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THE RULE OF LAW IN THE TRIAL COURT

Robert P. Burns*

INTRODUCTION

Is the American trial courtroom a dangerous place for the rule of law? Certainly, the concerns expressed about the decline of the rule of law in America have often focused on the trial court. Critics argue that trial practices and rhetoric systematically undermine the rule of law. This notion has been fueled by sensationalist media coverage of notorious criminal trials and public relations campaigns against trial lawyers and trial practices. The latter are so skillful that they have, to some extent, achieved the remarkable feat of convincing the same Americans who serve on juries that they ought not to be trusted to make important decisions. A number of academic and professional authors have, in different ways, attacked the trial court's alleged indifference to the rule of law and the values associated with it.

All of this should be quite shocking. After all, one very powerful perspective—what I have called "the received view"—understands the trial court as the very institution designed to realize the rule of law in situations where there are disputes of fact.1 The parliamentary aspects of trial procedure, including the orderly sequence of presentation and rebuttal, assure the rational evaluation of factual and legal issues.2 Many of the requirements of the law of evidence, such as authentication3 and the rule against hearsay,4 have been thought to enhance factual accuracy. The judge's authority to grant directed verdicts5 and appellate review of jury verdicts have been thought to ensure that a jury's decisions are consistent with the rule of law.

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2. Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 366-67 (1978) ("[Adjudication] assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.").


Moreover, the evidentiary doctrine of materiality requires that every piece of evidence offered has a pedigree provided by its logical link to one of the norms embedded in the jury instructions, thereby minimizing the influence of other norms that immaterial evidence implicitly invokes. The generative evidentiary principle that witnesses must testify in the language of perception (and not offer opinions and interpretations) honors both factual accuracy and respect for the law. Perceptions are more likely to be accurate than self-indulgent opinion evidence; perceptions are also more plastic to the norms embedded in the substantive law because they are value-free. Indeed, the architecture of the Anglo-American trial seems to be the result of the very practical utopianism of bench and bar in creating a forum within which the rule of law can prevail. Has it completely failed?

I argue here that it has not. I begin with a description of the alternative method of decisionmaking with which the trial implicitly is compared unfavorably—"bureaucratic-formalist" decisionmaking. I recall the moderate Realist critique of the claims to lawfulness of that style. Because general rules do not decide particular cases, something other than the rules determines judgment in specific cases.

The Realists concluded that the judge's response to "the facts of the case" was generally the determinative factor. But, I suggest, it makes a good deal of difference how "the facts" are presented to the decisionmaker. If the case is presented in a manner that flattens out the record and avoids its narrative and dramatic elements, the result will be left to the undisciplined subjectivity of the decisionmaker, and to the "attitudes" which political scientists find best predict appellate decisionmaking. I also suggest that there is a kind of deep necessity here: the attempt to eliminate the role of common-sense moral judgment in legal decisionmaking can generate, not a higher level of lawfulness, but greater arbitrariness in deciding concrete cases.

The trial allows for a fairer tension between the instrumental or bureaucratic function of legal rules and the aspiration to justice in particular cases and, paradoxically, achieves a higher level of lawfulness. To say that the trial may be "vanishing" implies a loss of lawfulness. Finally, I consider two critiques of the contemporary trial that focus on its failure to achieve "truth" in the sense of factual accuracy. I con-

7. The Federalist No. 10, at 54–55 (James Madison) (E.H. Scott ed., 1898) ("As long as the connection subsists between [man's] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.").
cede that the major failure of the trial’s concrete lawfulness may stem from its dependence on pretrial practices that distort “brutally elementary fact.” I conclude by raising a number of questions about how to move forward.

II. THE BUREAUCRATIC-FORMALIST VISION OF THE RULE OF LAW AND THE “FAILURE” OF THE TRIAL COURT

Implicit in the attack on the trial court is the notion that other modes of “dispute resolution” or “social ordering” must be more “lawful” than the methods of the trial court.9 Rules do not apply themselves; in the words of the great judge, “General propositions do not decide concrete cases.”10 Any critique of the trial court must advocate some alternative kind of process.11

This necessarily comparative feature of one’s assessment of lawfulness raises some basic problems. There are a number of recurring rhetorical patterns that interfere with understanding and that are prominent here. One is what I call “the fallacy of mixed ideality.”12 Here, an idealized version of an alternative method is compared to the concrete and flawed method under scrutiny.

A related problem involves criticizing an imperfect aspect of practice while ignoring an equally flawed, counterbalancing practice. The adversary system has evolved as a pattern of specific ad hoc reforms designed to counter the profound unfairness of prosecution-oriented English criminal procedure.13 It is not only in evidence law where “an irrational advantage to one side is offset by a . . . counterprivilege to the other” and where “reforming” only one aspect of our practice “is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.”14 For example, the role that criminal defense lawyers have in preparing their clients for trial must be balanced against the role of the police in investigation and interro-

9. There is also a line of criticism of the trial court from the other direction. Some proponents of mediation object that the trial court can be too “legalistic” or “formalistic.” This complaint about formalism is sometimes combined with a complaint about the adversarial nature of the trial court. See generally Dispute Processing and Conflict Resolution: Theory, Practice and Policy (Carrie Menkel-Meadow ed., 2003).
11. In the polemical literature, these alternatives are rarely described concretely. Typically a court that “follows the law” is contrasted favorably with one that “ignores the law” or, worse, “legislates.” See Tony Freyer, Individual Rights, Judicial Discretion, and Judge Frank M. Johnson, Jr., 39 St. Louis U. L.J. 523, 564 (1995).
gation. This does not mean that reform is impossible. But we must not forget that key conservative insight: how much effort it takes to keep things from getting worse.

More globally, one has to evaluate the appropriateness of a less adversarial form of trial procedure in light of our broader institutions. Of the world’s large countries, we are probably the most capitalist, and we are relatively unencumbered by state welfare institutions. Our corporate executives have incentives to maximize short-term profits and have few obligations to other “stakeholders.” The public relations machinery is sophisticated and wholly instrumental. Our politics are dominated by powerful interest groups that gain a disproportionate hold on scientifically gerrymandered legislatures, as they did in the Gilded Age.\(^\text{15}\) This style of politics is likely to extend to elected judges, as more restrictions on advertising and campaigning are lifted.\(^\text{16}\) The trial, and especially the “populism” of the jury trial, has always been envisioned as a partial counterbalance to these aspects of our national life.\(^\text{17}\)

Further, all societies divide their lives into discontinuous social spheres—economy, neighborhood, school, church, family, and so on. In America, these discontinuities are at their sharpest. One does not have to be a relativist to say that in our society there will be a broader range of perspectives and “truths” than in (even somewhat) more organic societies. To a larger extent than in more organic societies, for us, “justice is conflict.”\(^\text{18}\) That is, justice is achieving the fairest tension among incommensurable norms, each of which finds its natural home in one aspect of our social life and whose extension to other realms is likely to be contested.

