all of which reflect a single underlying value judgment: the administration of the criminal justice process is too important to be left exclusively in the hands of government officials.[160] Unlike judges or prosecutors, lay jurors are independent from the government bureaucracy. As the Supreme Court noted, the framers of the Constitution "knew from history and experience" that it was necessary to provide a safeguard through the petit jury, "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge . . . . Fear of unchecked power, so typical of our State and Federal Government in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[161] The independence of the grand jury provides a similar check against the misuse of executive authority in charging.[162]

The insistence upon respect for individual dignity is reflected in various elements of the criminal justice process.

In addition to their independence, lay petit and grand jurors offer advantages that stem from their lay perspective and their representation of the community. Their position as community representatives lends a special sense of legitimacy to the criminal justice process, making unpopular decisions more readily acceptable to the general public. Lay jurors' community views "bring to bear local conceptions of justice . . . and adjust the crude substantive criminal law to the circumstances of individual cases."[163] Indeed, jurors may refuse to convict (or charge, in the case of the grand jury) when they conclude that, notwithstanding a proven violation, enforcement of the letter of the law would result in a miscarriage of justice.

Vesting decisionmaking authority in lay jurors, "neither legally trained nor routinely engaged in the administration of criminal justice," arguably strengthens the factfinding capacity of the process.[164] The jurors' "very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye."[165]

Although use of lay magistrates today is a necessary consequence of resource limitations (allowing accessible local courts in rural areas with too few lawyers to provide lawyer-magistrates), the lay magistrate originally was justified by reference to basic values of lay participation.[166] The lay magistrate was assumed to be closer to the community views and therefore more likely to reflect the community's sense of justice. Only the lay magistrate could provide this perspective in "petty offense" cases to which a right to jury trial was unavailable.[167] The movement away from lay magistrates stems from concern that the advantages provided by their perspective are diluted by the bureaucratization of the magistrate's position within the judicial hierarchy and are offset by the typical magistrate's lack of familiarity with, or lack of inclination to take seriously, the defendant's basic legal rights.[168]

Respecting the Dignity of the Individual

Another foundational process objective is to ensure that criminal justice administration is consistent with respect for the individual dignity. The concept of human dignity, as used in this context, is far from precise. It roughly encompasses the basic needs of the human personality, including privacy, autonomy, and freedom from humiliation and abuse.[169]

Requiring that criminal justice practices respect human dignity is justified on several grounds. First, all persons, including criminals, are entitled to governmental respect for their dignity as an inherent element of the social compact which provides the foundation for a democratic society.[170] Second, in light of the combination of the "severity of the sanctions administered by the criminal law," the "status-degrading potency of criminal proceedings," and the "community outrage" that tempts officials to solve crime at all costs, the preservation of human dignity is the *sine qua non* for maintaining a society that respects individual liberty and adheres to the rule of law.[171] As the Supreme Court noted:

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair, and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[172]

Finally, ensuring respect for individual dignity is essential in obtaining public acceptance of the process and to promote respect for the law.[173]

The insistence upon respect for individual dignity is reflected in various elements of the criminal justice process. Many procedural requirements that implement other cornerstone objectives also serve this goal. Thus, requirements promoting an adversarial adjudicatory system recognize individual dignity by giving the defendant an element of control over his own de-

fense.[174] Similarly, the Supreme Court described the privilege against self-incrimination as based on "our respect for the inviolability of the human personality."[175]

Other legal requirements are devoted entirely to ensuring respect for human dignity. The Eighth Amendment bars cruel and unusual punishment which reduces individual honor and dignity.[176] Insofar as the double jeopardy prohibition provides for the repose of the convicted defendant (rather than safeguarding against erroneous convictions), it also focuses on limiting the oppression to which the guilty can be subjected.[177] The Fourth Amendment prohibition against unreasonable searches and seizures guarantees respect for another aspect of human dignity, the privacy of the individual. It does, however, permit government officials to invade that privacy upon a demonstration of sufficient need and grounding.[178] Many common law standards, such as the privilege for marital communications, recognize the essential needs of the human personality.[179]

Legal restrictions aimed at ensuring respect for individual dignity tend to be more truth-deflecting than standards serving other objectives of the criminal justice process. Typically, such restrictions prevent prosecutors from obtaining probative evidence that could establish guilt. The impact of that loss often is unclear because the evidence is not obtained. The loss is crystallized, however, when incriminating evidence otherwise establishing the defendant's guilt is held inadmissible, and the prosecution is lost. By disallowing the use of such incriminating evidence, the criminal justice process uses the criminal prosecution itself to vindicate the prohibition that was violated.

The use of prosecutorial presentation as the appropriate forum for vindication, rather than imposing sanctions directly upon the governmental agents who violated the restrictions, is accepted in some applications and highly controversial in others. Perhaps the most controversial application is the exclusion of evidence obtained in violation of the Fourth Amendment search and seizure provisions. The basic premise underlying this remedy was stated aptly by Abraham Goldstein:

> Justice to society is sometimes taken to require that a given case be used not only to deal with the situation immediately before the court but also to serve a larger public interest. In criminal cases, the accused may get relief, not so much out of concern for him or for the "truth," but because he is strategically located, and motivated, to call the attention of the courts to excesses in the administration of criminal justice. The underlying premise is that of a social utilitarianism. If the criminal goes free in order to serve a larger and more important end, then social justice is done, even if individual justice is not.[180]

Maintaining the Appearance of Fairness

The criminal justice process seeks not only to provide fair procedures, but also to maintain the appearance of fairness in applying its procedures. As the Supreme Court noted, "justice must satisfy the appearance of justice."[181] The fact that criminal justice procedures are fair is not sufficient; the procedures must also be perceived as fair (and as fairly administered) by both its participants and the public.

The appearance of fairness is essential to the effectiveness of process. Initially, it is vital to maintain public confidence in the process.[182] Because three of the primary administrators of the process, the judge, the prosecutor, and the defense counsel, are all members of the same profession, there may be a tendency on the part of outsiders to view the process with some suspicion. This suspicion can be offset by ensuring that the process and its decisions are open to public review.[183] These factors also may help reconcile the losing defendant to his fate. Even though he may disagree with the result, he knows who made the decision and how it was reached.[184] Finally, the appearance of fairness, particularly as it relates to the trial stage, is necessary to fulfill what commentators have characterized as the "symbolic function" of the trial.[185] That function is described as providing a "series of object lessons and examples" through which "society is trained in right ways of thought and action, not by compulsion, but by parables which it interprets and follows voluntarily."[186]

A positive perception of the criminal justice process is sought through legal standards that guarantee openness of the process and preclude suggestions of possible bias.

