AMERICAN CRIMINAL PROCEDURE IN A EUROPEAN CONTEXT

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If I were innocent, I would prefer to be tried by a civil court, but if I were guilty, I would prefer to be tried by a common-law court.[1]

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1 JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 127 (3d ed. 2007).

I. INTRODUCTION

In Europe and the United States, two different global legal traditions exist:[2] Anglo-American common law and Romano-Germanic civil law. These two systems have evolved into what are now known as the accusatorial and the inquisitorial criminal systems.[3] The civil law tradition is person-centered and grounded in the traditions of Roman law, whereas the common law tradition is centered on adjudication, beginning its historical development with the conquest of England by the Normans. In the former, written law has produced an inquisitorial type of procedure, which has negative connotations for many legal professionals and lay persons more accustomed to accusatorial procedure, a term used in Europe and elsewhere, which refers to oral criminal proceedings based upon the common law tradition developed in England.[4]

These diverse legal traditions and their historical roots create enormous procedural differences that greatly impact criminal justice in the United States and the United Kingdom, compared to European and Latin American countries.[5] In contrast to civil

2 *See* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 13 (2d ed. 1999) (discussing the concept of legal tradition). *See generally* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2d ed. 2004) (detailing other legal traditions, such as the Asian, Hindu, Islamic, and Talmudic legal traditions). Controversy remains over exactly how many legal traditions there are in the world. *See* PHILIP L. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH 104-05 (4th ed. 2008). Specifically in relation to criminal procedure, see ERIKA S. FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS (1993); GEORGE F. COLE ET AL., MAJOR CRIMINAL JUSTICE SYSTEMS (1981); CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 2d ed. 2007). *See also* RICHARD VOGLER, A WORLD VIEW OF CRIMINAL JUSTICE (2005).

3 Although a difference between the terms "process" and "system" in relation to criminal justice has been suggested, for the purpose of this paper both terms shall be used interchangeably. *See* PETER C. KRATCOSKI & DONALD B. WALKER, CRIMINAL JUSTICE IN AMERICA: PROCESS AND ISSUES 10-11 (2d ed. 1984) (discussing conceptual differences).

4 GLENN, *supra* note 2, at 125, 232. For this reason, the author suggests the use of investigative and adversarial criminal procedures because of their more positive connotations.

5 For a general discussion of the differences between criminal and civil procedure, see David J. Gerber, *Comparing Procedural Systems: Toward an Analytical Framework*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 665 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002). This paper is limited to discussion of criminal justice systems in Europe. For a discussion of criminal justice in Latin America, see generally MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, as well as EDMUNDO S. HENDLER, SISTEMAS PROCESALES PENALES COMPARADOS (1999), and especially Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007).

procedure, a unique aspect of criminal procedure is its potential politicization.[6] This invites discussion of and preference for different criminal justice models, in which adversarial features of the accusatorial model make it the best choice, giving way to a sort of Manichean dichotomy.[7] However, it should be noted that there is currently no "pure" criminal procedure in the world. All criminal systems, in fact, are the product of exchanges and mixtures of different legal traditions.[8] In addition, it appears existing criminal procedures are converging[9] due to the countless criminal proceedings around the world, coupled with the specific influence of the U.S. legal system.[10] This phenomenon supports

6 *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 80-81 (2001). This author is very critical of what he calls American "adversarial legalism" dominating criminal justice. *Id.* at 61. Another example of politicization of criminal law with respect to budgetary policy is presented by Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581 (2012).

7 This will likely be the case until the similarities between accusatorial and adversarial criminal procedures are recognized. *See* Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,* 121 U. PA. L. REV. 506, 569 (1973).

8 *See* Stephen C. Thaman, *A Comparative Approach to Teaching Criminal Procedure and its Application to the Post-Investigative Stage*, 56 J. LEGAL EDUC. 459 (2006). *See* David J. Gerber, *Toward a Language of Comparative Law*, 46 AM. J. COMP. L. 719 (1998) (discussing how comparative law functions); George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1998) (identifying the perils of comparative law); Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L L. 949 (2011) (explaining the principles of comparative law).

9 *See* Nico Jörg, Stewart Field & Chrisje Brants, *Are Inquisitorial and Adversarial Systems Converging?*, CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 41 (P. Fennell et al. eds., 1995). *See also* John Anthony Jolowicz, *On the Comparison of Procedures*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MERHEN, *supra* note 5, at 721 (discussing the globalization of civil procedures).

10 *See* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004). In reference to the transplant effect of legal systems from an economics perspective, see Daniel Berkowitz et al., *Economical Development, Legality and the Transplant Effect* (Ctr. for Int'l Dev. at Harvard Univ., Working Paper No. 39, 2000), *available at* http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/cid/publications/faculty/wp/039.pdf, as well as Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994). The U.S. criminal procedure model is preeminent in contemporary times. *See* Bernd Schünemann, *Krise des Strafprozesses? Siegeszug des Amerikanischen Strafverfahrens in der Welt?*, *in* JORNADAS SOBRE "LA REFORMA DEL DERECHO PENAL EN ALEMANIA" 49 (1992); *¿Crisis del Procedimiento Penal? (¿Marcha Triunfal del Procedimiento Penal Americano en el Mundo?)*, *in* TEMAS ACTUALES Y PEMANENTES DEL DERECHO PENAL DESPUES DEL MILENIO 288 (B. Schünemann ed. 2002). The

the notion that the classical distinction between the accusatorial and the inquisitorial models should cease to exist. Further, there is no *single* European criminal procedure[11] in Europe; instead, there exist various procedures that posessess different characteristics and features. This is yet another reason to remove the distinction between the two models.

While accusatorial and inquisitorial models are the primary mechanisms of criminal procedure, scholars have proposed many other binomial models. Most, if not all, make reference to existing criminal procedures in the U.S. and the U.K, as well as Europe. For example, both models proposed by Packer[12]—the Due Process Model and the Crime Control Model (or Battle and Family Model)—follow a review of models purported by Griffiths.[13] Griffiths acknowledged that both Packer's models and his own operate more as "perspectives" or "interpretations," rather than as strict models of criminal procedure.[14] An ideological approach is present in all of these models, which has attracted some criticism from scholars.[15] The two models of criminal procedure proposed

author is well known in Europe as a prestigious professor of criminal law with a very critical view of the U.S. criminal procedure model.

11 Any proposal on this topic—for example, between the member states belonging to the European Union, in order to adopt a common proceeding—is far away because the existing and forthcoming regulations only provide minimum rules on specific topics. *See generally* MAR JIMENO-BULNES, UN PROCESO EUROPEO PARA EL SIGLO XXI (1st ed. 2011). For a general description of mainly European criminal procedures in Europe, see EUROPEAN CRIMINAL PROCEDURES (M. Delmas-Marty & J.R. Spencer eds., 2005), as well as CRIMINAL PROCEDURE IN EUROPE (R. Vogler & B. Huber eds., 2008).

12 Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149 (1968). Regarding the two models of criminal procedure, the author points out:

> [T]hey represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process. . . . The two models merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims. . . . And, since they are normative in character, there is a danger of seeing one or the other as Good or Bad.

Id. at 153.

13 John Griffiths, *Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process*, 79 YALE L.J. 359 (1970). Griffiths proposes the "family model" as an alternative understanding to both of Packer's models, which are considered polar responses to only one model, the "battle model." *Id.* at 367.

14 *Id.* at 362.

15 *See* Abraham S. Goldstein, *Reflection on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1974) (suggesting that "it

by Damaska are well known but have less of an ideological impact, despite taking into account sociological and political elements. This places them somewhere in between the hierarchical and the coordinate model[16] (in contrast to the inquisitorial and accusatorial model) because they respond to different conceptions of political and judicial organization related to whether certainty and uniformity in decision-making is accorded greater or lesser importance.[17]

Over many years, and especially in the 1960s,[18] academics in the U.S. and Europe focused on these issues sought to shed light on this topic and demystify deeply-rooted theories. Some scholars analyze the European experience, despite the negative connotations associated with its inquisitorial criminal model, in order to find a useful remedy for the ailing U.S. criminal justice system.[19] In contrast, others sought to dispel the importance of

may be useful to return to an older mode of analysis which is more explicitly procedural and which offers the possibility of choosing among systems rather than between a system and a tendency."). *See also* Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 396, 400, 404 (1999) (analyzing different stages of criminal procedure from the perspective of Packer's two models).

16 Mirjan R. Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 489 (1975) [hereinafter *Structures*]. Other research by the same author includes the classical distinction between accusatorial and inquisitorial models of criminal procedure. *See, e.g.*, Mirjan R. Damaška, *Models of Criminal Procedure*, 51 ZBORNIK COLLECTED PAPERS OF ZAGREB L. SCH. 477 (2001). The author also discusses the adversarial and non-adversarial modes. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 16 (1986) [hereinafter FACES] (demonstrating the earlier distinction between hierarchical and coordinate models in relation to the organization of judicial and other authorities).

17 *Structures*, *supra* note 16, at 83, 509. Both models also include two forms of adjudication, which the author refers to as the conflict-solving type of proceeding in a coordinate government and the policy-implementing justice in a hierarchical government. *See* Damaška, *supra* note 16, at 88.

18 Important earlier contributions must be also pointed to, for example, Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935).

19 *See, e.g.*, Jan Stepan, *Possible Lessons from Continental Criminal Procedure*, *in* THE ECONOMICS OF CRIME AND PUNISHMENT 181 (1973). For an interesting point of view and an extensive review of the existing scholarship, see Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME & JUST. 381 (1980). *See also* Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361 (1976); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005) (building upon continential European criminal procedures and relating them to both civil and criminal proceedings). An interesting aspect of Kessler's work is the presentation of the theory on

any disparity between criminal justice systems in Europe in this context. In particular, they argued that a gap would always exist between theory and judicial practice and contended that real criminal proceedings in Europe were much closer to the U.S. proceedings than previously thought.[20] Scholars suggested alternative models for American criminal justice, made with references to some of the criminal procedures in force at that time in Europe.[21] Controversy arose between scholars due to the perceived similarity of judicial practices in Europe and miscarriages of justice in the United States.[22]

Admittedly, some may consider the debate surrounding the two criminal procedural models in force in the United States, England, and Europe to be an old fashioned controversy that has been thoroughly discussed by scholars. However, there still exists a misconception that is rooted, if not specifically in the legal world, in the general community. This misconception arises especially when the two legal traditions, civil and common law, interact. For example, such interaction occurs when an American citizen is subject to indictment and trial in Europe,[23] or vice versa. A

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the presence of inquisitorial elements in the American adversarial system due to European influences at that time. *Id.*

20 Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1977). It must be highlighted that these are usually European criminal proceedings analyzed by comparative scholars, probably with more references to France and Germany because the former country is considered the source of the inquisitorial criminal procedure system.