More than our European cousins,\(^\text{19}\) it may be important to us that parties invoking the values of these conflicting spheres be able to tell

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their own stories in court. It may also be appropriate that parties have more control over the evidence they present than they do in Europe. These are normative as well as descriptive issues. In a sufficiently individualist and adversarial society, a justice system that is not adversarial\(^\text{20}\) will likely ease the imposition of the will of socially dominant groups—the "tyranny of the effective majority," if you will. This tension between law as the instrument for social control by dominant groups—put more darkly, Thrasymachus's "will of the stronger"\(^\text{21}\)—and law as a medium for the realization of the justice revealed by its internal practices has been a recurring theme in our history and the nature of the trial has often been a focus of that controversy.\(^\text{22}\) The appropriate procedures for applying the law of rules have often seemed discontinuous with the procedures that will allow "true law" to emerge.

Although the phrase is seldom used because of its negative connotations, the critics most often attack the trial court for failing to employ purely bureaucratic-formalistic modes of social ordering.\(^\text{23}\) Bureaucratic modes of social ordering are justified as being the most efficient devices for achieving legislatively predetermined goals and "exclude questions of value or preference as obviously irrelevant to the administrative task, and . . . view reliance on nonreplicable, nonreviewable judgment or intuition as a singularly unattractive methodology for decision."\(^\text{24}\) The dispassionate bureaucrat who mechanically

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\(^\text{20}\) It is true that there is no one "adversary system." Although the American system is generally the most adversarial, that does not mean that we have not incorporated various aspects of "inquisitorial" systems within our practice or that we should not. As I noted above, it simply counsels caution. For an interesting set of proposals to increase accuracy in criminal adjudication by a scholar who appreciates the power of adversary presentation, see Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 CAL. L. REV. 1585 (2005).

\(^\text{21}\) PLATO, The Republic (G.M.A. Grube trans., 1974).


\(^\text{23}\) Roberto Mangabeira Unger notes that the combination of bureaucratic and formalistic understandings of law was a product of the nineteenth century and that the combination produced what we know as a "legal system." Formalism added the ideals of generality and consistency to older bureaucratic methods. ROBERTO MANGABEIRA UNGER, Law in Modern Society: Toward a Criticism of Social Theory 48, 50–54 (1976). On formal justice, see JOHN RAWLS, A Theory of Justice 235–43 (1971).

\(^\text{24}\) JERRY L. MASHAW, Bureaucratic Justice: Managing Social Security Disability Claims 26 (1983). Rules enable a ruler to communicate abstract features of the ruler's will to an
applies the rules, regardless of context or consequences, often seems to be the ideal against lawfulness of which trial processes are found wanting.

Bureaucratic adjudication often has, at least on the rhetorical level, a higher level of “rule-centeredness” than the efforts of our trial courts. Bureaucratic methods embody what Professor James White has argued is an impoverished understanding of legal processes as a machine designed to stamp fully predetermined goals on plastic material in a wholly instrumental way. For that kind of enterprise, the individual case should be presented through processes that screen out life-world values and that avoid the more interpretive and evaluative language with which we usually describe human events. From a common-sense point of view, this means that only the language of power or will that is embodied in legislative or administrative rules will supply the norms for evaluating a particular case. The facts of the case should not “talk back” to the rules.

Though it would be laborious to demonstrate in general terms, the bureaucratic-formalistic project can never be fully realized. That is the weight of the argument made by realists of one stripe or another for a hundred years. Some third thing, between the rule and a value-free account of “the facts,” is necessary to complete the judgment. It will come either from the values embedded in the languages and performances of the process by which the adjudicator is exposed to the concrete case, or it will come from the decisionmaker’s subjectivity. Although the proposition is controversial, many political scientists who study appellate decisionmaking tell us that the judge’s “attitude”—a complex of very general sensibilities, political leanings, and moral commitments—really determines or completes the judgment in a particular case.

army of enforcers, but the rule of law can then take on a momentum of its own because of its internal ideals.

25. JAMES BOYD WHITE, Teaching Law and Literature, in FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 73, 88 (1999).

26. It is no accident then that Hannah Arendt classically described bureaucratic modes of social ordering as “rule by nobody.” HANNAH ARENDT, THE HUMAN CONDITION (1958). Our selves are constituted by the moral judgments we make. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 25-52 (1989). Concretely, in avoiding the description of the case before him in any languages other than that supplied by the rules, and in particular avoiding simple everyday language, the bureaucrat is bracketing his moral self. At an extreme, he will find himself speaking in Orwellian terms with Kafkaesque results.


The formalist model of adjudication has undergone withering and recurring criticism for seventy-five years.\textsuperscript{29} A crucial principle in formalist self-understanding—the distinction between law and fact—has been criticized as a purely pragmatic fiction.\textsuperscript{30} Viewed in institutional terms, it has served only to allocate increasing decisionmaking power to the judge, who increasingly acts in summary fashion.\textsuperscript{31} If the critique of formalism is even partially correct, how do our judicial bureaucrats \textit{actually} decide the truly debatable cases that come to them? To the extent that our judges are becoming more comfortable as bureaucrats, we are likely to see fewer trials.\textsuperscript{32} That is because bureaucrats do not need to engage in the process of moral judgment that has traditionally been at the heart of trial and common-law litigation as a whole.

Professor Jerry Mashaw contrasts bureaucracy with traditional adjudication and argues that the paradigmatic task of the latter is the resolution of initially and generally plausible claims about rights.\textsuperscript{33} Typically, each of the parties to an adjudication can invoke some right that has a place in society's moral landscape. The task is then to resolve the tensions between the competing principles in the crucible of the concrete case.\textsuperscript{34} This is certainly true when the legal rule itself invokes an open-textured standard such as "reasonableness," and it remains true across a whole range of other situations, such as in criminal cases, which require an evaluation of the defendant's mental state.\textsuperscript{35} Mashaw concedes the \textit{partial} overlap of bureaucratic rationality and adjudicatory fairness:

To some degree these traditional notions of justice in adjudicatory process imply merely getting the facts right in order to apply existing legal rules. So conceived, the goal of a moral judgment model of justice is the same as that of a bureaucratic rationality.
model—factually correct realization of previously validated legal norms. If this conception exhausted the notion of adjudicatory fairness, moral judgment's competition with bureaucratic rationality would entail merely a technical dispute about the most efficient way to find facts. But there is more to the competition than that.36