A positive perception of the criminal justice process is sought through legal standards that guarantee the openness of the process and preclude suggestions of possible bias. Those designed to ensure the openness of the process include constitutional and statutory standards that guarantee public access to the trial and pretrial proceedings.[187] Openness is also provided by statutes and common law doctrines allowing public inspection of documents and records relating to an even broader range of proceedings.[188]

Legal standards to eliminate suggestions

of bias include several that provide relief for the mere possibility of prejudice (rather than proof of actual prejudice).[189] One such standard, for example, requires automatic reversal of a conviction when a judge may have had financial or personal interest in the outcome of his decision, without inquiry as to whether that interest actually produced a biased decision.[190] At times, the process' interest in ensuring an appearance of fairness will prevail over the defendant's desire to forego a particular procedural right. Some jurisdictions require the defendant to be present at trial even though he would prefer to be tried in absentia.[191]

Achieving Equality in the Application of the Process

In a society dedicated to achieving "equal justice under law," it is natural that another goal of the criminal justice process is to achieve equality in its administration. The primary concern is that each jurisdiction be evenhanded in its treatment of defendants. Accordingly, while procedures need not be applied in the same way to all defendants, similarly-situated defendants must be treated alike.[192] In other words, distinctions drawn between defendants must be based on grounds that are properly related to the process' functions.

A proper basis for disparate treatment of defendants varies with each case. In determining whether to press charges, for example, a prosecutor could rationally draw distinctions based on a variety of factors (such as differences in the defendants' past records) that would have no bearing in determining which defendant will receive six-person rather than twelve-person juries. As a result, where a broad range of relevant factors are likely to produce legitimate considerable disparity from one case to another, the process tends to provide extensive discretion to the decisionmaker. When the procedural step should result in roughly similar treatment for all, the decisionmaker's authority to draw distinctions is more narrowly proscribed. The range of permissible considerations is not unlimited, however, even in those areas where extensive discretion is granted. Certain factors such as race, ethnicity, and religion are viewed as improper grounds for discrimination throughout the process.[193] Indigency may also fall within this category, although the state's obligation to the indigent falls short of providing him with precisely the same assistance available to a non-indigent defendant.[194]

A wide range of limited laws prohibit improper discrimination. The primary provision barring discrimination is the Fourteenth Amendment's Equal Protection Clause.[195] Other constitutional guarantees, such as the Sixth Amendment's counsel and jury requirements, bar certain types of discrimination.[196] Statutory provisions often extend beyond constitutional guarantees to reduce the discriminatory impact of the process.[197] Thus, statutory provisions reduce the heavier burden of indigent defendants by both providing them with greater assistance than constitutionally required and restricting reliance upon procedures more likely to be unavailable to the poor.[198] The recent movement to limit judicial sentencing discretion also reflects an interest in reducing a type of discrimination (that based upon differences in the sentencing philosophies of individual judges) that is not barred by the Fourteenth Amendment.[199]

THE VALUE OF CORNERSTONE ANALYSIS

Public policy analysis often must take a back seat for a court that must decide whether a particular legal standard is legally mandated. Statutory or constitutional language, legislative history, or precedent often clearly provides an answer so as to minimize the need for such analysis. At times, however, the court needs to look to the basic policies that shape the process. For the legislator, the high court considering the adoption of a court rule, and the delegate to a state constitutional convention, public policy analysis will more frequently be critical, as the lawmaker here commonly possesses greater freedom in establishing new standards or rejecting old standards.

When public policy analysis is required, the starting point should be identifying cornerstone principles and assessing their relationship to the core process function of promoting effective enforcement of the substantive criminal law.

Where public policy analysis is required, the starting point should be identifying cornerstone principles and assessing their relationship to the core process function of promoting effective enforcement of the substantial criminal law. That is the task attempted here. Others may find additional or somewhat differently defined cornerstone objectives. They may see differently the possible relationships between those objectives and achievement of effective enforcement. In any case, the process of identification and articulation should help the lawmaker in providing a basic framework for

the analysis of the role of a particular legal requirement. While that may be only the beginning of the lawmaker's task, it is a very important first step.