21 The best example is the alternative model proposed by Lloyd Weinreb. Major amendments are suggested regarding the investigative phase in an effort to adopt patterns similar to those in European criminal procedures. In Europe, investigative responsibility is transferred to a trained judicial officer; this fact provokes the unification of investigations into a single investigation. *See* LLOYD L. WEINREB, DENIAL OF JUSTICE 117-46 (1979); *see also* John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 543 (1978) (constructing a hypothetical model for conflict resolution that counterbalances the twin objectives of truth and justice).

22 *See* John H. Langbein & Lloyd L. Weinreb, *Comparative Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978). The authors address strong criticism to previous research by Abraham S. Goldstein and Martin Marcus, *supra* note 20, considering that no foreign literature is taken into account and only interviews with different European practitioners are held. Further response is made by Abraham S. Goldstein and Martin Marcus in *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978), supporting their previous statements. More recently, see, for example, Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 914, 918 (2012) (relating to the current efforts, such as the Innocence Project, taking place throughout U.S. jurisdictions with respect to wrongful convictions).

23 *See* Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791 (2001).

contemporary example of this is the trial of Amanda Knox, which took place in Italy in December 2009. Media coverage of the trial resulted in public perception of Italy as having a lower standard of due process of law in comparison to the United States;[24] even following an appeal of the two accused that led to their acquittal.[25] This further demonstrates the necessity for scholarly discussion on the topic of criminal procedure and its varying models.

The purpose of this Article is to provide insight into the classical distinction between accusatorial and inquisitorial criminal procedures in the U.S. and Europe, and to review the contemporary relevance of existing terminology and its underlying concepts.[26] One may ask whether the terms should be

Lerner provides a fine example of the confluence of both legal systems. In particular, she provides an explanation of the French court system and criminal procedure, as well as references to how American procedure differs. Also interesting is the parallelism in relation to the well-known Simpson double murder trial (which was called the "trial of the century" and lasted 474 days) according to a European model. *See* Myron Moskovitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121 (1995) (employing the original method of a dramatic script reproducing the dialogues that could have taken place at the trial).

24 *See, e.g.*, NINA BURLEIGH, THE FATAL GIFT OF BEAUTY 265-67 (2011) (listing various instances demonstrating a lack of fairness, such as: "the defendants had stopgaps and safety checks against prosecutorial misconduct at every step of the investigation," "judges and prosecutors are technically on the same side," "defense lawyers working in the Italian system are also at an institutional disadvantage," "police surveillance and wiretapping are endemic, requiring little oversight."). The author, a well-known journalist involved with judicial issues, concludes that the system is mostly inquisitorial and that the changes put into place in 1988 are not yet common practice. Italian criminal procedure is the most accusatorial in Europe since the reform of its criminal procedure code in 1988. *See* Giulio Illuminati, *The Accusatorial Process from the Italian Point of View*, 35 N.C. J. INT'L & COM. REG. 297 (2010); *see also* Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211 (1989); Michele Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 30 N.C. J. INT'L & COM. REG. 577 (2005); William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429 (2004).

25 Judgment pronounced on October 3, 2011, by the Court of Appeal of Perugia, reversing the lower court judgment on December 16, 2010, which sentenced Amanda Knox to 26 years. *See* Amanda Knox Acquitted of Murder, CBSNEWS.COM (Oct. 3, 2011), http://www.cbsnews.com/2102-202_162-20114867.html?tag=contentMai; *see also* JOHN FOLLAIN, DEATH IN PERUGIA: THE DEFINITIVE ACCOUNT OF THE MEREDITH KERCHER CASE FROM HER MURDER TO THE ACQUITTAL OF RAFFAELE SOLLECITO AND AMANDA KNOX (2011) (discussing the events from the perspective of an English journalist focused on the victim's story). For a legal perspective see Julia Grace Mirabella, Note, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 B.U. INT'L L.J. 229 (2012) in relation to new "adversarial" Italian criminal procedure.

26 Lorena Bachmaier Winter, *Acusatorio Versus Inquisitivo. Reflexiones Acerca del*

abandoned—even though it would be inaccurate to plaster over the differences between both procedures—to justify their convergence or to arrive at an absolutist determination of which is the "good" and which the "bad" model. Nevertheless, the intent of this Article is to clarify certain misconceptions, especially in relation to "inquisitorial" procedure, and to provide a clearer understanding of the place for "accusatorial" procedure.

The structure of this Article is as follows: Part II discusses the historical background of both models, discussing their theories and features, and considers the construction of a third model. Part III presents the conceptual background in relation to terminological questions and the characteristics of the different criminal procedural models. A discussion of existing terminology with opposing characteristics follows. Part IV provides examples of mutual influence between different American and European criminal procedures regarding pretrial investigation and trial phases. Finally, Part V provides some concluding remarks.

II. HISTORICAL BACKGROUND: TWO OR THREE MODELS OF CRIMINAL PROCEDURE?

The number of existing models of criminal procedure passed down through history is still disputed, with some authors quoting a bipartite, and others a tripartite, division. Scholars tend to take a stand in line with their geographical and scholastic background, insofar as U.S. academics makes reference to a bipartite division, dismissing the existence of the mixed model[27] that is, in contrast, upheld by European scholars. There is a rich history in Europe supporting this third model.[28] In particular, the Napeolenic *Code d'Instruction Criminelle*, adopted in France in 1808, is hailed as a landmark and starting point of this model. If we consider this mixed model or system of criminal procedure, it inevitably leads to the conclusion that all criminal procedures—not only those of

Proceso Penal, PROCESO PENAL Y SISTEMAS ACUSATORIOS 11 (2008).

27 *See* Goldstein, *supra* note 15 (providing a good example of this bipartite position and commenting on Packer's models). The author also considers that the "American procedure is a mixed system." *Id.* at 1016. The bipartite position is also adopted in English scholarship. *See* EUROPEAN CRIMINAL PROCEDURES, *supra* note 11, at 10.

28 The importance of scholarship in the construction of this third model must also be underlined. *See* ADHÉMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE (1913) (translating into English the original French version, HISTOIRE DE LA PROCÉDURE CRIMINELLE EN FRANCE, ET SPECIALEMENT DE LA PROCÉDURE INQUISITOIRE DEPUIS LE XIII SIÈCLE JUSQU'A NOS JOURS (1882)).

Europe, but also those of the U.S. and the U.K.—may belong in the same category.[29] A discussion of the predominant models of criminal procedure follows, including a brief historical overview from the point at which trial by ordeal became the means of obtaining evidence to establish guilt or innocence.[30]

A. Accusatorial

The so-called accusatorial model, as opposed to the inquisitorial model, appears to be linked to the application of English common law and the institution of the jury; however, recall that Roman criminal procedure has also been described as fundamentally accusatorial.[31] The model replaced trials by battle and ordeals, which were definitively prohibited in 1219 by Henry III.[32] Common law emerged in England in the 12th century, where a sort of royal justice had existed since the times of the Anglo-

29 Goldstein, *supra* note 15; *see* Jacqueline Hodgson, *The Future of Adversarial Criminal Justice in 21st Century Britain*, 34 N.C. J. INT'L & COM. REG. 319, 320 (2010) (regarding the United Kingdom or, more explicitly, England and Wales, as Roman Law was also introduced in Scotland); Edwin R. Keedy, *Criminal Procedure in Scotland*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 728 (1913); *see also* Allard Ringnalda, *Inquisitorial or Adversarial? The Role of the Scottish Prosecutor and Special Defences*, 6 UTRECHT L. REV. 119, 137 (2010) (concluding that Scottish criminal procedure is hybrid in nature as it has "inquisitorial features in a predominantly adversarial setting.").

30 This practice largely came to an end in Europe during the 12th and 13th centuries. *See* ROBERT BARTLETT, TRIAL BY FIRE AND WATER 34, 70 (1986). It appears that the exact date of the end of ordeal was 1215, the year of the enactment of 4th Lateran Council promoting condemnation of trial by ordeal and establishing the rule that "nor may anyone confer a rite of blessing or consecration on a purgation by ordeal of boiling or cold water or of the red-hot iron, saving nevertheless the previously promulgated prohibitions regarding single combats and duels." *See* Canons of the Fourth Lateran Council, canon 18 (1215), *available at* http://www.ewtn.com/library/councils/lateran4.htm. According to this statement, trial by battle (duels) had been prohibited before trial by fire and water.

31 Roman criminal procedure is considered accusatorial in nature, as formal allegations from an accuser, who was also obliged to furnish the necessary evidence, was required to bring a case against another Roman. *See* ESMEIN, *supra* note 28, at 18. Nevertheless, inquisitorial elements gradually developed in Roman criminal procedure during the period of Republic. *See* Kai Ambos, *El Principio Acusatorio y el Proceso Acusatorio: Un Intento de Comprender su Significado Actual Desde la Perspectiva Histórica*, *in* PROCESO PENAL Y SISTEMAS ACUSATORIOS, *supra* note 26, at 49, 51.

32 Ploscowe, *supra* note 18, at 446. Trial by battle is regarded as a common heritage of the Germanic kingdoms of the early Middle Ages, but it was unknown by Anglo-Saxons, which is supposed to be a more literate culture; it does not appear in Britain until the Norman conquest. *See* BARTLETT, *supra* note 30, at 103-05; *see also* PAUL R. HYAMS, *Trial by Ordeal: The Key to Proof in the Early Common Law*, *in* ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 90 (M.S. Arnold et al. eds., 1981) (discussing trial by ordeal in England).