The “more” is that the process of adjudication is partly value-defining. The definition occurs in the process of “contextualized exploration of individual deservingness.”37 At trial, this means two rather distinct things. One is that the parties and the procedural rules limit the range of morally relevant facts, because the goal is “to resolve particular claims of entitlement in a way that fairly allocates certain benefits and burdens, not to allocate benefits and burdens in general.”38 A second point, one that Mashaw does not emphasize but which is characteristic of the American trial, is that the inquiry that takes place at trial focuses on the concrete, the factual, and the multiple to an almost obsessive degree—one almost completely discontinuous with most other inquiries.39 That is the kind of inquiry that should determine the relative reach or significance of the competing and inevitably overgeneralized rules or principles that make up both our moral and legal sources. After a certain point, indeterminacy is usually a welcome aspect of legal rules because they can never completely anticipate the normatively relevant aspects of the situations to which they will be applied.40 According to White, a statute can be better understood as an important first assertion in a conversation than as a fully determinate expression of sovereign will.41

What do we actually do at trial? We tell different sorts of sharply constrained stories, then criticize them, and then partially reconstruct them. So, mercifully, decision at trial is not about who is the better storyteller. It is true that trial decisionmaking draws on the moral sources inherent in the judge’s and jury’s common sense and experience, and that those sources are realized through the narrative structures of the trial. But there are at least two competing stories told at trial. Even within each case, narrative structures are hybrid: the fully

36. Mashaw, supra note 24, at 29 (emphasis added) (citation omitted).
37. Id. at 30.
38. Id.
40. The law of evidence has certainly recognized this issue. Our evidence “codes” actually function as a set of relatively broad guidelines to structure the judge’s sense of fairness in regulating the trial. See generally Robert P. Burns, Notes on the Future of Evidence Law, 74 Temp. L. Rev. 69 (2001) [hereinafter Burns, Notes on the Future of Evidence Law].
characterized God's-eye narrative of opening statements stands in harsh contrast to the artificially stripped-down and perceptual narratives of direct examination. The tension between what each lawyer says "this case is about" in the opening statement and the actual testimony presented to support the case can be revealing. This tension reveals the appropriate reach of the "general propositions" that do not decide cases, but do structure them. The trial proceeds not only by the construction of narrative, but also by its deconstruction through rebuttal, cross-examination, and argument.

The trial is also a dramatic event constituted by the confrontation of actors in different roles: lawyers and lawyers, lawyers and witnesses, lawyers and judges, and lawyers and juries. This confrontation of roles is revealing. It limits the inevitably overgeneralized rules and normative scripts to which each party will necessarily appeal. It allows the judge or jury to see which case "rings true." It serves not only as a "critique" of law, as Professor David Luban has put it, but also as a critique of common sense. The trial refines the law and common sense by confronting generalization with the meaningful detail of past events in ways that our mass media almost never do. This may explain the feeling of an "elevation" of common sense that jurors often describe.

What does the social science literature say about decisionmaking in the trial court? Certain recurring conclusions emerge from the vast literature. "[J]urors are deeply engaged with the evidence, and their verdicts emerge from that engagement," what Professor Jeffrey Abramson has called "the discipline of the evidence." Broad demographic characteristics of jurors do not predict verdicts. Juries rarely exercise their power of nullification, and there is a high level of convergence between what juries and what judges believe is the legally correct result. This convergence probably stems from the general congruence between democratically enacted law and societal norms that a cross-sectional jury is likely to apply in a case even in the absence of instructions. Professors Harry Kalven Jr. and Hans Zeisel found that judges and juries agree in the dispositions of cases about

44. Burns, supra note 1, at 143.
45. Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 162 (1994).
46. Burns, supra note 1, at 143 (citing Abramson, supra note 45, at 143–76).
47. Id. at 144.
48. Id. (citing Harry Kalven, Jr. & Hans Zeisel, The American Jury 495–96 (1966)).
seventy-five percent of the time—a figure which probably understates the convergence.49 The jury’s “war with the law is thus both modest and subtle.”50 The level of convergence does not increase with the complexity of cases, a conclusion which Kalven and Zeisel interpreted as a “stunning refutation of the hypothesis that the jury does not understand [difficult cases].”51 Disagreements between judges and juries stem mainly from the ways in which different values affect the fact-finding process itself. This is, in part, because “a jury’s approach to the evidence is ‘equitable’ rather than ‘rule-oriented,’” and the considerations that “explain” trial decisions do not fit exclusively within the categories defined by the instructions.52 For reasons grounded in the nature of trial practices and languages, the judge and jury make detailed distinctions based on many levels of moral, legal, and political evaluation: “In the world of jury behavior, fact-finding and value judgments are subtly intertwined.”53 The decisionmaker at trial organizes evidence in narrative form, not as a series of links in a logical chain that leads to the categories in the jury instructions. These narratives “have the capacity to create clear interpretations for social behavior—interpretations that might not have been obvious outside the story context.”54 These stories bring with them “an ethics already realized,”55 in the common sense and social practices of the decisionmaker who determines how legal rules will be applied. These norms are not arbitrary and they are enormously more refined than the very broad “attitudes” that often make the difference in bureaucratic decisionmaking.

These social-scientific findings regarding the process of trial adjudication are consistent with the accounts that experienced judges and lawyers have given. The major Legal Realists agreed that the law of rules “obscured more than it explained about why a court decided as it did,”56 and that “judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons (the latter figur-

49. Id. at 144–45.
50. Kalven & Zeisel, supra note 48, at 495.
51. Id. at 157.
52. Burns, supra note 1, at 146 (citing Kalven & Zeisel, supra note 48, at 76, 495).
53. Kalven & Zeisel, supra note 48, at 164.
ing primarily as ways of providing post-hoc rationales for decisions reached on other grounds).\textsuperscript{57}

As Jerome Frank has pointed out, Chancellor Kent stated that "[h]e first made himself master of the facts" and then "[h]e saw where justice lay, and the moral sense decided the court half the time; [h]e then sat down to search the authorities... but [h]e almost always found principles suited to [h]is view of the case."\textsuperscript{58} Judge Joseph Hutcheson floridly described "hunching" his way to a conclusion: "I... wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way."\textsuperscript{59} This is all consistent with the observations of the kinds of cognitive operations that actually take place at trial. Some "honest and sensible judgments" are tacit: "They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."\textsuperscript{60} They are mainly integrative, not deductive:

The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence introduced.... In giving appropriate, if sometimes unreflective, weight to a specific piece of evidence the trier will fit it into a shifting mosaic.\textsuperscript{61}