NOTES

1. WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE HORNBOOK §§ 2.2, 2.6 (2d ed. 1992).
2. Roscoe Pound, *The Cannons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926).
3. *See, e.g.*, Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975) (discussing the choice between hierarchial and coordinate structures).
4. *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983). Of course, other interests apart from achieving efficient allocation of resources may also influence the allocation of administrative authority, including interests that relate to other goals of the process, as discussed *infra*.
5. Robert S. Summers, *Evaluating and Improving Legal Processes--A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 51 (1974).
6. *See id.*; Wilfried Bottke, *'Rule of Law' or 'Due Process' as a Common Feature of Criminal Process in Western Democratic Societies*, 51 U. PITT. L. REV. 419 (1990). Indeed, the universal character of many of these values is reflected in their incorporation in widely accepted international covenants and charters.
7. These values are widely discussed and debated in the general literature on procedure. *See, e.g.*, Summers, *supra* note 5; Jerry L. Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); DUE PROCESS: NOMOS XVIII (J. Roland Pennock & John W. Chapman eds., 1977).
8. Sanford Kadish, *Torture, The State and The Individual*, 23 ISR. L. REV. 345 (1989). *But see* Michael Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280 (1989) (on the use of torture to extract information potentially saving lives).
9. *See, e.g.*, DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 3-15 (rev. ed. 1976); Thomas J. Miceli, *Optimal Criminal Procedure, Fairness and Deterrence*, 11 INT'L REV. L. & ECON. 3 (1991).
10. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964), *reprinted in* Herbert L. Packer, The Limits of the Criminal Sanction (1968) [hereinafter Packer].
11. Packer, of course, sets forth a due process model which treats as its "dominant concern" the "desire to protect the individual from public officials," rather than the more realistic model that seeks to maximize such protection within a framework that also seeks effective enforcement. *See* Arenella, *supra* note 4; Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 575 (1973).
12. PACKER, *supra* note 10, at 159-62.
13. *Id.*, at 164-65. *See also* Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 501 (1980) (from the utilitarian perspective "so long as the appearance is maintained that the guilty are punished and the innocent vindicated, procedures designed actually to achieve that result need never be utilized").
14. Arenella, *supra* note 4, at 197-98 (arguing that this element of moral evaluation, requiring lay participation, is always present in criminal adjudication). *But see* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 456-58 (1992) (arguing that "the central issue" for determining responsibility commonly rests simply on historical fact and does not rest on moral evaluation by the adjudicating body).
15. *See* text following note 140 *infra*.
16. *See, e.g.*, Arenella, *supra* note 4; David L. Bazelon, *The Morality of the Criminal Law: Rights of the Accused*, 72 J. CRIM. L. & CRIMINOLOGY (1981).
17. *See* Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984).
18. *See* Arenella, *supra* note 4, at 203; WILLIAM O. DOUGLAS, WE THE JUDGES 354 (1956). *Cf.*, NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY 140 (1969) ("[P]olice lawlessness, degrading prison conditions, and other deficiencies in criminal justice damage the goal of an orderly society by making the law seem unworthy of obedience. That, too breeds crime and disorder . . . .").
19. *See, e.g.*, GERHARD O.W. MUELLER & FRE LE POOLE-GRIFFITHS, COMPARATIVE CRIMINAL PROCEDURE 13 (1969) ("Police power advocates maintain that effectiveness of law enforcement increases as due process is diminished. This is at best a doubtful proposition. . . . A police force which violates basic standards of decency will lose the respect and cooperation of the community. Without such respect and cooperation, law enforcement isolates itself from the community and will become ineffective.")
20. As to courts, *see, e.g.*, James v. Illinois, 493 U.S. 307 (1990); Duckworth v. Eagan, 492 U.S. 195 (1989); Illinois v. Gates, 462 U.S. 213 (1983). As to commentators, *see, e.g.*, the

articles cited in note 21 *infra*.

21. *See, e.g.*, Stephen J. Markman, *The Search for the Truth in Criminal Justice*, 41 RUTGERS L. REV. 871, 872 (1989) ("The right of decent people to protection against crime is just as much a 'civil liberty' as the right to a grand jury indictment or the right to a fair trial."); MACKLIN FLEMING, OF CRIME AND RIGHTS: THE PENAL CODE VIEWED AS A BILL OF RIGHTS 11, 84-90 (1978); DELMAR KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 99-100 (1967).

22. *Cf.* 3 ROSCOE POUND, JURISPRUDENCE 30-33 (1959).

23. *See* Graham Hughes, *English Criminal Justice: Is It Better Than Ours?*, 26 ARIZ. L. REV. 507, 514 (1984) ("[A] legitimate and inevitable tension in all criminal justice systems . . . is indicated by the contrast between the crime control and the due process models. It is not a clash between justice and crime control but rather a conflict in which crime control is perceived as one aspect of justice.").

24. DONALD J. NEWMAN, INTRODUCTION TO CRIMINAL JUSTICE 30 (2d ed. 1978). *See also* Roscoe Pound, *Criminal Justice in the American City, in* CRIMINAL JUSTICE IN CLEVELAND 577 (Roscoe Pound & F. Frankfurter eds., 1922) ("[T]here has been a continual movement [in the criminal justice process] back and forth between an extreme solicitude for the general security, leading to a minimum of regard for the individual accused and reliance upon summary, unhampered, arbitrary, administrative punitive justice, and at the other extreme excessive solicitude for the social interest in the individual life, leading to a minimum of regard for the general security and security of social institutions and reliance upon strictly regulated judicial punitive justice, hampered at all points by checks and balances and technical obstacles.").

25. *See, e.g.*, Harvey J. Sepler, *The Next Twenty-Five Years Facing the Criminal Justice System: Using Standard Celeration Charting for Systems Analysis*, 47 AM. J. CRIM. L. 47 (1979).

26. *See generally* ELLIOT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE (1985); KEVIN WRIGHT, THE GREAT AMERICAN CRIME MYTH (1985); Bazelon, *supra* note 16.

27. *See* Richard S. Frase, *Defining the Limits of Crime Control and Due Process*, 73 CAL. L. REV. 212, 213 (1985) (reviewing HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT (1982)). As to many proponents of this general position, there is a "critical ambiguity" as to whether they are claiming only that a more efficient criminal justice process (i.e., a process that provides substantially greater certainty of apprehension and conviction) is not capable of producing a "drastic reduction (for example, 25% or more)" in the crime rate or are claiming that "most American jurisdictions cannot even make *noticeable, non-trivial, or statistically significant* reductions in their present crime rates" through changes in the enforcement process. *Id.* (emphasis in original).

28. Some who take this position argue that increased enforcement can, in itself, significantly reduce the crime rate by reducing the opportunity for crime, by achieving greater deterrence through an increased risk of apprehension and conviction, and by incapacitating those offenders who engage in repeated criminality. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 89-97 (1975); James Q. Wilson & Barbara Boland, *The Effect of Police on Crime*, 12 L. & SOC'Y REV. 367 (1978); Perry M. Johnson, *The Role of Penal Quarantine in Reducing Violent Crime*, 24 CRIME & DELINQ. 465 (1978). Others stress the symbolic significance of an emphasis on achieving effectiveness, arguing that highly visible efforts gain increased community cooperation in responding to and preventing crime and reduce the disabling effect of the fear of crime. *See* Markman, *supra* note 21; James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, 249 ATLANTIC MONTHLY 27 (March 1983).

29. At issue here is the contention that resource allocation plays a far more significant role in enforcement effectiveness than differences in procedures and that the key to reducing crime through the enforcement process lies primarily in increasing the quantity and quality of the available resources. *See* JAMES Q. WILSON & BARBARA BOLAND, THE EFFECT OF POLICE ON CRIME 3-4 (1979); RAYMOND T. NIMMER, THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS 21-26 (1978).

30. *See* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1 (1987).