Saxon kings and the two great departments of state (the Chancery and the Exchequer).[33] The activity of the royal court paved the way for important treatises compiled by Glanvill and Bracton[34] describing the laws and customs of England. Enacted during the reign of Henry II (1154-1189), the first treatise was a product of existing English law and led to Henry II becoming known as the "father of common law."[35] The first treatise was also a crucial component in the emergence of common law practice, compiling a "law of the writs"[36] accompanied by a commentary in Latin.

At that time, the task of identifying the guilty parties involved in each crime (accusation) fell upon the community. If those responsible failed to present themselves before the royal judges, the whole community was punished in a kind of communal retribution. These representatives formed the institution known as the Grand Jury, a system that became mandatory under the Assizes of Clarendon and Northampton.[37] The Assize of Clarendon, followed by the Assize of Northampton, created a new institution: a body of accusation for every community composed of twelve "good and lawful men" under the name "presenting jury." The institution was later given the more familiar and modernly used name, the Grand Jury (Jury of Accusation).[38] This body of

33 *See generally* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 11 (2d ed. 1979); *see also* R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 62-84 (1973) (relating to the functioning of the jury in the royal courts). For a discussion of substantive criminal law, see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 11 (2d ed. 1956); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 39-76 (45th ed. 1923).

34 *See* BAKER, *supra* note 33, at 12 (noting that the first treatise is traditionally, albeit questionably, attributed to Sir Ranulf de Glanvill, justiciary of England between 1180-1189). The first treatise was written around 1187 and the second one around 1250, in the latter case by Henry de Bracton, who was a judge *coram rege* in the 1240s and 1250s. *Id.* at 161.

35 JOHN GILLINGHAM, *The Early Middle Ages (1066-1290)*, *in* OXFORD HISTORY OF BRITAIN 115, 167 (1991).

36 That is "the instruments which initiated lawsuits in the king's courts and of the remedies they enshrined." *See* BAKER, *supra* note 33, at 13. For an analysis of different types of writs see Baker, *supra* note 33, at 54, and VAN CAENEGEM, *supra* note 33, at 29.

37 BAKER, *supra* note 33, at 23, 415; PLUCKNETT, *supra* note 33, at 19. The assizes and the petty assizes were created by Henry II in the 1160s as an alternative to the writ of rights in order to protect the status quo against wrongfulness through speedy inquiries by neighbors, taking only questions of fact into account. *See* BAKER, *supra* note 33, at 201. Earlier scholarship also discusses such criminal issues. *See* PENDLETON HOWARD, CRIMINAL JUSTICE IN ENGLAND: A STUDY IN LAW ADMINISTRATION (1931); JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (2d ed. 1890).

38 Unlike the later petty or trial jury, the Grand Jury—or jury of accusation—was

twelve men, being sworn to tell the truth, was called a jury (*curate*) and its members were persons who have been sworn (*juratores*).

The idea of sworn testimony, in which a man promised before God to recount the truth (*veredictum*), is ancient and by no means confined to England. In fact, this sort of inquest appears to have its roots in Scandinavia and the old Carolingian empire. Not surprisingly, it was also used in Normandy, where the jury of accusation also appears in the Doomsday Book[39] commissioned by William the Conqueror. However, the jury was not recognized as an institution to settle private disputes until the reign of Henry II. The first provision referred to actions of trespass, where allegations of disturbing the peace of the realm warranted its use. Recall, this Grand Jury or jury of accusation was still considered as a method of gathering "proof" rather than a "trial"[40] per se or a method for ending disputes. Its task was to scrutinize information received in the form of "bills of indictment" in order to decide whether sufficient evidence existed to put the accused person on trial.

It has been asserted that this sort of private accusation by the community, coupled with the notion that the commission of a crime is not only an offense against the state itself, but also against a member of the community, means that the criminal trial bears a certain resemblance to a private litigation.[41] It is true that the jury of men who investigated crimes and brought accusations based upon their own knowledge gradually evolved into the modern-day jury that listens to the evidence of witnesses in the context of a jury trial. However, it is probably this original Grand Jury, or jury of

comprised of more members of the community. On many occasions, more than "twelve good men" (a number that was preserved for the petty jury) made up the Grand Jury. See BAKER, *supra note* 33, at 64 and HOWARD, *supra* note 37, at 352-54, on the tasks of the Grand Jury.

39 A sort of judicial combat with the intervention of the jury was also provided here. *See* HENRY J. ABRAHAM, THE JUDICIAL PROCESS 109 (7th ed. 1998); MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY (1894 ed. 1992); *see also* WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 45 (2d ed. 1994) (determining that the institution of the jury was unknown in Anglo-Saxon times).

40 It has been said that "trial suggests the weighing up of evidence and arguments by an intelligent tribunal." *See* BAKER, *supra* note 33, at 63.

41 HOWARD, *supra* note 37, at 383 ("The fact that the private vengeance of the person wronged by a crime was the principal source to which men trusted for the administration of justice in the early times is one of the most characteristic circumstances connected with English criminal law, and has had much to do with the development of what may perhaps be regarded as its principal distinctive peculiarity, namely, the degree to which a criminal trial resembles a private litigation.").

accusation that shaped the essentially adversarial nature of accusatorial criminal procedure.[42] This is interesting because the existence of the jury trial[43] is often considered the essence of the accusatorial model. It became a primary component of English liberty, insofar as the accused had the right to opt for jury trial; the same right to jury trial that was included in the English Bill of Rights (1689)[44] that subsequently spread to Europe[45] and America.[46] Recognition of the Grand Jury as a body of accusation continued up until 1933 in England,[47] and it is still an institution in the U.S., with specific mention in the Fifth Amendment of the U.S. Constitution.

B. Inquisitorial

The so-called inquisitorial model often has negative connotations stemming from its use of torture during the Holy Inquisition, which began in the 13th century to quell the great

42 That is the idea of private prosecution and privatized criminal investigation. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 11 (2003); *see also* STEPHEN, *supra* note 37, at 17 (discussing the functions of the petty and grand juries and stating that the difficulty of establishing fixed dates contributes to the gradual development of this change).

43 *See* Ploscowe, *supra* note 18, at 455; *see also* JOHN P. DAWSON, A HISTORY OF LAY JUDGES 10-34 (1960) (discussing the jury trial's origins in Greece and Rome); FORSYTH, *supra* note 39, at 178 (detailing the Grand Jury).

44 Bill of Rights, 1689, § 11 (Eng.), *available at* http://www.fordham.edu/halsall/mod/1689billofrights.asp ("[J]urors ought to be duly impaneled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.").

45 The Declaration of the Rights of Man and of the Citizen, drafted during the French Revolution, did not consider the jury institution as it may have initially been thought. *See* JOHN H. LANGBEIN, THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900 (Schioppa ed., 1987).

46 See U.S. CONST. amend. VI (1791), as well as the Bill of Rights in different states, particularly Virginia, Maryland, and North Carolina. *See also* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 47 (1986) (discussing the importance of the right to trial by jury). Nevertheless, some U.S. states—like Louisiana, due to its French and Spanish origin—were reluctant to provide jury trials. *See* Duncan v. Louisiana, 391 U.S. 145, 151-58 (1968); *see also* ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 117 (1945) (stating that while the American criminal justice system was inherited from England, it became distinctively American in the 18th century).

47 Administration of Justice (Miscellaneous Provisions) Act, 1933, § 2 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/Geo5/23-24/36/contents; *see* NATHAN T. ELLIF, *Notes on the Abolition of the English Grand Jury*, 29 AM. INST. CRIM. L. & CRIMINOLOGY 3, 15 (1938).

heresies in Europe (especially in the South of France)[48] and reached its peak in Spain in the late 15th century. Its name is derived from the inquest, a tool used to compile a written account of the investigation of the facts. Nevertheless, it must be noted that the inquisition or inquest did not belong exclusively to the inquisitorial model,[49] nor was it the first inquest in history. In fact, another sort of inquest existed under the name of *pesquisa* that began in the 11th century in some parts of Europe as an exemption to the earlier ordeals.[50] What is indeed important is that the public authority, the royal or ecclesial, took charge of the investigation of the crime and had the right to decide the punishment.[51]

Although the inquisitorial model should not be associated with an ecclesiastical origin, it is nevertheless true that the Catholic Church was certainly the first legal authority to implement this inquisitorial procedure because of the presumed efficacy of this sort of official prosecution. The birth of inquisitorial procedure is dated at the end of the 12th century and was founded upon canon law. Up until then, canon law made use of the early Roman accusatory procedure.[52] With this new model, the magistrate or judge was authorized to undertake an objective investigation of

48 ESMEIN, *supra* note 28, at 93 (pointing out that the Holy Inquisition employed the most drastic aspects of the canon common law, which included torture); *see also* HENRY ANGSAR KELLY, INQUISITIONS AND OTHER TRIAL PROCEDURES IN THE MEDIEVAL WEST (2001) (relating to ecclesial procedures); JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (1977) (relating to criminal procedure). Langbein uses the term "judicial torture" because torture was considered an ordinary component of criminal procedure and was routinely used as a means to investigate and prosecute crimes. *Id.* This author also associates the origin of the torture itself in the 13th century with the abolition of ordeals as system of proof, as tortune was a more humane system of proof. *Id.* at 6.

49 Esmein points to the use of the inquest as an alternative to the *accusatio* in the Middle Ages and in England under the name of "inquest by the country," a procedure with no accuser at all and composed of proof given by witnesses. *See* ESMEIN, *supra* note 28, at 64-65. An inquisitorial criminal procedure also developed in England during the 16th century, according to statutes adopted under Queen Mary. In particular, a "preliminary inquiry" was established which was, in essence, an official investigation and evidence gathering. *See* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 5-6 (2005).

50 This is the case in Spain, where this sort of inquest (*pesquisa*) was contemplated in certain charters of liberties called *fueros*. For example, Fuero de Logroño, enacted by Alfonso VI of Castile and Léon for the *populatores de Logroño* in 1095. *See* BARTLETT, *supra* note 30, at 60-61.

51 Illuminati, *supra* note 24, at 301.

52 *See* ESMEIN *supra* note 31; *see also* LANGBEIN, *supra* note 49, at 129 (discussing the role played by the church and Roman-canon law).

the crime without having to wait for a formal accusation.[53] This official and bureaucratic investigation was composed of a written dossier that had to remain absolutely secret and that likely constitutes one of the most characteristic features of the inquisitorial procedure.