Noted trial attorney Louis Nizer put it as follows:

Although jurors are extraordinarily right in their conclusion, it is usually based on common sense "instincts" about right and wrong, and not on sophisticated evaluations of complicated testimony.... [A] Judge, trying a case without a jury, may believe that his decision is based on refined weighing of the evidence; but... he, too, has an over-all, almost compulsive "feeling" about who is right or wrong and then supports this conclusion with legal technology.\textsuperscript{62}

That we are not consciously following rules at trial does not mean that our practices are not consistent with rules: "[W]e seem to be able to participate deftly in rule-governed practices, even intellectual prac-

\textsuperscript{58} Leiter, \textit{supra} note 29, at 276 (internal quotation marks omitted) (quoting Jerome Frank, \textit{Law and the Modern Mind} 104 n.* (1930)).
\textsuperscript{60} Chi., Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907) (Holmes, J.).
\textsuperscript{62} Louis Nizer, \textit{My Life in Court} 313 (1961).
tics, without consciously directing our actions by an ongoing inter-
pretation and application of the rule." To give a mundane example,
the appropriate use of our native language in social situations reflects
a tacit and practical "knowing how" that rarely adheres to the rules of
grammar: "Each seeks to account for successful judgment in terms of
an ineluctable grounding in social or communal contexts. Illocution-
ary force operates on the basis of tacit conventions that interlocutors
share by virtue of being part of the same linguistic community." As
I have previously argued, we should reject accounts of language com-
prehension that consider it to be a kind of inference:

Students of language have come to see... that we consistently un-
derstand what others mean in daily conversation through an instan-
taneous grasp of the contexts within which statements are made and
the background conditions against which they are made. That kind
of grasp or integration cannot be reduced to representation, defini-
tion, and inference but requires a tacit grasp of the situation as a
whole and the human context of linguistic performances.

Professor Peter Steinberger notes that "reliable and accurate judg-
ment is often a matter of invoking, however automatically and uncon-
sciously, the range of norms, assumptions, conceptual materials, and
rhetorical tools that constitute the linguistic/intellectual community of
which one is a part."

The trial narratives we use do not imprison us. We are not enclosed
within the stories we tell, but can counter story with story, to remind
ourselves of the inevitable gap between events and the telling of those
events. More importantly, we can place different kinds of stories in
tension with one another. In particular, we can contrast the fully char-
acterized narratives of opening and closing statements with the more
spartan and perceptual stories of direct examination. The issues are
(1) who should be entrusted with the task of moving in the space be-
tween the general rules and the particular narratives of the individual
case, and (2) how, and under what procedures, should that movement
take place. It is by dwelling in this tension that an integrative judg-
ment can emerge that accounts for all the facts, norms, and possibili-
ties. The "consciously structured hybrid of languages and practices"
that prevails in the trial court, even while respectful of the law of
rules, inevitably allows the judge or jury to see, to feel, and to be ab-

63. BURNS, supra note 1, at 205.
65. BURNS, supra note 1, at 204.
66. Id. at 206 (quoting STEINBERGER, supra note 64, at 185).
sorbed in a broader range of moral sources than the bureaucrat would ever allow.  

This is not to say that the law of rules is unrepresented in the trial court. Dispositive motion practice screens out many civil cases from coming to trial. The doctrine of materiality insists on a pedigree of every piece of evidence in the form of a link to the law of rules. Jury instructions are given with some solemnity and are supported by the jury's oath. But they are simply one normative source among others. Those other sources will shape the law of rules in a range of different and complex ways, from affecting the way in which the law of rules is interpreted or applied, all the way to the relatively rare jury nullification.

This does not mean that legal rules are irrelevant to adjudication. Rules structure the absorbing event that is the trial in a number of important ways. The issues here are more subtle. One can approach the model of rule application suggested by bureaucratic rationality only by impoverishing both the normative and factual sides of rule application and eliminating the richness that we generally believe necessary for just outcomes. Regardless of the philosophical issues, however, neither the judge engaging in summary or appellate disposition of a case, nor the judge or jury deciding a case at trial, is deciding the case mechanically. It is not true in either case that "judges exercise no discretion and that they do not render decisions by reasoning in ways that are not sanctioned by legal reasons."  

If the law of rules provides only some of the normative sources for decision at trial, does that mean that the rule of law is threatened? To answer this question, one must first ask a more fundamental question: "What is law?" Some scholars believe that this question ought not be asked, because it leads to more confusion than it is worth. For example, the classic controversy between Ronald Dworkin and H.L.A. Hart about the meaning or content of law seems to have more to do with the relative power of two different modes of legal theory, one seeking solely to describe legal materials and the other arguing that such description is not possible without some implicit evaluation of those materials. Hart responded to Dworkin's theory:

The central task of legal theory so conceived is termed by Dworkin "interpretive" and is partly evaluative, since it consists in the identi-

67. Id. at 183.
ification of the principles which both best "fit" or cohere with the settled law and legal practices of a legal system and also provide the best moral justification for them, thus showing the law "in its best light." For Dworkin the principles thus identified are not only parts of a theory of the law but are also implicit parts of the law itself.70

Only by including those principles within the law does legal decisionmaking in concrete cases become something other than arbitrary—the exercise of a discretion that is the expression of the judge's subjectivity. Those principles allow judges to decide each case in a way that is uniquely consistent with the law as a whole, understood in its best light. The practices of the trial perform the same determining function "from below." The shape of trial practices constitutes an expression of "considered judgments of justice," determinations on important matters that are relatively long-standing and in which we have confidence71 because they have normative weight. Viewed historically, they reflect the entire "higher law" thread in our understanding of the American trial.72

The trial provides a richer and more engrossing encounter with the realities of the case than affidavits, depositions, briefs, and appellate records. More importantly, by absorbing the decisionmaking in the details and the drama of the case, previous attitudes are refined and disciplined so that the decisionmaker is exercising less discretion, and is less arbitrary than a judge who can maintain more of a Cartesian aloofness from the materials, and thus act more subjectively.

As G.K. Chesterton saw after his own jury service, the central contribution of lay jurors is that they can still allow themselves to see what the languages and performances of the trial show:

Many legalists have declared that the untrained jury should be altogether supplanted by the trained Judge.

...[However] the more a man looks at a thing, the less he can see it, and the more a man learns a thing the less he knows it... [T]hat the man who is trained should be the man who is trusted, would be absolutely unanswerable if it were really true that a man who studied a thing and practiced it every day went on seeing more and more of its significance. But he does not. He goes on seeing less and less of its significance... .