31. Alfred F. Conard, *Macrojustice: A Systematic Approach to Conflict Resolution,* 5 GA. L. REV. 415, 426 (1971).

32. *See, e.g.*, DAVID L. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 13-16 (1988); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 194-200 (1977); Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 645-50 (1983).

33. *See* Kamisar, *supra* note 32, at 648 (quoting Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police, in* POLICE POWER AND INDIVIDUAL FREEDOM, 87, 97 (Claude R. Sowle ed., 1962)).

34. *See* Chambers v. Florida, 309 U.S. 227, 236 (1940) ("Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny."); MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 15-16 (1990); FRANCIS A. ALLEN, THE CRIME OF POLITICS 4-5 (1974).

35. Advocates of this position recognize that the process is designed to facilitate enforcement of the criminal law, but they

contend that where a choice must be made between promoting efficiency and restricting the potential for government oppression, the later objective must come first (perhaps because more enforcement is seen as having a limited value in serving the objectives of the criminal law, *see* text at notes 16-19 and 25-26 *supra*). *See* PACKER, *supra* note 10, at 166; FLEMING, *supra* note 21, at 152-53; FELLMAN, *supra* note 9, at 11-13.

36. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

37. *See* ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE 569 (1964). Some adherents to this position acknowledge that there is a bit of subterfuge in the use of such categorical absolutism, that there comes a point at which even "fundamentals" must give way. They justify that subterfuge, however, on a slippery-slope argument of the type set forth by Guido Calabresi in his discussion of Charles Black's defense of Justice Black's reliance on absolutes in constitutional interpretation. Dean Calabresi notes:

> After posing a situation in which we would all doubt the applicability of a powerful societal absolute -- that against torture -- [Professor Black] dramatically suggests why we have chosen nonetheless to describe torture as absolutely forbidden in our system.... A judge is faced with the claim that a prisoner is being tortured. The police, remarkably, admit the fact but demonstrate beyond a doubt that the prisoner has hidden a hydrogen bomb, set to explode in an hour, in a major city and that the only thing the prisoner fears is hideous pain. The judge, Black indicates, may waffle, may adjourn court, may subsequently resign, but the one thing he or she is not apt to do is to enforce the supposed absolute against torture and let the city be destroyed. Are we then correct in characterizing our rule against torture as an absolute one? Yes, Black suggests, because the opposite rule -- which would say we balance the need for torture against its harm -- would be totally inaccurate. Whom would you trust more to decide both the case of the hydrogen bomb and the torture cases generally, as we want them decided, he asks rhetorically: a judge who in hard and easy cases is always declaring that we must balance the costs and benefits of torture, or the judge who announces that our system has an absolute prohibition against torture? Which in practice, if not definition, is using words more nearly correctly; which use of terms, in other words, leads us closer to the desired result? ... [It is argued] that to admit this judicial power [to balance torture against other ends] would be inevitably to admit its abuse; that we come closer to achieving the amount of judicial supervision we want by denying that it is permitted at all than we would by acknowledging what is going on and trying to control it by doctrine and language; that, like the judge in the torture example, we decide better, in practice, by denying it ever takes place at all.
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> GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 173-82 (1982) *commenting on* Charles Black, *Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S MAG., Feb. 1961, at 63.

38. *See id.*

39. *See supra* notes 10-15 and accompanying text.

40. *See* California v. Trombetta, 467 U.S. 479, 484 (1984); THOMAS C. GREY, Pro*cedural Fairness and Substantive Rights, in* DUE PROCESS, *supra* note 7, at 182, 183. Of course, fairness may require more than accuracy: it may also require that risk of error be allocated to the state. *See* note 106 *infra.*

41. United States v. Havens, 446 U.S. 620, 626 (1980).

42. Arizona v. Fulminante, 111 S. Ct. 1246 (1991); Colorado v. Connelly, 479 U.S. 157 (1986); Delaware v. Van Arsdall, 475 U.S. 673 (1986). *See also* United States v. Cronic, 466 U.S. 648 (1984) ("basic purpose of the trial").

43. *See, e.g.*, Lanari v. People, 827 P.2d 495 (Colo. 1992) ("fundamental characteristic"); State v. Miller, 757 P.2d 1275 (Mont. 1988) ("purpose of criminal trial"); In re Ferguson, 487 P.2d 1234 (Cal. 1971) ("ultimate goal"); Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061 (1992); Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

44. *See* Arenella, supra note 4, at 197-98; Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 133 (1987); Stephen A. Saltzburg, *Lawyers, Clients, and The Adversary System*, 37 MERCER L. REV. 647, 654 (1986); Charles A. Pulaski, Jr., *Extending the Disclosure Requirements of the Jenks Act to Defendants: Constitutional and Nonconstitutional Considerations*, 64 IOWA L. REV. 1, 41, 44-45 (1978); H. Richard Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1076 (1975).

45. United States v. Nobles, 422 U.S. 225, 230 (1975); United States v. Nixon, 418 U.S. 683, 709 (1974). *See also* Rock v. Arkansas, 483 U.S. 44, 50 (1987) (The truth-seeking function seeks to advance "both the detection of guilt and the protection of innocence."); *Cronic,* 466 U.S. 648 (The "ultimate objective that the guilty be convicted and the innocent go free.").

46. *See* Uviller, *supra* note 44 at 1076; Arenella, *supra* note 4.