Inquisitorial criminal procedures spread from Northern Italy into France and Germany due to the studies of Roman and Canon law by jurists and intellectuals at that time. It was especially disseminated due to the founding of the University of Bologna and other schools in Europe. The success of the procedure is also associated with the professionalization of the administration of justice itself and increased juridicial knowledge over time. As a result, a new complex and technical law of evidence, coined legal proof (*preuve légale*), emerged.[54] Condemnation, and even the form of accusation, became a matter of concern for the judge, as it was essential to dictate a better standard of proof and to provide clear procedural rules. A leading maxim of that time was that any judgment should be rendered *secundum allegata et probata* ("according to the allegation and the proof"), and that the judge's decision should be bound by such proof; this was understood to counterbalance the secret nature of the procedure, to the benefit of the defense.[55] In fact, this question of legal proof is also another crucial feature of inquisitorial procedure.

Inquisitorial procedure gradually developed through the enactment of several ordinances in Europe in the 15th and 16th centuries,[56] but it reached its peak with the Criminal Ordinance of 1670 (*Ordonnance Criminelle*) in France. This legislation responded to the project of codification performed by Colbert and his uncle Pussort under the rule of Louis XIV (1643-1715), one of the greatest proponents of absolutism.[57] The ordinance was even refered to as the *Code Louis* at that time. This code governed French legal practice throughout the 16th, 17th, and 18th centuries and was only replaced after the French Revolution. Interestingly, it summarizes the main features of inquisitorial procedure. According to the Code, the instruction was perceived as the soul of

53 Ploscowe, *supra* note 18, at 447.

54 EUROPEAN CRIMINAL PROCEDURES, *supra* note 11, at 9.

55 ESMEIN, *supra* note 28, at 251.

56 *Id.* at 145-79. These enactments include the Ordinances of 1498 and 1539 enacted in France, as well as the Carolina Code of 1532 ratified in Germany. *Id.*

57 The declaration "I am the state" (l'État c'est moi) by Louis XIV is now famous. *Id.* at 183 (relating to the drafting and content of the Ordinance of 1670).

procedure and its purpose was to prepare the conviction or the acquittal of the accused.[58] In brief, its features were as follows: the procedure (instruction) was written and secret; the investigative task corresponded to the judge or court with no clear division of the prosecutional and judicial functions; it had a system of legal proof involving compulsory interrogation of the defendant (confession), who was required to take an oath and who could be tortured if necessary;[59] it provided channels for appeals; and the right to a double degree of jurisdiction was upheld.

C. Mixed

As previously mentioned, the third (mixed) model is not commonly accepted among legal scholars. In fact, its existence would imply the demise of the other two models, as all criminal procedures worldwide are semi-accusatorial and semi-inquisitorial to different degrees and could be said to belong to this third category.[60] It is nevertheless included because its emergerence marked a turning point in the historical development of criminal procedure in Europe, distancing it from the former inquisitorial model. This was largely due to the enactment of the French Code of Criminal Examination of 1808 (*Code d'Instruction Criminelle*),[61]

58 Criminal Ordinance of 1670, registered on Aug. 26, 1670, and entered into force on Jan. 1, 1671 (Fr.), *available at* http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/ordonnance_criminelle_de_1670.htm; *see also* Ploscowe, *supra* note 18, at 449-50 (defining the object of this instruction according to the original legal expression "*préparer, rechercher, ordonner et composer tout ce qui est nécessaire pour parvenir à la condamnation où à l'absolution de l'accusé*," which means to prepare, investigate, order and compose all that is necessary to arrive at the conviction or the absolution of the accused).

59 *See* Criminal Ordinance of 1670, *supra* note 58, tit. XIX (regarding judgments and oral proceedings of questions and torture). The reference to torture is made under the name of "question" in Article 1: "[i]f there is considerable evidence against the accused of a crime that deserves capital punishment, and which is constant, all judges can order that he [the accused] will be applied to the "question," in case the evidence were not sufficient." *Id.* Article 8 makes reference to the compulsory swearing of oath by the accused: "[t]he accused will be questioned after having taken an oath, before he is applied to the question and will sign his interrogation, if not mention will be made of his refusal" (free translation in both cases). *Id.*

60 *See* GLANVILLE WILLIAMS, THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL 29 (1963).

61 *See* R. Garraud, *Presentation of the Code of Criminal Procedure*, LE DROIT CRIMINEL, *available at* http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_instruction_criminelle_1808.htm (last visited Feb. 5, 2013) (detailing the principles of the French Code of

which greatly influenced and extended to many other European countries after the Napoleonic era. The new code represented a sanitized version of the inquisitorial procedure,[62] and for this reason, the French considered it a landmark for a new model of criminal procedure. The new system combined the earlier inquisitorial model with the features of the English accusatorial system introduced during the French Revolution.[63] It has been argued by some scholars that the system represents a compromise between the former Criminal Ordance of 1670 and English criminal procedure.[64]

Surely one of the most important changes imposed by this third model is the separation of the prosecutor and the investigative judge: the prosecutor as a representative of the public interest and the judge as a representative of judicial authority.[65] In fact, the task of accusation is entrusted in special functionaries, who act as public prosecutors and for whom the parties should, in principle, be no more than auxiliaries. In contrast, the judge presides over the investigation. Thus the appointment of the investigative judge or magistrate is a distinctive characteristic of European criminal procedure. This fact had a logical explanation in its day because it was not possible to entrust the investigation in the police.[66] However, it also did not make sense to leave it in the

Criminal Examination).

62 EUROPEAN CRIMINAL PROCEDURES, *supra* note 11, at 10.

63 *See* MONTESQUIEU, DE L'ESPIRIT DES LOIS (1748), *available at* http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/de_esprit_des_lois_tdm.html. This work has acquired particular importance over time.

64 Ploscowe, *supra* note 18, at 462 (discussing the preliminary stage or instruction before the investigative magistrate and stating "the Code is the child of the *Ordonnance* of the *ancien régime*.").

65 The judicial branch cannot be considered a "power" (*pouvoir*) but, instead, an "authority" (*potestas*). *See* ERNESTO PEDRAZ PENALVA, *Sobre el 'Poder' Judicial y la Ley Orgánica del Poder Judicial*, *in* CONSTITUCIÓN, JURISDECCIÓN Y PROCESO 141, 154 (2000); ERNESTO PEDRAZ PENALVA, *La Jurisdicción en la Teoría de la División de Poderes de Montesquieu*, *in* REVISTA DE DERECO PROCESAL 905 (1976). With respect to the separation of the prosecutorial and investigative functions, recall that it is akin to the accusatorial criminal procedure described above. *See* Vicente Gimeno Sendra, *El Derecho Fundamental a un Proceso Acusatorio,* 7869 DIARIO LA LEY (2012), *available at* http://www.mpfn.gob.pe/escuela/contenido/actividades/docs/2239_derechoacusatorio.pdf (discussing the mixed model of criminal procedure).

66 *See* A.E. Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441, 442-43 (1960) (arguing "it would have been thought absurd to allow it to be conducted by the *gendarmerie*. Although the *gendarmes* enjoyed a merited reputation for firmness, they often lacked the independence, impartiality, knowledge of the law, and sometimes even the intelligence necessary for the conduct of an *information*.").

hands of the prosecutor because the primary purpose of the new code was to maintain the accusatory function as separate from the investigation and trial. Indeed, the only interest in having an investigative judge, as opposed to police and prosecutor, was to ensure that justice would be done.[67]

The comprehensiveness of this system is seen in its dividing of the criminal proceeding into two phases, each following the characteristics of the former accusatorial and inquisitorial models. The first phase, called the preliminary examination, investigation, or instruction phase, relates to the abovementioned investigative magistrate. In accordance with the features of the inquisitorial model, including a written and secret[68] proceeding, its objective is to prepare a further trial (dossier) and no defense counsel is initially appointed.[69] The second phase is the trial itself, which accords to the guidelines of the accusatorial model and principles of orality and publicity, as well as the confrontation between parties. In such a case, the legal proof is substituted by the principle of intimate conviction.[70] This trial takes place before a tribunal or court, as the English concept of the jury swept through Europe as a further consequence of French revolutionary fervor.

This mixed system, embodied in the Napoleonic code, spread through other European countries, especially Germany, Italy, and Spain[71]. The characteristics of this model turned out to be more enduring than the French conquest itself, and remain in place to this day. At that time, the institution of public prosecution existed

67 *See id.* at 443. Unlike France, in England there was no organization of public prosecutors at that time, which was one of the reasons why criminal procedure continued to be accusatorial and based upon private prosecution. *See* Ploscowe, *supra* note 18, at 459. In fact, the first public prosecution service was inaugurated in England and Wales in 1986 under the name of the Crown Prosecution Service (CPS); until then the role of accusation was done by the police. *See* Hodgson, *supra* note 29, at 320, 333.

68 Although no express provision in the French Code of Criminal Examination of 1808 declared the procedure secret, its secrecy was mandated in 1827. *See* Anton, *supra* note 66, at 443 n.1.

69 As Ploscowe recalls, "it took fifty years of agitation to win for the accused the privilege of assistance of counsel during the preliminary investigation." Ploscowe, *supra* note 18, at 462; *see* LANGBEIN, *supra* note 42, at 106 (explaining the role of defense counsel, in the context of the trial, in English accusatorial criminal procedure).

70 *See* Illuminati, *supra* note 24, at 304; *see also* ESMEIN, *supra* note 28, at 12 (stating, "although the search for and the furnishing of the evidence are subject to legal rules, its probative value is not measured beforehand and the outcome of the charge depends upon whether the judges are or are not thoroughly convinced.").

71 *See* ESMEIN, *supra* note 28, at 570-606; *see also* Ploscowe, *supra* note 18, at 463-67 (regarding Germany and Italy).

throughout Europe, the divergence of the criminal procedure mimicked the two stages described above; and even the jury was adopted, albeit in different forms.[72] It was at this time that the Codes of Judicial Organization and of Criminal Procedure of 1877 were enacted in Germany, the Code of Criminal Procedure of 1865 in Italy, and the Criminal Procedure Acts of 1872 and 1882 in Spain, the last of which remains in force.[73] All of these codes maintained, at their inception, the characteristics and the institution of the investigative magistrate. Essentially, the magistrate could administer this first, investigative stage of criminal procedure in preparation for the trial itself. In this context, the existence of a totally separate judicial investigation from that carried out by the police forces (if one did indeed take place) was a common feature found in each of these European criminal procedures.