Now it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things.... And the horrible thing about all


71. On the notion of "considered judgments of justice," see RAWLS, supra note 23.

72. See generally ABRAMSON, supra note 45, at 57–95; Harrington, supra note 17.
legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.\footnote{G.K. Chesterton, Tremendous Trifles 83–86 (1909).}

Justice Abe Fortas put the same thought in more conventional terms in the criminal context, though his basic point applies across the spectrum of litigation: “[J]udges do become case-hardened. Judges do sometimes tend, after many years, to take a somewhat jaundiced view of defendants. Many trial judges tend to become a bit prosecution-minded. That’s the basic justification for a jury.”\footnote{Alan W. Scheflin, Jury Nullification: The Right to Say No, 45 S. Cal. L. Rev. 168, 213 (1972). For an illuminating account of the daily business in an American criminal trial court that Chesterton would have appreciated, see Steve Bogira, Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse (2005).}

Let us accept the conservative formulation that the trial’s “consciously structured hybrid of languages and performances”\footnote{Burns, supra note 1, at 201.} guides the interpretation of the legal rules applied to actual human events. Are those interpretations and applications “lawful”? Are the moral sources actualized by trial practices part of the law? I have argued that they are. Just as Dworkin’s moral principles “above” the law can be understood as part of the law—and must be so understood if, in his view, the law is to be determinate—so too the normative sources that are realized in the practices of the trial court, themselves expressing our considered judgments of justice, ought to be so considered.\footnote{I would use the now-fashionable term norm for these moral sources, but that term easily leads to entitizing those sources, and suggesting that they can be realized, or strictly identified, outside the practices that reveal them.}

To the extent that they are so considered, and to the extent that actual cases are decided without them, there will be less law and more discretion. They inhere in the narrative, argumentative, and dramatic resources embedded in the trial. They are not “principles” understood as yet more general rules. But they fall under the “rule of recognition” that judges and jurors practically follow and defend as justifications for decisions at trial. Some of them, such as the right to cross-examine and present evidence, are of constitutional dimension.

That the results of those processes cannot be exhaustively identified ex ante does not itself preclude the trial’s methods from the category of law. Uncontroversially “legal” provisions in statutes and regulations are often expressed in “factors,” without a predetermined hier-
archy or relative weight to be given by a decisionmaker to each one. Professor Cass Sunstein described the decisionmaking process: "Hence the decision-maker cannot rely simply on 'finding the facts' and 'applying the law.' The content of the law is not given; part of it must be found. There is a degree of ex post allocation of legal entitlements." Legal provisions expressed as "standards" will impose a high burden of contextual interpretation, one that requires a range of considerations before the meaning of the standard in the particular case can be discerned.

III. THE TRIAL COURT AND TRUTH: TOO MUCH OF THE WRONG KIND OF LAW?

I now turn to another set of considerations that has led critics to suggest that the trial court is not lawful based on the way it treats factual issues—its alleged indifference to the truth. Although I do not accept some of the central prescriptions of the two authors whose arguments I recount, I freely concede the importance of this issue. Factual accuracy relates directly to the rule of law. A court without truth will be lawless, regardless of how perfectly the legal rules are stated in the instructions. Without procedures that reliably allow the judge or jury to accurately determine what has occurred, there is no rule of law, understood narrowly as the "law of rules" or in the broader sense I have sketched out.

If judges can manipulate factual findings to bring them within the legal categories, the rule of law is observed only superficially. If judges simply cannot determine what did or did not happen, litigants are no better off. In neither case will the core values surrounding the liberal version of the rule of law be realized. Citizens will not be assured that they can protect themselves from intrusions of the state into their freedom by avoiding the prohibitions of the law of rules, and they will not be able to avail themselves of the assistance of the state afforded by the rules of private law doctrines. Factual accuracy is essential if the rule of law is to prevail in concrete cases.


78. I can barely resist the urge to place scare quotes around the word "factual." (Those latter quotes aren't scare quotes!) There is, of course, an enormous legal literature surrounding the fact-law distinction, just as there is an enormous philosophical literature surrounding the analogous is-ought distinction. One cannot take a step here without implicating the issues that literature addresses.

THE RULE OF LAW IN THE TRIAL COURT

I will summarize below what two distinguished critics of the trial court have said about its ability to achieve this basic goal. Although I do not accept their skepticism about adversary practices at trial, their accounts, especially as they bear on pretrial practices in cases where "brutally elementary facts" are at issue, raise basic questions that demand attention if the lawfulness of the trial court is to be enhanced. I end with a set of questions that must be answered in order to move forward intelligently.

In his magisterial history of the British adversary trial, Professor John Langbein traces the history of the "lawyerization" of the criminal trial. He attributes the domination of the trial by lawyers, and the relatively passive role of the judge, to a set of historical conditions in British criminal trial procedure that prevailed in the eighteenth century. The criminal trial at the turn of that century was different from the trial as we know it today. Prosecutions were initiated by private parties who brought their complaints to local justices of the peace. Over time, the justices of the peace came to be partisans of the prosecution's case, rather than independent "truth-seekers." Their role was to create and preserve evidence that supported the prosecution. They were precluded from searching for evidence that supported innocence or even from examining "[w]itnesses that expressly [came] to prove the Offender's Innocence." They conducted an examination of the defendant (a "deposition") that was often used against the defendant at trial. Langbein recounts the complaint of the defense counsel at a 1787 Old Bailey trial that "[t]he Magistrates at Bow Street never receive evidence for prisoners, only for prosecutors." Langbein concludes that "[m]agisterial questioning functioned as police interrogation does today; it offered the government an opportunity to get whatever information it could from an uncounseled, and frequently frightened and confused, defendant."

The justices of the peace would routinely commit a defendant to jail pending trial. The conditions were appalling—malnutrition and dis-

80. LANGBEIN, supra note 13.
81. Id.
82. Id. at 43.
83. Id. (quoting THEODORE BARLOW, THE JUSTICE OF PEACE: A TREATISE CONTAINING THE POWER AND DUTY OF THAT MAGISTRATE 190 (1745)).
84. Id. (quoting D'arcy Wentworth, Old Bailey Sessions Papers (Dec. 1787, #8), at 15, 19).
85. Id. (quoting William J. Stuntz, The Substantive Origins of Criminal Procedure, 105 YALE L.J. 393, 417 (1995)). In Langbein's view, as the nineteenth century wore on and professional police forces took over the responsibility for assembling the prosecution's case, the justice of the peace's investigation began to look increasingly like our preliminary hearing.
86. LANGBEIN, supra note 13, at 48-49.
ease killed large numbers of detainees.\textsuperscript{87} Prisoners, who were often detained for months and who did not have the assistance of counsel, were disgorged directly into the trial court:

Beattie's account . . . of the ineptness that many felony defendants displayed when attempting to defend themselves at trial, links their predicament in part to the horrific jail conditions. "[M]en not used to speaking in public who suddenly found themselves thrust into the limelight before an audience in an unfamiliar setting—and who were for the most part dirty, underfed, and surely often ill—did not usually cross-examine vigorously or challenge the evidence presented against them." The degradation and distraction of confinement continued into the courtroom; defendants were kept in leg irons until called for trial.\textsuperscript{88}

Defendants were prohibited from having a copy of the indictment either before or at trial, and their imprisonment made it all but impossible for them to discover and organize evidence of their innocence. Felonies were all capital crimes. Prosecution witnesses (known as "thief-catchers") were paid handsome bounties for accusing the defendant, and felons could escape the gallows by accusing others and sending them to their deaths.\textsuperscript{89} The prosecution possessed compulsory process and the defense did not; defense witnesses were not permitted to testify under oath.\textsuperscript{90} Trials were designed to pressure the defendant into speaking in response to the prosecution's case, although the defendant was prohibited from testifying under oath in England until the late nineteenth century.\textsuperscript{91} Judges were satisfied that they and the jury could distinguish truth from falsehood. Judges were also much more active—overbearing by our sensibilities. They commented on the evidence, interrogated the defendant and the jury in what Langbein describes as the "altercation" style of trial, and forced the jury to reconsider a verdict they thought was wrong.\textsuperscript{92}

The adversarial trial as we know it today emerged over the eighteenth century as a series of specific reforms to this deeply unfair system, which was either imported directly into the colonies or created independently. At first, lawyers were permitted to assist the defendant solely on points of law and were not permitted to address the court or jury on the central issue of factual guilt or innocence.\textsuperscript{93} The

\textsuperscript{87} Id. at 49.
\textsuperscript{88} Id. at 50 (second alteration in original) (quoting J.M. Beattie, Crime and the Courts in England 1660–1800, at 350–51 (1986)).
\textsuperscript{89} Id. at 148–65.
\textsuperscript{90} Id. at 51–52.
\textsuperscript{91} Id. at 52–53.
\textsuperscript{92} Langbein, supra note 13, at 13–16.
\textsuperscript{93} Id. at 110.
lethality of thief-catchers and codefendants eventually led judges to permit lawyers to cross-examine prosecution witnesses, to call defense witnesses, and finally to address the jury directly on the ultimate issues. What Langbein descriptively calls the "accused speaks" trial evolved into a proceeding where the defendant rarely spoke.94

The judges' relative ignorance of the facts of the case and the apparent clumsiness of their questioning led them to cede more and more authority to the lawyers who had investigated and prepared the case and could thus present a coherent theory.95 In the United States, ceding an increasing level of responsibility for the presentation of the case to the parties, and increasing restrictions on the trial judge, were consistent with many of the democratic themes that emerged during the colonial and revolutionary periods, especially as they bore on the suspicion of the trial judges.96

Though he recognizes the unfairness of the pre-adversarial English criminal trial, Langbein laments the shape that the Anglo-American trial has taken as a result of the reforms of the eighteenth and early nineteenth centuries:

Two-sided partisanship may indeed have been better than one-sided partisanship, but it was still a poor proxy for truth-seeking. Adversary procedure entrusts the responsibility for gathering and presenting the evidence upon which accurate adjudication depends to partisans whose interest is in winning, not in truth. . . . The adversary dynamic invited distortion and suppression of the evidence, by permitting abusive and misleading cross-examination, the coaching of witnesses, and the concealment of unfavorable evidence. This attribute of adversary procedure, the combat effect, was worsened by the wealth effect inherent in privatizing for hire the work of the adversaries who gathered and presented the evidence. We recall the chilling lament of the woman tried and sentenced to death for forgery at the Old Bailey in 1757, who told the court: "I have not a six penny piece left to pay a porter, much less [enough] to fee counsel." For her, the message of adversary justice was that "I must die because I am poor . . . ."97

Langbein criticized adversarial justice for its lack of "a coherent theory of truth-seeking": "Adversary procedure presupposed that truth would somehow emerge when no one was in charge of seeking it. Truth was a byproduct."98 He critiques the failure of Anglo-American

94. Id. at 48–61.
95. Id. at 311–14.
96. See generally Nelson, supra note 22.
97. Langbein, supra note 13, at 332–33 (second and third alteration in original) (quoting Eleanor Eddacres, Old Bailey Sessions Papers (July 1787, # 285), at 263, 269).
98. Id. at 333.
procedure to embrace the methods of reformed continental procedure, where the judges have the authority to conduct their own pre-trial investigations and guide the testimony of witnesses to achieve truth, and a result consistent with the law. As the quotation suggests, he argues that the "combat effect" and the "wealth effect" continue to plague our trial system.

Professor William Pizzi, who was himself a prosecutor, picks up the critique in the present day, and mourns the death of the truth in criminal trials at the hands of the combat effect in *Trials Without Truth*. He argues that our criminal trial system fails the three crucial tests of any such system:

No trial system is strong and deserving of public respect (1) if it cannot be trusted to acquit the innocent and convict the guilty with a high degree of reliability; (2) if it fails to treat those who come in contact with the system—including victims and witnesses as well as suspects and defendants—with dignity and respect; and (3) if it fails to make wise use of limited judicial resources.

Pizzi believes our system fails the first requirement for a number of reasons. The "basic metaphysics" of the American lawyer sees the criminal trial as "two-sided contests between the state and the individual." Further, we are addicted to procedure, which is an odd kind of counterweight to the harshness of the adversarial battle. Constitutional criminal procedure drives the investigative police function and the prosecutorial function too close together. Police and prosecutors become a team whose goal is to produce convictions—not to discover the truth. Though largely ineffective in the most serious cases, the exclusionary rule infects the professionals involved in the criminal trial with an ethos of disregard for factual accuracy, which coheres nicely with a personalized obsession with winning at all costs. Our overblown privilege against self-incrimination—ineffective for all but the wealthy, sophisticated, and hardened—deprives the court of any access to the defendant as a reliable source of information about what

99. Continental systems do not really have "trials" in the American sense—presentations of all the evidence on each side of a case. Rather, the judge has the authority to adjourn the formal proceedings and conduct further investigations. It is a *Prozess*, to use the title of Kafka's often mistranslated classic. FRANZ KAFKA, DER PROZESS (1935).

100. WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1999). He has much less to say about the wealth effect.

101. Id. at 24.

102. Id. at 36.

103. Pizzi makes the running comparison of our trial process to American football, which he unfavorably contrasts with soccer for the same reason. Id. at 5–24.
has occurred.\textsuperscript{104} The requirement that defense counsel file an \textit{Anders} brief, and the lack of negative consequences for appealing an unfavorable verdict, encourage—indeed, all but mandate—appeals.

Evidentiary rules are complex and often fail to differentiate between reliable and unreliable evidence.\textsuperscript{105} Even appellate courts use a dismissive, “roll the dice” language in speaking of jury trials, and the willingness of appellate courts to reverse for technical error paints a picture of trials as “fragile and uncertain events in which any error ... may alter the outcome.”\textsuperscript{106} Trial judges have to walk on procedural eggshells for fear of reversal. One result is the “vanishing trial” syndrome, which Pizzi notes when he contrasts American trials with the more informal Dutch inquiries: “Obviously, we have made different choices, preferring a much more elaborate and formal trial procedure but only being able to use it for a very tiny percentage of criminal cases.”\textsuperscript{107} Another result is the unwillingness of judges to provide jurors the benefit of their experience on the bench by summarizing and commenting on the evidence.

According to Pizzi, a major failure of our criminal litigation system—one that Langbein anticipated—is the competitive pretrial discovery system: “[O]ur trial system turns discovery of information ‘from the other side’ into a game in which one wants to get as much information as possible but give as little as possible,”\textsuperscript{108} and where no agency is responsible for gathering all the relevant information regardless of whom it benefits. Trial procedures, such as tightly controlled cross-examinations and the mandated question-and-answer format of direct examination, keep the witness from telling the whole truth in the witness’s own words. Lawyers learn from actors and start to think of the trial as theatre. An accelerating downward spiral occurs when harsher criminal penalties and more strident defense advocacy meet with the increasing power of prosecutors to force plea bargains that judges fail to scrutinize:\textsuperscript{109}

\textsuperscript{104} Pizzi is echoing the criticism that Marvin Frankel made a quarter of a century ago. Marvin E. Frankel, \textit{Partisan Justice} (1980). Frankel, at the time a federal district court judge and a political liberal, pointed out the contradiction between our overblown protections at trial, where the refusal of the defendant to speak with the police cannot even be mentioned, and the coercive realities of the police station. \textit{Id.} at 87–100.

\textsuperscript{105} This is a point I generally agree with. \textit{See} Burns, \textit{Notes on the Future of Evidence Law}, \textit{supra} note 40, at 87–89.

\textsuperscript{106} Pizzi, \textit{supra} note 100, at 78.

\textsuperscript{107} \textit{Id.} at 97.


\textsuperscript{109} Pizzi, \textit{supra} note 100, at 191.
When a country has an efficient trial system that puts a high priority on truth and expects defendants to own up to what they have done and accept responsibility, it is easier to maintain a high level of public respect and confidence. That, in turn, permits the system to try alternatives to incarceration that would not be politically possible in the United States.\textsuperscript{110}

Finally, the reality of "jury nullification makes a mockery of our whole intricate trial system."\textsuperscript{111}

One can take issue with some of the conclusions drawn by Langbein and Pizzi. The harmless error doctrine continues to grow, shielding judges and prosecutors from reversible errors. With relatively few streamlining devices—such as limits on jury selection methods, simplified evidence rules, and time limits for the presentation of cases\textsuperscript{112}—it seems possible to conduct many more jury trials. In the hands of competent practitioners, the conventions of direct and cross-examinations can reveal both the strongest and weakest aspects of the witness's evidence, as it bears on the issue before the jury. Americans in particular have long been cautious of the power that judges may exercise when "commenting" on evidence. I have my doubts that the long sentences characteristic of American criminal justice are really the result of popular skepticism about adversarial criminal procedure. Pizzi quotes Justice Byron White's invocation of Kalven and Zeisel:

\begin{quote}
[T]he most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.\textsuperscript{113}
\end{quote}

He rejects as a "mockery of our whole intricate trial system" what he interprets as Justice White's veiled approval of jury nullification.\textsuperscript{114} But Kalven and Zeisel's study, which probably exaggerated the differences between judge and jury,\textsuperscript{115} actually found that most of the dis-

\textsuperscript{110} Id. at 192.
\textsuperscript{111} Id. at 210.
\textsuperscript{112} Such time limits are, I believe, far more effective and democratic devices for focusing trials than "micromanaging" evidence through exclusionary rules.
\textsuperscript{113} Pizzi, supra note 100, at 208-09 (alteration in original) (quoting Duncan v. Louisiana, 391 U.S. 145, 157 (1968)).
\textsuperscript{114} Id. at 210. Usually Pizzi is unhappy with the intricacy of the system; one might think he would approve of a method that cuts through unnecessary intricacy.
\textsuperscript{115} Kalven and Zeisel asked the judges how they "would have" ruled in cases that went to the juries and then compared their answers to the actual jury verdicts. Because this relieved the judges of any pressure of the "equitable" considerations that they found largely motivate jurors, it was likely to exaggerate the differences between judges and juries. Pizzi also implicitly accepts
agreements between judge and jury occurred because of the different ways they perceived the evidence—a much more subtle difference consistent with "the democratization of inference" that the jury right was meant to uphold, and not nullification "in the teeth of the law."

Further, the American lawyer's "basic metaphysics" in the criminal context has much to recommend it. The dominant utilitarian justification for the criminal justice system, which has affected practice, has always considered the defendants as tools for achieving a general social good, akin, in Justice Oliver Wendell Holmes's poignant metaphor, to the draftee being marched into battle with a bayonet at his bottom. Though Hart tried to distinguish the utilitarian "general justifying aim" of the system from the retributive-distributive principle, this normative divide has not often found its way into practice. Despite the empirical evidence that certainty of conviction is more important than length of sentence, the severity of the punishment of an individual has often been directly justified by the social need for crime control. There can be little doubt that the English criminal justice system, as Langbein describes it, has historically had a strong prosecution bias. And at the deepest level, there may be something darkly primitive about our social need to single out and condemn deviant individuals, a compulsion that our religious traditions have haltingly attempted to counter. Notice, too, that Pizzi's complaint is that there is too much law in the trial court. Our obsession with procedure and relatively complex legal rules defeats the truth-seeking imperative of the trial in a number of different ways. The exclusionary rule, in theory, bars evidence even if it is reliable. Evidentiary rules, by contrast, are usually justified by their power to ensure the reliability of evidence and keep the trial inquiry focused on the issues legitimized by the substantive law, but they can fail by virtue of inevitable overgenerality and complexity.