47. Pulaski, *supra* note 44 at 22-54 (quoting JEROME FRANK, COURTS ON TRIAL 15-16 (1949)) .

48. John D. Jackson, *Theories of Truthfinding in Criminal Procedure: An Evolutionary Approach*, 10 CARDOZA L. REV. 475 (1988); Pulaski, *supra* note 44.
49. *See* Van Kessel, *supra* note 14, at 456-58; Tom Stacy, *The Search For the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1406-09 (1991).
50. *See generally* Taylor v. Illinois, 484 U.S. 400 (1988).
51. Pearce v. Pearce, 63 Eng. Rep. 950, 957 (1846), *cited in* West Virginia v. Douglass, 20 W.Va. 770, 783 (1882) (discussing the attorney-client privilege). *See also* James v. Illinois, 493 U.S. 307, 311 (1990).
52. U.S. CONST. amend. IV.
53. U.S. CONST. amend. V, VI.
54. *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (Stevens, J., dissenting); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUDIES 43, 66-74 (1988); John S. Elson, *Balancing Costs in Constitutional Construction: The Burger Court's Expansive New Approach*, 17 AM. CRIM. L. REV. 160 (1979).
55. *See, e.g.*, United States v. John Doe, Inc. I, 481 U.S. 102, 117 (1987) (Brennan, J., dissenting); *Connelly*, 479 U.S. 157, 174 (Brennan, J., dissenting); Garner v. United States, 424 U.S. 648, 655 (1976) (The "fundamental purpose" of self-incrimination privilege is "preservation of an adversarial system of criminal justice."). For an exploration of the distinction between adversarial and accusatorial adjudication, *see* Abraham Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1974); note 105 *infra*.
56. AUSTRALIA LAW REFORM COMMISSION, REFORM, April 1980, at 52. *See also* MARVIN E. FRANKEL, PARTISAN JUSTICE 10-13 (1980); PATRICK DEVLIN, THE JUDGE 61 (1979).
57. *See* William W. Schwarzer, *Dealing with Incompetent Counsel -- The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980); Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978); LAFAVE & ISRAEL, *supra* note 1, §§ 20.3, 20.5, 24.3 and 24.5.
58. *See* RUDOLF SCHLESSINGER ET AL., COMPARATIVE LAW 473-91 (5th ed. 1988); Van Kessel, *supra* note 14, at 421-25; Thomas Weigand, *Continental Cases for American Ailments: European Criminal Procedure as a Model for Law Reform, in* 2 CRIME AND JUST. 381 (Michael Tonry & Norval Morris eds., 1980).
59. This commonly includes questioning the defendant, who may give his side of the case in narrative form (not under oath). *See* Van Kessel, *supra* note 14, at 423; Damaska, *supra* note 11, at 506, 527 (1973).
60. *See* Frassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245-46, 267-72 (1991); Damaska, *supra* note 11, at 559-61; Robert Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483 (1970).
61. *See generally* ADHEMAN EISMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 3-18 (J. Simpson transl. 1913).
62. *See* PENDLETON HOWARD, CRIMINAL JUSTICE IN ENGLAND 381-83 (1931); Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 436 (1935).
63. *See* Nicholas Kittrie, *Symbolic Justice: The Trial of Criminal Cases, in* AN ANATOMY OF CRIMINAL JUSTICE--A SYSTEM OVERVIEW 121, 125 (Cleon H. Foust & D. Robert Webster eds., 1980) ("Much as fierce individualistic economic competition was to produce better and cheaper goods for all to share in, fierce adversity in court was to produce the truth."); FRANKEL, *supra* note 56, at 10-20; Marian Neef & Stuart Nagel, *The Adversary Nature of the American Legal System From A Historical Perspective*, 20 N.Y.L. FORUM 123, 147-48 (1974).
64. *See* FREEDMAN, *supra* note 34, at 14-42; STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 44-47 (1984). The Supreme Court has cited both of these justifications in discussing elements of the adversary process. *See, e.g.*, Penson v. Ohio, 488 U.S. 75, 84 (1988); United States v. Cronic, 466 U.S. 648 (1984); Jones v. Barnes, 463 U.S. 745, 758-59 (1983) (Brennan, J., dissenting).
65. The Supreme Court has placed special emphasis upon this process of adversarial testing of evidence and theory. *See Penson*, 488 U.S. at 84 ("[S]ystem is premised on the well-tested principle that truth -- as well as fairness -- is 'best discovered' by powerful statements on both sides of the question."); Herring v. New York, 422 U.S. 853, 857, 862 (1975) ("[T]he very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").
66. *See* Fuller, *The Adversary System, in* TALKS ON AMERICAN LAW 43-44 (Harold Joseph Berman ed., 1971).
67. Jon L. Fuller & John D. Randall, *Report of the Joint Conference on Professional Responsibility*, 44 A.B.A. J. 1159, 1160-61 (1958).
68. *See* JEROME FRANK, COURTS ON TRIAL 80-102, 122 (1949); Van Kessel, *supra* note 14, at 435-42; Steffen, *supra* note 43, at 817-23.
69. Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error.").
70. Van Kessel, *supra* note 14, at 487-501.
71. Frankel, *supra* note 43, at 1036.
72. *See* Steffen, *supra* note 43, at 820-22; Van Kessel, *supra* note 14, at 435-38; Charles P. Curtis, *The Ethics of Advocacy*, 4

STAN. L. REV. 3 (1951).

73. *See* Berger v. United States, 295 U.S. 78 (1935) (Prosecution interest "is not that it shall win a case, but that justice shall be done."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8.

74. *See* JOHN JAY DOUGLASS, ETHICAL ISSUES IN PROSECUTION 7-20 (1988); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

75. Unlike the prosecutor, the defense counsel's obligation is not to "do justice," but to advance the interest of the defendant as a partisan. *See* Moran v. Burbine, 475 U.S. 412 (1986) ("[U]nder our adversary system, [the defense counsel] deems that his sole duty is to protect his client -- guilty or innocent -- and that in such a capacity he owes no duty to help society solve its crime problem."); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985) ("[U]nder our adversary system the role of counsel is not to make sure the truth is ascertained, but to advance his client's cause by any ethical means.").

76. *See* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, Ch. 1-6 (1975); Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 343 (1981).

77. *See* Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135 (1988); Albert W. Alschuler, *The Search For Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67 (1982); Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975).

78. *See, e.g.*, Zacharias, *supra* note 74, at 66-84; Jay Sterling Silver, *Equality of Arms and The Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007; William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781 (1988); Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982) .

79. DEVLIN, *supra* note 56, at 71 (quoting an English Committee Report on Identification Evidence).

80. FELLMAN, *supra* note 9, at 4. *See also* Williams v. Florida, 399 U.S. 78 (1970) (Black, J., dissenting); Zacharias, *supra* note 74.

81. *See* Abraham S. Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1173-74 (1962).

82. Babcock, *supra* note 78.

83. Roscoe Pound, *The Cannons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926). Pound attributed this theory to "the Anglo-Saxon bent for contentious procedure and love of a fair fight, and the desire of the pioneer American to see a forensic game of skill in backwoods court houses." *Id.*

84. The earlier criticisms, in addition to that of Pound, *supra* note 83, are noted in Perkins, *Absurdities in Criminal Procedure*, 11 IOWA L. REV. 297, 324-25 (1926). More recent complaints as to the promotion of a sporting theory are noted in Van Kessel, *supra* note 14, at 448-51; Joseph D. Grano, *Implementing the Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure - Part I*, 32 WAYNE L.J. 1007 (1986).