III. TERMINOLOGICAL QUESTIONS AND CHARACTERISTIC FEATURES: ACCUSATORIAL OR ADVERSARIAL CRIMINAL PROCEDURE?

Having presented the historical background of the two accusatorial and inquisitorial models of criminal procedure, we may now explore the terminological and conceptual questions and the most characteristic features of both criminal procedures, which are traditionally regarded as in contrast to each other.[74] Both have specific, geographical connotations and their prevalence in particular territories or jurisdictions often evidences a link with a different legal systems. For example, the accusatorial systems in England and the United States hold to the common law legal tradition, while the inquisitorial system in European countries upholds the civil law tradition. It should also be taken into account that (in fact) many different European criminal

72 *See* Mar Jimeno-Bulnes, *La Participación Popular en la Administración de Justicia Mediante el Jurado* (art.125 CE), 2 DOCUMENTOS PENALES Y CRIMINOLÓGICOS 297, 307-11 (2004) (providing a more extensive analysis and citing legislative and bibliographical sources); *see also* Dawson, *supra* note 43, at 35-112 (regarding France and Germany).

73 New legislation has been proposed and is currently under discussion. *See Actividad Legislativa*, MINISTERIO DE JUSTICIA, GOBIERNO DE ESPANA, http://www.mjusticia.gob.es/cs/Satellite/es/1215198252237/DetalleActividadLegislativa.html (last visited June 21, 2012).

74 In this context, no reference to the mixed model shall be made, insofar as it reproduces the combination of former models presented above.

procedures[75] that are rooted in this inquisitorial background. The same distinction may be made in relation to the enforcement of the accusatorial model in England and the United States, as each system has its own unique features.[76]

The first question raised in relation to this discussion of terminology concerns the global use of the "accusatorial" and "inquisitorial" labels. More doubts arise in reference to the inquisitorial model, where negative connotations persist. This association gives way to some misconceptions of common law, particularly in relation to the criminal procedure enforced in the civil law countries. These misconceptions are usually related to the presumption of guilt, instead of the innocence, that may be experienced by the defendant, as well as the unfairness of the entire proceeding due to the lack of jury trial.[77] Of course, both statements are completely false today and the epithet inquisitorial, if ever used, should only apply to the active role of the European judge in general. This judicial participation must be understood as relating not only to the existing judicial investigation by the investigative magistrate but also—and even more importantly—as a clear reference to judicial activism through the development of the criminal trial.[78]

As one scholar has suggested, the meaning of inquisitorial is, in itself, contrary to the proper essence of the process,[79] which

75 Thomas Volkmann-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1, 3 (1981). *See infra* Part I and accompanying footnote text for discussion of French, German, and Italian models; *see also* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 2 (providing a more extensive approach on different modern Anglo-American and European criminal procedures).

76 *See, e.g.*, Irving R. Kaufman, *Criminal Procedure in England and the United States: Comparisons in Initiating Prosecutions*, 49 FORDHAM L. REV. 26 (1980); *see also* D.J. Feldman, *England and Wales*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 2, at 149; C.M. Bradley, *United States*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra*, at 519; John Ll. J. Edwards, *English Criminal Procedure and the Scales of Justice*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra*, at 203-04; Stepan, *supra* note 19 (arguing that England will never adopt an inquisitorial criminal procedure model).

77 *See, e.g.*, GLENDON ET AL., *supra* note 2, at 99 ("There are three common misconceptions in the common law world about criminal procedure in the civil law countries: that the accused is presumed guilty until proven innocent, that there is no jury trial, and that the trial is conducted in an 'inquisitorial' fashion (with pejorative connotations of unfairness to the accused)."). As these authors state, "the first of these notions is simply false," "the second is incorrect," and the third one is a "misapprehension." *Id.*

78 *See id.* at 99; *see also* WILLIAMS, *supra* note 60, at 30.

79 *See* Juan Montero Aroca, *Principio Acusatorio y Prueba en el Proceso Penal La*

should be understood today as due process of law.[80] It should be recognized as an overarching principle in all European constitutional rules, as well as in supranational European texts.[81] In the United States, the standards of fairness operate in the same way and at the same level as they function in criminal procedure according to the Sixth Amendment. This was especially true under the so-called "criminal procedure revolution"[82] which emerged during the Warren Supreme Court era, the best example of which is the Court's ruling in *Miranda v. Arizona.*[83] Thus, to discuss

Inutilidad Jurídica de un Eslogan Político, PRUEBA Y PROCESO PENAL 17, 22 (Colomer ed., 2008). The author also criticizes the use of the accusatorial label as repetitive and monopolized by the Anglo-American criminal procedure models. *Id.*

80 It appears that the original expression comes from a provision of the Liberty of Subject Act of 1354, enacted in England during the reign of King Edward III. *See* Liberty of Subject Act, 1354, ch. 3 (Eng.), *available at* http://www.legislation.gov.uk/aep/Edw3/28/3 ("[N]o man of what State or Condition he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due process of law."). At that time, "due process of law" had the same meaning as "law of the land" (as discussed in section 39 of the Magna Carta). Both signified that certain established modes of trial were to be followed. *See* WILLIAM MERRITT BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 142 (1977).

81 European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 5, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Charter of Fundamental Rights of the European Union arts. 47-48, Dec. 18, 2000, 2000/C 364/01 [hereinafter CFREU] (binding after the ratification of the Treaty of Lisbon in 2009). It must also be noted that the provision of a right to a fair trial and the presumption of innocence has been ratified by European countries in international texts, as well. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 art. 14 (Dec. 16, 1966) [hereinafter ICCPR]; Universal Declaration of Human Rights art. 11, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), (Dec. 10, 1948) [hereinafter UDHR]; *see also* Jacqueline Hodgson, *EU Criminal Justice: The Challenge of Due Process Rights Within a Framework of Mutual Recognition*, 37 N.C. J. INT'L L. & COM. REG. 308 (2011) (discussing fairness in judicial proceedings and the European meaning of "due process of law").

82 Thaman, *supra* note 8, at 461; *see also* Arenella, *Rethinking the Functions of Criminal Procedure: the Warren and Burger Courts' Competing Ideologies*, 7 GEO. L.J. 185, 189 (1983) (discussing the Warren Court's "revolution"). In fact, it is often argued that during this period and throughout the 1960s, the "constitutionalization of criminal procedure" took place. *See generally* JEROLD H. ISRAEL & WAYNE R. LAFAVE, CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITATIONS IN A NUTSHELL 1 (7th ed. 2006); KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 471 (1994). The developments during this period largely related to pretrial investigation and the enforcement of the Fourth and Fifth Amendments. For general commentary, including related case law, see CONG. REC. SERV., S. DOC. No. 108-17, THE CONSTITUTION OF UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1281 (2002), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf.

83 Miranda v. Arizona, 384 U.S. 436 (1966); *see* WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS 1 (2004) (describing *Miranda* as the most famous criminal

inquisitorial criminal procedure is a *contraditio in terminis.*[84] The term itself should be abolished and replaced by a more specific and descriptive term. This term could be *investigative* criminal procedure, in reference to the European model and in order to distinguish it from Anglo-American criminal procedure, as has been proposed in related scholarship.[85]

However, accusatorial criminal procedure is often difficult to explicate, because according to its *literal* meaning, both contemporary Anglo-American and European criminal procedures should be characterized as accusatorial.[86] In fact, all forms of criminal procedure include formal accusation (in terms of the Roman model), and in today's context, as a different prosecutorial and judicial authority. Despite much scholarship seeking to clarify this concept and its relationship to the notion of adversariness itself,[87] the pattern of this accusatorial criminal procedure has become a source of fascination for European scholars. It has created a sort of accusatorial principle,[88] which has even been described as a political slogan.[89] In this context, while European scholarship looks to North America for inspiration on

procedure decision). In Dickerson v. United States, 530 U.S. 428, 442-45 (2000), the Court noted that the *Miranda* decision has become a seminal part of criminal procedure jurisprudence. *See* Ronald Steiner, Rebecca Bauer & Rohit Talwar, *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219 (2011); *see also* Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581 (2001) (discussing the influence of *Miranda* on European criminal procedures, as a result of the adversarial features in U.S. criminal procedure).

84 *See* Juan Montero Aroca, *supra* note 79, at 23. The inquisitorial model is a terminological contradiction, according to the author, because inquisitorial features are opposed to criminal procedure itself.

85 *See* GLENN, *supra* note 2.

86 *See* Juan Montero Aroca, *La Inutilidad del Llamado Principio Acusatorio para la Conformación del Proceso Penal* (prepared for X Congreso Nacional de Derecho Procesal Garantista) (Nov. 12-14, 2008), *available at* http://es.scribd.com/doc/76717270/Congreso-Azul-2008-Montero-Aroca.

87 *See* Mirjan R. Damaška, *Adversary System*, *in* 1 ENCYCLOPEDIA OF CRIME & JUSTICE 24, 25 (2002).

88 *See* Kai Ambos, *Zum Heutigen Verständnis von Akkusationsprinzip und –verfahren aus Historischer Sicht*, 8 JURA 586 (2008), *available at* http://www.department-ambos.uni-goettingen.de/index.php/component/option,com_docman/Itemid,133/gid,130/task,cat_view/; Juan Luis Gómez Colomer, *Adversarial System, Proceso Acusatorio y Principio Acusatorio: Una Reflexión Sobre el Modelo de Enjuiciamiento Criminal Aplicado en los Estados Unidos de Norteamérica*, 19 REVISTA DEL PODER JUDICIAL 25 (2006); *see also* MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE 24 (2012) (detailing German denominations such as *Anklagegrundsatz*); TERESA ARMENTA DEU, PRINCIPIO ACUSATORIO Y DERECHO PENAL (1995).