Of course, Langbein's wealth effect can distort the trial because of the effects of the surrounding market institutions within which the
trial takes place. If parties had equal resources to pay legal fees (or
the insurance to pay them), the wealth effect would disappear. I have
no doubt that the wealth effect, especially at the pretrial stage, can
distort the accuracy of trial decisionmaking and therefore endanger
the rule of law in the trial court. Serious reform efforts, which will be
quite different in the civil and criminal contexts, and which will re-
quire the greatest imagination and political will, are necessary.

The trial’s practices and languages are less autonomous and more
dependent on the market and bureaucratic institutions when their task
is to determine “brutally elementary data.” These are not the
meaning of events, but the basic perceptual “data” in some cases, such
as criminal cases where identity is the key issue. Underfunded,
sloppy, or deliberately deceitful behavior at the pretrial stage can pro-
duce skewed verdicts at trial, as can formally inadequate discovery
methods, such as the lack of any compulsory pretrial deposition prac-
tice in most criminal cases, and realities such as the crushing case
loads in public defenders’ offices. Most of the failures of the rule of
law that occur because trials are “without truth” stem from these
sources. The uneven skills of trial lawyers, assuming a threshold of
competence, are less likely to have an effect.

The evaluation of the combat effect is more difficult. It may, of
course, be viewed solely as a function of the wealth effect, because
lawyers for the party best able to reward them will do more of the bad
things that distort the truth. But if taken independently of that effect,
its broadest claim is that under the conditions that prevail in litigated
cases, the presentation and mutual critique of two interested parties
are less able to allow the truth to appear to a “passive” and disinter-
ested judge or jury than the sustained inquiry of a single focused in-
vestigator. But is it really so clear that truth is most likely to emerge
to a single mind directly seeking it than to a disinterested judge or jury
hearing the best case to be presented on each side? If the essence of
procedural justice is audiatur et altera pars, is it not more likely that
the other side will be heard when it is urged by an advocate whose
energies are directed to making it heard?

We return to our problem of mixed ideality here. Much, although
not all, of the criticism of excessive adversarialism points to conduct

121. See generally D. Michael Risinger, Unsafe Verdicts: The Need for Reformed Standards
the special importance of this range of cases).

122. Roughly, this means “the other side must be heard.” See Mauro Cappelletti, Fundamen-
tal Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and
Social Trends, 25 Stan. L. Rev. 651, 652 (1973) (defining the phrase as “the right of defense”).
that is misconduct under current procedural and ethical norms. This is conduct that our legal rules have not been able to control. Because it is skeptical of state power, our tradition generally resists comparing that conduct with the idealized inquiry of an inquisitorial judge. Pizzi makes a compelling case for the circularity of the pathology of the criminal justice system, but the moderate reformist problem is how to cut into that pathology without making things worse. For example, can we realistically expect the police to adopt a more detached style, unconcerned about convictions, if we just relax the privilege against self-incrimination? Pizzi’s argument that most of the difficulty occurs at the pretrial stage is convincing.

How much of the problem is the result of the wealth effect and how much is the result of the combat effect? Is there a way of equalizing the access of both parties to the evidence? Should we rely on competitive fact-finding and “sharing” through greater discovery or on nonadversary investigation by neutral agencies? What would the latter look like concretely?

IV. Conclusion

Throughout our legal history, judges and juries have relied on a variety of moral sources. That history points in many directions. There are historical sources that elevate the importance of the mechanical application of clear preexistent norms with little regard for contextual equities and hold, as Justice William Rehnquist put it, that “[s]imple justice is achieved when a complex body of law developed over a period of years is evenhandedly applied.”

There is likewise significant support for a view that the jury’s search for moral sources beyond what can be deduced from the law of rules is legitimate. The general trend of the nineteenth century was to elevate the former view. The twentieth century presents a much more mixed picture. The expansion of Seventh Amendment jurisprudence, the selective incorporation of ever more aggressive interpretations of the criminal jury provisions of the Bill of Rights, and the liberalization of pleading and the law of evidence, all expanded the jury’s role in adjudication, and so almost certainly broaden the moral sources on which our trial courts rely. We stand in an interpretive relationship with this history and the best account of it will depend on our own normative assessment of the contemporary trial and our own historically informed judgment about how to go forward.

123. Pizzi, supra note 100, at 59–68, 122.

At the beginning of this Article, I asked whether the trial court was a dangerous place for the rule of law. The answer depends in large part on one’s notions of the rule of law and the consciously structured hybrid of languages and practices that makes up the American trial. I have argued that one’s notion of the rule of law is enriched by understanding the ways of the trial court. I have suggested that what emerges from that understanding is a notion of law that remains in touch with its constitutive relationship to justice and is consistent with the social structure that we have framed for ourselves. In our world, highly contextual judgments of relative importance of competing considerations are essential. Dworkin is broadly right in arguing that the best account of what we do at trial is accomplished by the richest legal philosophy.\(^{125}\) He is also right that the richest legal philosophy will take into account our best practices.\(^{126}\) This is circular—as are all important interpretive questions.

My view remains that the trial’s linguistic performances are unparalleled in hammering out the meanings of human events, and then determining which of those inevitably multiple meanings is the most important. The meanings are multiple because the significance of the event will vary from the perspectives of the different social spheres within which it is situated. Events being tried will usually involve a family, a neighborhood, a religious community, an interest group political community, a political party, a legal order, or a market mechanism.\(^{127}\) These are not only intellectual constructs. We really divide our society into these spheres. They are the forms of life within which we live and move and have our being. They have corresponding modes of social ordering and our ways of speaking are grounded in them. I have argued that the importance of the trial for us is precisely its ability to mediate among these spheres without the possibility of an Archimedean position. Thus, “[o]ur task is less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions and their friction with one another.”\(^{128}\) In order to accomplish this task, the jury\(^{129}\) must be able to dwell in the enormous tension that the hybrid discourses create at trial.

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125. RONALD DWORKIN, LAW’S EMPIRE 410–13 (1986).
126. Id.
127. BURNS, supra note 1, at 201.
129. I use the word “jury” to apply to the decisionmaker at trial solely for ease of reference. My remarks apply equally to bench trials and jury trials.
Philosophers have argued that we actually do this and its result can be fairly called knowledge: "[We achieve insight by making] something appear by juxtaposing images or, even harder to explain, by juxtaposing words. The epiphany comes from between the words or images, as it were, from the force field they set up between them, and not through a central referent which they describe . . . ."130 What the jury understands is "a juxtaposed rather than integrated cluster of changing elements that resist reduction to a common denominator, essential core, or generative first principle."131 The meanings that the trial reveals are the most important meanings for purposes of public judgment and action, most likely to allow the decisionmaking to effect the law's purposes and to achieve what an older idiom called "true law."132