85. Grano, *supra* note 84, at 1019-20.

86. *See* Zacharias, *supra* note 74, at 54-56 (citing various commentators who stress alternative justifications); Goodpaster, *supra* note 44.

87. *See, e.g.*, ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 117 (1980); Saltzburg, *supra* note 44, at 684.

88. THURMOND ARNOLD, SYMBOLS OF GOVERNMENT 128-29, 145 (1935). *See also* PACKER, *supra* note 10, at 157; Frank J. Michelman, *Formal and Associational Aims in Procedural Due Process, in* DUE PROCESS, *supra* note 7, at 126.

89. Neef & Nagel, *supra* note 63, at 155. *See also* GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 120-135 (1978).

90. Faretta v. California, 422 U.S. 806 (1975) (discussing the defendant's right to self-representation).

91. *See* DEVLIN, *supra* note 56, at 59; JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 118 (1975) ([A]dversary system was "judged fairest and most trustworthy both by persons subject to litigation and by those observing the proceedings.").

92. Damaska, *supra* note 11, at 506, 583.

93. *See Faretta*, 422 U.S. at 818 (noting that the Sixth Amendment, through these rights "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); LAFAVE & ISRAEL, *supra* note 1, § 20.1.

94. The use of in camera, ex parte presentations on pretrial rulings also has been confined. *See* Alderman v. United States, 394 U.S. 165 (1989).

95. *See* Michigan v. Jackson 475 U.S. 625 (1986); United States v. Wade, 368 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964); Francis Allen, *The Judicial Quest for Penal Justice: The Warren Court and Criminal Cases*, 1975 U. ILL. L. REV. 518, 530.

96. *See* LAFAVE & ISRAEL, *supra* note 1, § 8.15.

97. *Id.* § 14.2. Reliance on other inquisitorial proceedings, such as the coroner's inquest, has also diminished. *See* Robert Emmett Burns, *Criminal Justice: Adversary or Inquest: Did Due Process Reform the Wrong System*, 2 LOY. U. CHI. L.J. 249 (1971).

98. As to preventive detention, *see* United States v. Salerno, 481 U.S. 739 (1987); As to incompetency, *see* Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375, 378

(1966).
99. *See* LaFave & Israel, *supra* note 1, §§ 26.4(g), 26.5(e).
100. *See* Alexander B. Smith & Harriet Pollack, Criminal Justice 157 (3d ed. 1991) ("[R]eality of our judicial process conforms more closely to the bureaucratic model than to the adversary ideal."); Abraham S. Blumberg, Criminal Justice, 154-177 (2d ed. 1979); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463, 466-70, 523-33 (1980) (surveying this line of criticism and the reform proposals it spawned).
101. *See* LaFave & Israel, *supra* note 1, §§ 1.4(f), (l), 21.1(b).
102. *Id.* § 21.1; Albert W. Alschuler, *The Changing Plea-Bargaining Debate*, 69 Cal. L. Rev. 652 (1981).
103. *See* Mirjan Damaska, *Adversary System, in* 1 Encyclopedia of Crime and Justice 24, 28-29 (Sanford Kadish ed., 1983); Malcome M. Feeley, The Process is the Punishment 13-14 (1979); Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 Law & Soc'y Rev. 509 (1979).
104. *See* Thomas W. Church, Jr., Examining Local Legal Culture: Practitioner Attitudes in Four Criminal Courts 8 (1982) (adversarial relationship can govern plea negotiation just as it governs trade union contracts or international treaties); Goodpaster, *supra* note 44, at 139-144 (suggesting that the adversarial trial "may form the foundation of a system of criminal case resolution that is much greater than the trial" where trials "radiate their effects through the system" and thereby impact non-trial dispositions).
105. *See* Goldstein, *supra* note 55 ("Adversary refers to a method of resolving disputes and takes its contour from the contested trial," while "accusatorial" encompasses "other fundamental premises" designed to compliment the adversary trial procedure in the protection of the accused.)
106. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), quoting 8 Wigmore, Evidence 317 (McNaughton rev., 1961).
107. *Tehan*, 382 U.S. 406; Malloy v. Hogan, 378 U.S. 1 (1964); Rogers v. Richmond, 365 U.S. 534 (1961) .
108. *See, e.g.,* Colorado v. Connelly, 479 U.S. 157 (1986) (Brennan, J., dissenting) ("A concern for reliability is inherent in our criminal justice system, which relies upon accusatorial . . . practices" and therefore reflects a "distrust for reliance on confessions."); Taylor v. Kentucky, 436 U.S. 478 (1978) (Presumption of innocence provides a safeguard against erroneous conviction by giving added emphasis to the principle that one "accused of crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."); *Murphy*, 378 U.S. at 52 (Self-incrimination privilege founded in part on "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'") (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).
109. *See* Spano v. New York, 360 U.S. 315 (1959); Chambers v. Florida, 309 U.S. 227 (1940); Pulaski, *supra* note 44, at 12, 45 ("By far the most common explanation for requiring proof before punishment . . . is distrust of political authority.") .
110. *See supra* notes 78-82.
111. *See* Watts v. Indiana, 338 U.S. 49, 54 (1949) (Frankfurter, J., plurality).
112. *Taylor*, 436 U.S. at 484 n.12 (quoting 9 J. Wigmore, Evidence § 2511, at 407 (3d ed. 1940)).
113. Speiser v. Randall, 357 U.S. 513 (1958) ("There is always in litigation a margin of error, representing error in factfinding . . . . Where one party has at stake an interest of transcending value--as a criminal defendant in his liberty--this margin of error is reduced as to him by the process of placing in the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.").
114. Bell v. Wolfish, 441 U.S. 520, 533 (1979).
115. Carleton Kemp Allen, Legal Duties 256 (1931).
116. *See Watts* 338 U.S. at 54 (Frankfurter, J.) ("Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.").
117. *See* Model Penal Code and Commentaries, 191-95 (1985) (noting that defense burden is common for: "self defense and similar claims of justification for conduct that would otherwise be criminal; necessity, duress, and claim of right: irresponsibility by reason of mental disease or defect; license; and many claims of exemption from a statutory prohibition based on a proviso or exception in the definition of the crime").
118. *See* Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977); Irene Merker Rosenberg, *Winship Redux: 1970 to 1990*, 69 Tex. L. Rev. 109 (1990).
119. Medina v. California 112 S. Ct. 2572, 2577 (1992); LaFave & Israel, *supra* note 1, §§ 3.2(i), 6.9, 7.2, 8.10(e), 21.2.
120. Malloy v. Hogan, 378 U.S. 1, 7-8 (1964); *See also* Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).
121. *See* LaFave & Israel, *supra* note 1, §§ 3.2(i), 6.9, 7.2, 8.10(e), 21.2. *But see* Goldstein, *supra* note 55, at 1020 (describing the "use of the accused for interrogation and search" and the practice of offering plea-bargain concessions as "inquisitorial devices" which have coexisted with the "accusatorial tradition" of American law).
122. *See* Ake v. Oklahoma, 470 U.S. 68, 78 (1985) ("The