89 *See* Montero Aroca, *supra* notes 79 *passim*; *supra* note 86, at 19.

how to best reconstruct the criminal procedure of its own countries,[90] Anglo-Americans, and especially American academics, are voicing their disappointment with adversariness and are also reevaluating their approach to Europe's criminal procedure.[91]

The terminology of adversarial criminal procedure is more accurate and specific, pointing to features of Anglo-American criminal procedures, as well as differences from the European models. Further, adversarial is the appropriate term, although often used as equivalent to accusatorial. Nevertheless, some authors have tried to quote a different meaning for each of these concepts.[92] Despite this, terminology differentiating both concepts is not pervasive and most related scholarship uses both terms

90 Spain is one country seeking to rework its criminal procedure paradigm. *See* MINISTERIO DE JUSTICIA, *supra* note 73; Juan Burgos Ladrón de Guevara, *La Reforma del Proceso Penal: Por un Modelo Contradictorio*, 3-4 JUSTICIA: REVISTA DE DERECHO PROCESAL 121 (2011). Countries are looking to the U.S. model for solutions. *See* JUAN LUIS GÓMEZ COLOMER, EL SISTEMA DE ENJUICIAMIENTO CRIMINAL PROPIO DE UN ESTADO DE DERECHO 37 (2008); LORENA BACHMAIER WINTER, *Rechtsvergleichung und Typologie des Strafverfährens Xweischen Inquisitorische und Adversatorische Modelle: Grundzüge des Vorverfahrens des Strafprozesses der USA*, *in* DAS STRAFPROZESSUALE VORVERFAHREN IN ZENTRALASIEN ZWISCHEN INQUISITORISCHEM UND ADVERSATORISCHEM MODELL (2012) (in press). The same interest in U.S. criminal procedure is evident in other countries with respect to legislative reforms. *See, e.g.*, Hans Heinrick Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239 (1970). Conversely, American scholars, in comparative studies, have recognized German criminal procedure. *See* Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995). For a general perspective of both German and U.S. criminal procedures, see GERSON TRUG, LÖSUNGSKONVERGENZEN TROTZ SYSTEMDIVERGENZEN IM DEUTSCHEN UND US-AMERIKANISCHEN STRAFVERFAHREN (2002).

91 *See* Gorden Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 425, 465 (1992) (pointing to failures in the U.S. criminal justice system, judicial passivism, and the predominance of lawyers and plea bargaining as the price to be paid for these characteristics); *see also* L.H. Leigh, *Liberty and Efficiency in the Criminal Process: The Significance of Models*, 26 INT'L & COMP. L.Q. 516, 520 (1977); JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE (2005) (discussing the French model of criminal procedure).

92 *See* Goldstein, *supra* note 15, at 1016-17 (defining the term "adversary" as referring "to a method of resolving disputes [that] takes its contours from the contested trial," explaining further characteristics, and considering that the adversary method "is merely one way of finding facts and implementing norms."). In contrast, the word "accusatorial" refers to "a classic procedural model that encompasses not only an adversary trial procedure but also other fundamental premises" where social significance is also involved and that implies, in the end, reactive and/or passive conduct by the judge. *Id.*

synonymously.[93] Additionally, the characteristics of both are often presented in relation to the criminal procedures of a common law legal tradition. While the outline of an accusatorial model appears blurred in the United States and Europe it is not explicit enough for use as the Anglo-American model of criminal procedure. This Article suggests the term *adversarial* be used, in clear reference to English and U.S. criminal procedure. Use of this term is more representative of what takes place in the courtroom, as well as the implicit values and behaviors of its different players.

It has been argued that the adversarial character of Anglo-American, and specifically U.S., criminal procedure lends the appearance of an aggressive combat between the parties, in which they compose their stories before an impartial and passive audience that acts as the decision-maker.[94] This conception is especially present at the trial stage, which is party-centered, unlike European criminal procedures, which are judge-centered.[95] In the adversarial context, the roles of the prosecution and defense counsel become essential[96] to controling and managing the trial itself, where the presentation of evidence by both sides must take place. Thus, it has been argued that a sort of lawyerization is

93 *See, e.g.*, Joachim Herrmann, *Various Models of Criminal Proceedings*, 2 S. AFR. J. CRIM. L & CRIMINOLOGY 3 (1978); Miranda v. Arizona, 384 U.S. 436, 460 (1966).

94 *See* Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 120 (1987) (expressing the opinion that "the American adversary criminal trial is a regulated storytelling contest between champions of competing, interpretive stories that are composed under significant restraints. The parties compose their stories for and present them to an impartial and passive audience, which acts as a decision-maker, by assigning criminal liability on the basis of the stories."). Some scholars have equated judicial proceedings to a "source of drama" and likely not only in reference to the adversarial system. *See* Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater*, 28 STAN. L. REV. 81, 82 (1975).

95 *See* Herrmann, *supra* note 93, at 5. Thus, the party or the judge (depending on the jurisdiction) exercises control over litigation, especially in relation with the first expression. *See* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 27, 33 (1988) (identifying the benefits and detriments of this feature of adversarial criminal procedure).

96 *See* LANGBEIN, *supra* note 42, at 252 (discussing the roles within and origins of the adversary trial); Jacqueline Hodgson, *The Role of the Criminal Defence Lawyer in Adversarial and Inquisitorial Procedure*, *in* STRAFVERTEIDIGUNG VOR NEUEN HERAUSFORDERUNGEN 45 (T. Weigend et al. eds., 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1504000 (discussing the lawyer's position in adversarial and non-adversarial criminal procedures); *see also* Richard E. Myers, *Adversarial Counsel in an Inquisitorial System*, XXXVII N.C. J. INT'L L. & COM. REG. 411 (2011) (presenting an interesting comparative study of criminal procedure systems).

predominant in adversarial systems,[97] as proceedings usually include a body of laypersons (jury) and only sometimes a professional judge,[98] as opposed to a passive or neutral judge serving as the decisionmaker.[99] In fact, the adversarial trial is considered to be the appropriate due process of law, as guaranteed in the Sixth Amendment, according to U.S. federal and state jurisprudence.[100]

The relevance of such adversariness is highlighted by the fact that both the prosecution and the defense, according to this schema of confrontation, construct and present two independent

97 *See* Jacqueline Hodgson, *Conceptions of the Trial in Inquisitorial and Adversarial Procedure*, JUDGMENT AND CALLING TO ACCOUNT 223 (A. Duff et al. eds., 2006). This fact has led to the virtual silence of the accused and, according to the author, the "accused speaks" trial has been replaced by the "lawyer speaks" trial, where the defendant is marginalized by the protection of her lawyer. *Id.*

98 Singer v. United States, 380 U.S. 24, 36 (1965) (revealing the reluctance of the U.S. Supreme Court to waive the defendant's right to a jury trial, as guaranteed in the Sixth Amendment and in spite of Federal Rule of Criminal Procedure 23). As is explicitly argued, "a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury." *Id.* That is, "due process of law" in this case guarantees a trial by jury and not a right to a trial by an impartial decision-maker. *See also* Duncan v. Louisiana, 391 U.S. 145 (1968); N.S. MARDER, THE JURY PROCESS (2005).

99 This passivity or neutrality of the decision-maker as a fact finder, coupled with reliance on party presentation of evidence, is a key element of adversariness. *See* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714 (1983); LANDSMAN *supra* note 95, at 77 (discussing the passivity of trial procedeedings). *See generally* THEODORE L. KUBICEK, ADVERSARIAL JUSTICE: AMERICA'S COURT SYSTEM ON TRIAL (2006). In England, 1730 is considered the starting point for the increased role of defense counsel in criminal proceedings at the court of the Old Bailey in London and following the more widespread judicial organization of the Tudor and Stuart eras. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 496, 525 (1990); J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 L. & HIST. REV. 221, 226 (1991); *see also* LANGBEIN, *supra* note 42, at 253 (regarding the "lawyerization" of criminal procedure in England, especially in the trial stage).

100 Faretta v. California, 422 U.S. 806, 818 (1975). In particular, "the right to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *Id.*; *see also* California v. Green, 399 U.S. 149, 176 (1970) (Harlan, J., concurring) (referring to the confrontation clause in the Sixth Amendment in conjunction with the requirements of "notice, counsel and compulsory process," all of them "incidents of an adversarial proceeding before a jury as evolved during the 17th and 18th centuries."); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (relating to the interpretation of the Fourteenth Amendment applying "due process of law" to the legislative acts and sanctions of each state).

cases before the court.[101] Both must gather their own evidence in order to persuade the passive decision maker (the juror) in this reactive adversarial model.[102] Thus, complex evidentiary rules are provided in an attempt to streamline the process and assist the decision maker's inferences.[103] The concept of discovery therefore becomes essential in the adversarial context when, in contrast, it is unknown in European criminal procedure.[104] In Europe, the investigative dossier[105] (the only dossier or record that exists in relation to the specific case) may be consulted by both parties at the beginning of the preliminary (and judicial) investigation.[106]

This method of presenting the case or cases before the court also has important consequences in relation to the truth-finding theory. The search for the truth takes place only at the trial, which is the best place to look for it,[107] but it happens that the whole

101 Damaška, *supra* note 87, at 25 (arguing that the limits of tolerance of such partisanship are lower for the prosecution due to their public responsibility, in order to protect the public interest).

102 *See* Goldstein, *supra* note 15, at 1017. The author draws a distinction between the reactive position of the judge representing the state in adversarial systems and the proactive role of the judiciary in non-adversarial systems. Damaška follows the same approach. *See Structures*, *supra* note 16, at 493; FACES, *supra* note 16, at 71.

103 *See* Richard A. Posner, *An Economical Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999) (analyzing this form of evidence gathering in the adversarial and inquisitorial criminal procedures from an economic perspective). For a comparison of the presentation of evidence in both criminal justice systems, see Damaška, *supra* note 7 (purporting the existence of two evidentiary styles).

104 *See* Damaška, *supra* note 7, at 533; Schlesinger, *supra* note 19, at 372 (referring to a sort of "Neanderthal stage" in U.S. criminal procedure); *see also* ROBERT M. CARY ET AL., FEDERAL CRIMINAL DISCOVERY (2011); *Chapter 11: Discovery and Procedure Before Trial*, *in* THE AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1983) (discussing Rule 16 of the Federal Rules of Criminal Procedure, as well as leading cases, such as *Brady v. Maryland* and its progeny).

