

Pseudo-Adversarialism

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Abstract

This article offers a unified theoretical framework to address two distinctive forms of adversarial procedure: the *bona fide* adversarial system and the *pseudo*-adversarial system. In the former, a harsh contest between the prosecution and the defense is promoted, and an acquittal is rendered with substantial likelihood. In the latter, the prosecution overpowers the defense so that defendants are almost always convicted. We explain this procedural dichotomy as a result of optimal incentive designs institutionalized through controlling a judge's standard of proof beyond a reasonable doubt, a prosecutor's discretionary rule for indictment, and a defendant's right to counsel. Our theory suggests that the *bona fide* adversarial system functions better with jury trials, publicly-elected prosecutors, and government-based defense systems, while the *pseudo*-adversarial system is molded with bench trials, bureaucratic prosecutorial offices, and court-appointed counsels. The Japanese *pseudo*-adversarial system might remain influenced by the defunct inquisitorial system initiated during the post-feudal Meiji Restoration.

Keywords: adversarial system; conviction rate; criminal trial; prosecutorial discretion; right to counsel.

JEL classifications: D02; D73; K41.