private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern.").

123. *See* Yale Kamisar, *Due Process and Criminal Procedure, in* THE CONSTITUTIONAL LAW DESKBOOK 1, at 8 (National College of District Attorneys 1977) (Defendant's constitutional right to proceed pro se, as recognized in *Faretta*, 422 U.S. 806, represents that "rare instance where the due process goal of insuring respect for the dignity of or individuality of the defendant clashes with and prevails over the first and more obvious due process objective of minimizing the possibility that an innocent person may be convicted."). *See also* text following footnote 53 *supra.*

124. Numerous Supreme Court opinions have described the truthfinding function as providing a "two-way street," designed to gain conviction of the guilty as well as acquittal of the innocent. *See, e.g.,* United States v. Nobles, 422 U.S. 225, 230-31 (1975); United States v. Nixon, 418 U.S. 683, 709 (1974).

125. *See* Stacy, *supra* note 49, at 1405-09 (Concern here is "error allocation" rather than "error avoidance," so that protections like the reasonable doubt standard of proof may be regarded as "truth impairing."); *see also* Grano, *supra* note 2, at 1013.

126. Tehan v. United States *ex rel* Shott, 382 U.S. 406, 416 (1966).

127. Williams v. United States, 401 U.S. 646, 653 (1971). *But see* Stacy, *supra* note 49 (questioning whether the Court has actually given a higher priority to this concern.)

128. Yates v. Aiken, 484 U.S. 211, 214 (1988) (quoting Justice Harlan's concurring opinion in In re Winship, 397 U.S. 358, 372 (1970)).

129. *See* 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 206 (4th ed. 1992); Damaska, *supra* note 11, at 514-21.

130. LAFAVE & ISRAEL, *supra* note 1, §§ 22.3, 22.4.

131. *Id.* § 20.7.

132. Maryland v. Craig, 497 U.S. 836, 846 (1990).

133. *See* Rock v. Arkansas, 483 U.S. 44 (1987) (state must allow hypnotically refreshed testimony of defendant); MCCORMICK ON EVIDENCE, *supra* note 129, §§ 21-26, 41-44 (permissible scope of cross-examination and impeachment of defendant).

134. *Winship,* 397 U.S. at 363.

135. Santosky v. Kramer, 455 U.S. 745 (1982).

136. *See* Johnson v. Louisiana, 406 U.S. 356, 392-93 (1972). While unanimity is not constitutionally required, it is the standard in the vast majority of states. *See* Birch v. Louisiana, 441 U.S. 130 (1979).

137. United States v. Scott, 437 U.S. 82, 91 (1978).

138. LAFAVE & ISRAEL, *supra* note 1, § 27.6.

139. *See* Anthony A. Marano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507 (1975) (arguing that the seventeenth century persuasion standard of a "satisfied conscience" probably came closer to a absolute certainty requirement).

140. *See supra* note 118; *see also* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457 (1989); Scott E. Sundby, *The Virtues of a Procedural View of Innocence--A Response to Professor Schwartz,* 41 HASTINGS L.J. 161 (1989).

141. Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987).

142. Grano, *supra* note 85, at 1013-14.

143. In re Fried, 161 F.2d 453, 458 (2d Cir. 1947) (Frank, J., concurring).

144. LAFAVE & ISRAEL, *supra* note 1, § 3.3(a).

145. *Id.* § 3.5(a).

146. *Id.* § 14.2.

147. *Id.* § 15.1.

148. *Id.* § 12.1. Danger to the community may also be considered in determining whether release pending trial is appropriate. *Id.* §§ 12.3, 18.1(b).

149. Barker v. Wingo, 407 U.S. 514, 532 (1972).

150. LAFAVE & ISRAEL, *supra* note 1, § 16.1(c), (g).

151. I §§ 17.4(b), 27.1.

152. *See* DORIS PROVINE, JUDGING CREDENTIALS: NON-LAWYER JUDGES AND THE POLICIES OF PROFESSIONALISM 24-60 (1986); LINDA J. SILBERMAN, NON-ATTORNEY JUSTICE IN THE UNITED STATES 24-35 (1979).

153. LAFAVE & ISRAEL, *supra* note 1, § 15.1.

154. *See supra* note 101.

155. LAFAVE & ISRAEL, *supra* note 1, § 1.3(n).

156. *Id.* § 22.1(a)-(b).

157. *Id.* § 22.1(h).

158. *See* Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (noting that, "even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely").

159. Professor Freedman cites six such functions--preventing governmental oppression, countering complaint, biased, or eccentric judges, leveling and democratizing the law, bringing a fresh perspective to familiar fact patterns, and governing by direct democracy. Freedman, *supra* note 34, at 38-39.

160. *See* John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 193, 209 ("[O]f the many purposes attributed to the jury, one stands out as paramount. The power to condemn citizens to criminal sanctions is potentially so dangerous that it ought not be left entirely hirelings of the state . . . . ").

161. *Duncan*, 391 U.S. at 156.