105 This term was adopted by Thaman. *See* STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 14 (2002).

106 *See* Mar Jimeno-Bulnes, *El Principio de Publicidad en el Sumario*, 4 JUSTICIA: REVISTA DE DERECHO PROCESAL 645 (1993) (distinguishing between contradiction, as equivalent to confrontation in civil law systems, and publicity, in relation to this investigative stage in criminal procedure); *see also* DANIEL E. MURRAY, A SURVEY OF CRIMINAL PROCEDURE IN SPAIN AND SOME COMPARISONS WITH CRIMINAL PROCEDURE IN THE UNITED STATES, 40 N.D. L. REV 7, 19 (1964) (discussing the similarities between *sumario* and the written dossier). It must be noted that an important amendment to Article 302 of the Spanish Criminal Procedure Act was made in 1978. In contrast, other American scholars talk of unlimited discovery. *See* Schlessinger, *supra* note 19, at 382.

107 *See* CORNELIUS P. CALLAHAN, THE SEARCH OF THE TRUTH (1997) (quoting, in an introductory page, the saying that "[a] trial is a search for truth; an appeal is a search for

truth is not always reached through the adversarial method. As has been argued that adversaries are often, if not always, more interested in winning rather than in the discovery of the truth.[108] It appears that the search for the truth, or to determine "what really happened" (material truth), is not the goal of adversarial criminal procedure. Instead, a more important value emerges: the fairness of the trial in order to resolve the criminal conflict.[109] A different method of proof has even been suggested for adversarial and non-adversarial procedures, addressing these divergent goals and values.[110] This concept of truthfinding demonstrates one of the greatest differences from non-adversarial criminal procedures in Europe.[111] The existence of official investigations conducted by

error."). The author also includes several practical examples of questioning at the trial, in order to look for this truth according to witnesses and expert evidence. *Id*. at 7.

108 *See* Goodpaster, *supra* note 94, at 124. Also in relation to this truth-deficit, see Landsman, *supra* note 94, at 26 and LANGBEIN, *supra* note 42, at 331 (considering a truth-deficit in adversarial systems). The latter author justifies this feature of the adversarial system as a consequence of the preceding altercation (question and answer) model, which is in fact the origin of adversary trial. Other scholars have been more critical of the approach. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035 (1975). Several scholars contested Frankel's proposal. *See* Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); H. Richard Uviller, *The Advocate, the Truth and Judicial Hackles: A Reaction to Judge's Frankel Idea*, 123 U. PA. L. REV. 1067 (1975); *see also* Findley, *supra* note 22, at 914 (pointing out the barriers to uncovering the truth in the American adversarial system). For the reasons cited by these scholars, many talk of "truth-deflecting" instead of "truth-finding." *See, e.g.*, Myers, *supra* note 96, at 114.

109 *See* Thomas Weigend, *Should We Search for the Truth and Who Should Do It?*, 36 N.C. J. INT'L & COM. REG. 389, 390 (2011); Jack Norton et al., *Truth and Individual Rights: A Comparison of United States and French Pretrial Procedures*, 2 AM. CRIM. L.Q. 159 (1963) (comparing the search for the truth in both countries). Also, in relation to these goals and the values of adversarial procedure, see Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 304 (1989). Recall the reference to both objectives in the theory of solving conflicts presented by Thibaut and Walker, *supra* note 21, at 543.

110 *See* J.D. Jackson, *Two Methods of Proof in Criminal Procedure*, 51 MOD. L. REV. 549, 561 (1988). For a comparative view, see Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122, 123 (1966) (refering to the modern theory of intimate conviction that developed in European criminal procedures, as opposed to the traditional system of legal proof).

111 *See* Michael L. Corrado, *The Future of Adversarial Systems: An Introduction to the Papers from the First Conference*, 35 N.C. J. INT'L & COM. REG. 285 (2010) (presenting key elements in both adversarial and non-adversarial systems). In summary, the following are aspects of adversarial systems: litigation is run by the parties and not by the judge and they have equal status, at least in theory; the defendant (or the defendant's legal counsel) is entitled to confront and cross-examine the accuser; the right to a jury trial as provided in the Sixth Amendment; evidence can only be presented at the trial; and victims have no

the investigative magistrate (or now, in many European countries, the public prosecutor) and the creation of the investigative dossier are another significant difference regarding the non-adversarial criminal procedures existing in Europe.

Lastly, another important distinction usually identified between the adversarial and non-adversarial systems relates to the role of the accused in the criminal procedure, specifically in relation to the truth-finding process. It has been noted that the defendant in adversarial criminal proceedings is considered a *subject* or a party to the trial, deserving of protection and entitled to a privilege against self-incrimination (as interpreted in *Miranda*,[112] although of limited scope as recently reviewed in *Berghuis v. Tompkins*).[113] In contrast, the defendant is treated as

role as prosecutors. In contrast, the characteristics of the most inquisitorial non-adversarial model are presented: trial conducted by a professional judge with little participation of counsel; pretrial judicial investigation in the form of dossier to be delivered to the trial judge (which, in the author's opinion constitutes the biggest different between two systems, with regard to the presumption of innocence); non-equality between parties because the prosecutor follows the same judicial career as the judges; almost no presence of jury or lay assessors; and the victim has a role as a prosecutor, and also in some cases, as a civil party in criminal proceedings.

112 Miranda v. Arizona, 384 U.S. 436, 452, 459-60 (1966) (stating that the privilege against self-incrimination is "the essential mainstay of our adversary system" and is part of the right to remain silent contained in the Fifth Amendment, under the entitlement no person shall be compelled in any criminal case to be a witness against himself); *see also* Griffith v. California, 380 U.S. 609 (1965) (relating to the privilege of self-incrimination); Thea A. Cohen, *Self-incrimination and Separation of Powers*, 100 GEO. L.J. 895 (2012) (analyzing the Self-Incrimination Clause).

113 Berghuis v. Tompkins, 130 S.Ct. 2250, 2264 (2010) (holding that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."). This lower standard of the right to remain silent has been criticized by scholars. *See, e.g.*, Brigite Mills, *Is Silence Still Golden? The Implications of* Berghuis v. Tompkins *on the Right to Remain Silent*, 44 LOY. L.A. L. REV. 1179 (2011); Jaime M. Rogers, *You Have the Right to Remain Silent . . . Sort of*: Berghuis v. Tompkins, *The Social Costs of a Clear Statement Rule and the Need for Amending the Miranda Warnings*, 16 ROGER WILLIAMS U. L. REV. 723 (2011); Emma Schauring, Berghuis v. Thompkins*: The Supreme Court's "New" Take on Invocation and Waiver of the Right to Remain Silent*, 31 ST. LOUIS U. PUB. L. REV. 221 (2011). The consequences of the *Berghuis* decision will likely be grave for non-English speakers. *See* 130 S.Ct. 2250, at 2266 (Sotomayor, J., dissenting) (arguing that criminal suspects must now invoke their right to remain silent i.e., "counter-intuitively, speak and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police."); *see also* Brenda L. Rosales, Note, *The Impact of* Berghuis v. Tompkins *on the Eroding* Miranda *Warnings and Limited English Proficient Individuals: You Must Speak Up to Remain Silent*, 9 HASTINGS RACE & POVERTY L.J. 109 (2012); George M. Dery III, *Do You Believe in* Miranda*? The Supreme Court Reveals its Doubts in* Berghuis v. Tompkins *Paradoxically Ruling that Suspects Can Only Invoke Their Right to Remain Silent by Speaking*, 21 GEO. MASON U. CIV. RTS. L.J. 407 (2011);

an *object* in non-adversarial procedure, emphasizing the most negative aspect of the term "inquisitorial." In the latter system, the defendant's confession emerges as the principle piece of evidence (or *regina probatorum*),[114] among all other sorts of evidence. The accused's declaration is considered the most important source of information.[115] Other means of obtaining evidence are usually employed in adversarial criminal procedure, such as substituting the accused's declaration or confession. The best example of this is the cross-examination of witnesses, where a sort of witness coaching[116] occurs, as both prosecutor and defense counsel are associated with different parties and cases.

IV. THE MUTUAL INFLUENCE BETWEEN ANGLO-AMERICAN AND EUROPEAN CRIMINAL PROCEDURES

Having presented the characteristics of adversarial and non-adversarial criminal procedures in their respective common law and civil law traditions and in accordance with their origins, this Article will now explore whether these differences, especially in relation to arguments for adversariness as opposed to so-called inquisitiveness,[117] are present today in European and Anglo-American criminal procedures. The increasing influence of the U.S. legal system in Europe in recent years must be taken into

Illan M. Romano, *Is* Miranda *on the Verge of Extinction? The Supreme Court Loosens Miranda's Grip in Favor of Law Enforcement*, 35 NOVA L. REV. 525 (2011); Austin Steelman, Note, Miranda*'s Great Mirage: How Protections Against Widespread Findings of Implied Waiver Have Been Lost on the Horizon*, 80 UMKC L. REV. 239 (2011).

114 *See* Volkmann-Schluck, *supra* note 75, at 2 (referring to the confession as the "principal item of evidence" in traditional inquisitorial criminal procedure, coupled with the principle of "*quod non est in actis, non est in mundo*" considering that the word *actis* relates to the dossier or investigative file).

115 *See* Damaška, *supra* note 7, at 526; *see also* LANGBEIN, *supra* note 42, at 35 (taking into account the historical background); Schlesinger, *supra* note 19, at 377 (criticizing the accused's right to remain silent, arguing that it gives way to "one-way-street" discovery). It is important to note that the privilege against self-incrimination is also a component of European criminal procedures. *See* Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962) (discussing its inclusion in French and German criminal procedure at that time); Kevin H. Tierney, *Transatlantic Attitudes Toward Self-Incrimination*, 6 AM. CRIM. L.Q. 26 (1967) (relating to its existence in English common law). Incidentally, Tierney is very critical of the interpretation of the Fifth Amendment provided by the Supreme Court in *Miranda*.

116 *See* Mirjan R. Damaška, *Presentation of Evidence and Fact-Finding Precision*, 123 U. PA. L. REV. 1083, 1088 (1975) (detailing the way both models develop evidence through witness cross-examination).