162. *See, e.g.*, United States v. Williams, 112 S.Ct. 1735 (1992); Wood v. Georgia, 370 U.S. 375 (1969); Stirone v. United States, 361 U.S. 212 (1960).
163. Damaska, *supra* note 3, at 512. *See also supra* note 14.
164. Langbein, *supra* note 160, at 210.
165. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting) (quoting HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 8 (1966)).
166. *See* PROVINE, *supra* note 152, at 11-19; JOHN R. WUNDER, INFERIOR COURTS, SUPERIOR JUSTICE: A HISTORY OF THE JUSTICE OF PEACE IN THE NORTHWEST TERRITORY (1979); Elizabeth G. Brown, *Frontier Justice: Wayne County*, 16 AM. J. LEGAL HIST. 126 (1972).
167. LAFAVE & ISRAEL, *supra* note 1, § 22.1(b).
168. *See* Gordon v. Justice Court, 525 P.2d 72 (1974); DAVID NEUBAUER, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 419-22 (4th ed. 1992); PROVINE, *supra* note 152, at 24-60, 82-121.
169. *See* Richard B. Saphire, *Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection,* 127 U. PA. L. REV. 111 (1978); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication - A Survey and Criticism,* 66 YALE L.J. 319 (1957).
170. *See* Christopher Slobogin, *The World Without A Fourth Amendment,* 39 U.C.L.A. L. REV. 1, 6-7 (1991) (stating that the protection of "individual interests," such as "privacy" and "autonomy" are "clearly shared even by citizens who are 'guilty'"); Donald Ayer, *The Fifth Amendment and The Inference of Guilt From Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841, 850-51 (1980) (noting the grounding of the self-incrimination privilege in "social compact theory of government" out of which "comes an idea that the individual is the source of his government's sovereignty, and thus that in relations with that government he should be treated with the respect due an equal.").
171. Francis A. Allen, *The Crisis of Legality in the Criminal Law? Reflections on the Rule of Law*, 42 MERCER L. REV. 811, 821 (1991).
172. Coppedge v. United States, 369 U.S. 438, 449 (1962) (citing a lecture by Justice Schaefer, reprinted as *Federalism and State Procedure*, 70 HARV. L. REV. 1, 26 (1956)).
173. *See supra* notes 16-19 and accompanying text.
174. *See supra* notes 87-91 and accompanying text.
175. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
176. Harmelin v. Michigan, 111 S.Ct. 2680 (1991); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).
177. LAFAVE & ISRAEL, *supra* note 1, § 25.1(b).
178. *Id.* § 3.2.
179. *See* MCCORMICK ON EVIDENCE, *supra* note 129, Ch. 9; Kamisar, *supra* note 123, at 542-43.
180. Goldstein, *supra* note 81, at 1149.
181. Offut v. United States, 348 U.S. 11 (1954).
182. *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 594-95 (1980) (Brennan, J., concurring) ("For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity . . . mandates a system of justice that demonstrates the fairness of the law to our citizens.").
183. *Id.* at 595 ("Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.")
184. *See* THIBAUT & WALKER, *supra* note 91.
185. *See* Kittrie, *supra* note 63, at 125.
186. THURMON WESLEY ARNOLD, SYMBOLS OF GOVERNMENT 128-29 (1935).
187. LAFAVE & ISRAEL, *supra* note 1, § 23.1(d).
188. *Id.*
189. *Id.* § 22.3(c) (automatic grounds for challenging prospective jurors for cause); § 22.4(a) (automatic grounds for challenging a judge); § 11.9(d) (conflict of interest by counsel).
190. *Id.* § 22.3(c).
191. *Id.* § 24.2(c).
192. In recent years, this focus on equality in the treatment of defendants has been challenged, with commentators arguing that the law must also seek to ensure equality in the vindication of victims of similar criminal harm. *See* SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION 109-17, 212-27 (1989); THE CHANGING ROLES OF WOMEN IN THE CRIMINAL JUSTICE PROCESS 185-202, 241-315 (Imogene L. Moyer ed., 1985); THE CRIMINAL JUSTICE SYSTEM AND WOMEN 153-96 (Barbara Raffel Price & Natalie J. Sokoloff eds., 1982).
193. LAFAVE & ISRAEL, *supra* note 1, §§ 13.4(a), (c); 14.2(a); 15.4(c); 26.4(b). *See also* Sheri L. Johnson, *Race and the Decision to Detain a Suspect,* 93 YALE L.J. 214 (1983).
194. LAFAVE & ISRAEL, *supra* note 1, §§ 11.2(d), (e). Concern as to the equality of treatment of the indigent can also play an important role in setting the scope of safeguards of general applicability. *See, e.g.,* the celebrated exchange of letters between Judge David Bazelon and Attorney General Nicholas Katzenbach relating to police interrogation, *reprinted in* BAZELON, *supra* note 32, at 158-69; Yale Kamisar, *Has the Court Left the Attorney General Behind? The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice,* 54 KY. L.J. 464, 475-85 (1966) (defining basic right so that it is available only to those with resources suggests doubts about the justification for the rights itself).
195. LAFAVE & ISRAEL, *supra* note 1, §§ 13.4, 15.4(c), 22.2(c).

See also Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

196. LAFAVE & ISRAEL, *supra* note 1, §§ 11.2 (indigent's right to counsel); 15.4, 22.2(d) (cross-section requirements on selection of grand and petit jury).

197. Reliance upon constitutional guarantees as the basic means of prohibiting racial, gender, and indigency discrimination have come under sharp attack. Numerous commentators have argued that such discrimination is inherent whenever the process allows for substantial administrative discretion. *See* RONALD B. FLOWERS, MINORITIES AND CRIMINALITY 149-76 (1988); HILARY ALLEN, JUSTICE UNBALANCED: GENDER, PSYCHIATRY, AND JUDICIAL DECISIONS (1987); Johnson, *supra* note 193.

198. LAFAVE & ISRAEL, *supra* note 1, §§ 11.2(counsel) 12.1(financial bail conditions).

199. The movement to restrict sentencing discretion also is based, in part, upon concern that unguided discretion leads to discrimination on grounds barred by the Fourteenth Amendment, most notably race. *See* JOAN PETERSILIA & SUSAN TURNER, GUIDELINE-BASED JUSTICE: THE IMPLICATIONS FOR RACIAL MINORITIES (Rand 1985).