117 *See* Mirjan R. Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 843 (1997).

account. In particular, the plea bargain, a pervasive aspect of American criminal procedure will be discussed at length.[118] In fact, some of the classical features of Anglo-American criminal procedure, as opposed to adversariness, may be found in European procedures. Thus, due to these mutual influences, it is apparent that the line between the two classical models is blurring and the convergence of the adversarial and non-adversarial (or investigative) systems[119] will likely have sufficient support.

A. Pretrial Investigation

All European and Anglo-American criminal procedures, as well as those in other parts of the world, begin with an investigation carried out by police officers, individuals who are the first to arrive at the crime scene. In fact, they act as the "doorkeepers" for entry into the criminal justice process,[120] and for this reason, it is recognized that they also have powers to

118 *See* Langer, *supra* note 10, at 3 (pointing to how other criminal procedures become "Americanized"). The author uses the concept of legal transplant in order to convey the idea that institutions are adapted and not simply "cut and split up" between legal systems. By contrast, the European model was traditionally seen as more advanced and fair in comparison to the American system. *See also* Schünemann, *supra* note 10, at 290.

119 *See* Jörg et al., *supra* note 10, at 41 (discussing two possibilities to facilitate convergence: either the two classical systems move "towards each other" or one system finally "comes to dominate the other, thereby causing the latter to lose many of its salient and unique features."). The latter possibility, it can be argued, is taking place in the European Union as a result of the Treaty of Lisbon, which set the goal of harmonizing criminal procedure. However, complete unification of European criminal proceedings is a distant goal, as only minimum rules in relation to specific concerns are being adopted. *See, e.g.*, JIMENO-BULNES, *supra* note 11, at 91. The best example of this is the negotiation of procedural rights, which has become very problematic. *See* Mar Jimeno-Bulnes, *The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union*, *in* SECURITY VERSUS JUSTICE? POLICE AND JUDICIAL COOPERATION IN THE EUROPEAN UNION 171 (Elspeth Guild & Florian Geyer eds., 2008); *see also* Mar Jimeno-Bulnes, *The EU Roadmap for Strengthening Procedural Rights for Suspected or Accused Persons in Criminal Proceedings*, 4 EUR. CRIM. L.F. 157 (2009); Mar Jimeno-Bulnes, *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?*, CENTRE FOR EUROPEAN POLICY STUDIES (Feb. 26, 2010), *available at* http://www.ceps.eu/book/towards-common-standards-rights-suspected-and-accused-persons-criminal-proceedings-eu; *see also* T.N.B.M. Spronken & D.L.F. de Vocht, *EU Policy to Guarantee Procedural Rights in Criminal Proceedings: "Step by Step"*, 37 N.C. J. INT'L L. & COM. REG. 436 (2011); Konstantinos D. Kerameus, *Procedural Harmonization in Europe*, 43 AM. J. COMP. LA. 401 (1995) (discussing procedural harmonization in the context of civil procedure).

120 KRATOCSKI & WALKER, *supra* note 3, at 98.

communicate the notice of the crime (*notitia criminis*).[121] In this context, Anglo-American and European procedures (the so-called accusatorial and inquisitorial legal systems, respectively) differ with respect to the addressee who will receive this notice and take final responsibility for instituting the criminal proceeding itself. This addressee will eventually conduct the pretrial investigation. It was customary in Europe for the director of this first phase of the criminal procedure to be a judicial authority, with the title of investigative magistrate (*juge d'instruction*),[122] as opposed to the public prosecutor, or in some cases, the police in Anglo-American models.[123]

Some European countries[124] have given governmental bodies, rather than judges, power over criminal procedure. Particularly Germany, where control of the pretrial investigation was attributed to the public prosecutor in 1975 following the abolition of the *Untersuchungsrichter*,[125] and Italy, where in 1988, the *giudice delle indagini preliminary* became the responsible body for

121 *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960) (criticizing this approach). *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (detailing the meaning, effects, and authors of disrection); *see also* Sandford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 906 (1962).

122 *See* ESMEIN, *supra* note 28, at 288 (discussing the historical background in different European countries). For a comparative view of the role of the investigative magistrate in Europe (particularly the Netherlands, France and Germany), as well as the situation in the U.S., see G.O.W. Mueller and F. Le Poole, *The United States Commissioner Compared with the European Investigating Magistrate*, 10 CRIM. L.Q. 159 (1967).

123 This was the case in England and Wales until the establishment of the Crown Prosecution Service and the enactment of the Prosecution of Offenses Act 1985, No. 1800, c.23, ¶ 1 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1985/23; *see* Hodgson, *supra* note 29, at 333; Andrew Ashworth, *Developments in the Public Prosecutor's Office in England and Wales*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 257 (2000); *see also* Feldman, *supra* note 76 (detailing modern English and Welsh criminal procedure).

124 *See generally* Goldstein & Marcus, *supra* note 20, at 246; Langbein & Weinreb, *supra* note 22, at 1549; PLOSCOWE, *supra* note 18, at 460; Volkmann-Schluck, *supra* note 75, at 11; Weigend, *supra* note 19, at 389; THAMAN, *supra* note 105, at 14; *see also* THOMAS WEIGEND, *Prosecution: Comparative Aspects*, *in* 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1232, 1235 (2002) (offering a comparative analysis of the Anglo-American and European models).

125 *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, § 160(1) (Ger.), *available at* http://www.iuscomp.org/gla; *see also* BOHLANDER, *supra* note 88, at 67; Joachim Herrmann, *Federal Republic of Germany*, *in* MAJOR CRIMINAL JUSTICE SYSTEMS 86, 100 (1981); Thomas Weigend, *Germany*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 243, 262 (Craig M. Bradley ed., 2d ed. 2007).

overseeing the course of judicial investigations.[126] Currently, the investigative magistrate exists in countries such as France and Spain, although attempts have been made in France to replace this judicial authority,[127] which coexists with a Judge of Liberties and Detention (*juge des libertés et de la détention*). In Spain, a new bill has recently been enacted that suppresses this judicial investigation.[128] If the non-existence of the investigative magistrate is considered a general characteristic of the accusatorial systems, it may also be said that European criminal procedures are reviewing this system.

Another feature that distinguishes both models of criminal procedure is the appropriate level of power exercised by the prosecutor in order to institute criminal proceedings. The principle of prosecutorial discretion is usually attached to Anglo-

126 *See* Codice di procedure penale [C.p.p.] art. 328 (It.), *available at* http://www.altalex.com/index.php?idnot=2011; *see also* Robert Adrian Van Cleave, *Italy*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 303, 333 (Craig M. Bradley ed., 2d ed. 2007); Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 WASH. U. GLOBAL STUD. L. REV. 567, 571 (2005); Illuminati, *supra* note 24, at 308; Mirabella, *supra* note 24, at 234; Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 232 (2000); Enzo Zappalà, *Le Procès Pénal Italien Entre Système Inquisitoire et Système Accusatoire*, 68 REVUE INTERNATIONALE DE DROIT PÉNALE 11, 113 (1997).

127 It appears as though the projected abolition is still on the political agenda. *See* Thomas Meindl, *Les Implications Constitutionnelles de la Suppression du Juge D'instruction*, 2 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 395 (2010) (criticizing such suppression due to dependence of the public prosecutor on executive power). Currently, regulation of this judicial investigation is provided for in Article 81 of France's Code of Criminal Procedure. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 81 (Fr.), *available at* http://www.legifrance.gouv.fr. For a discussion of the French *juge d'instructions* and their role, see Doris Jonas Freed, *Aspects of French Criminal Procedure*, 17 LA. L. REV. 730, 731 (1957); Morris Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure*, 23 AM. INST. CRIM. L. & CRIMINOLOGY 372, 373 (1932); and more recently, Richard S. Frase, *France*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 201, 220 (Craig M. Bradley ed., 2d ed. 2007). *See also* A.E. Anton, *L'instruction Criminelle*, 9 AM. J. COMP. L. 441, 442 (1960); Edwin R. Keedy, *The Preliminary Investigation of Crime in France Part II*, 88 U. PA. L. REV. 692 (1940); Jacqueline Hogdson, *The Police, the Prosecutor and the* Juge d'Instruction*: Judicial Supervision in France, Theory and Practice*, 41 BRIT. J. CRIMINOLOGY 342 (2001).

128 *See Actividad Legislativa*, *supra* note 73, arts. 457 *et seq.*; the establishment of a Judge of Guarantees (*Juez de Garantías*) is also included in order to supervise the investigation conducted by the public prosecutor (following the French model of the aforementioned Judge of Liberties and Detention). On the reform of the Spanish system, see J.M. Martín Pallín, *Un anteproyecto bien vertebrado*, ACTUALIDAD JURÍDICA ARANZADI, at 3 (2011). In fact, scholars have called for the drafting of a new criminal procedural law, as the one in force today was enacted in 1882. *See* J.V. Gimeno Sendra, *La Necesaria e Inaplazable Reforma de la Ley de Enjuiciamiento Criminal*, 5 LA LEY 1705 (2002).

American criminal procedures and especially, to the U.S. system, where the absence of control has been vigorously discussed.[129] This is in contrast to European models, where mandatory prosecution has prevailed as a general rule since the enactment of the "legality" rule.[130] Nevertheless, traces of this discretionary prosecution can also be appreciated in the criminal procedure codes of some European countries where, at least as an exceptional rule, opportunity principles have increasingly been introduced.[131] This is the case in France,[132] where the prosecutor has discretion to apply correctionalization. In essence, a criminal offense may be reduced to a misdemeanor (*délit*), which then transfers competence from a jury trial at the Assize Court (*cours d'assises*) to the criminal court (*tribunaux correctionnels)*, which consists of only a panel of judges and no judicial investigation.[133]

129 *See* Davis, *supra* note 121, at 188; *see also* Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 535 (1970); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978). For a specific discussion of the benefits and risks of this prosecutorial discussion along with some guidelines, see N. Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971). For a comparative view of civil law tradition countries, see William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993). One rationale for this prosecutorial discretion is provided by Robert L. Rabin in *Agency Criminal Referrals in the Federal System: An Empirical Study of Especially Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1038 (1972). For a general discussion of this, see Editorial, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1075 (1955); Gerard E. Lynch, *Prosecution: Prosecutorial Discretion*, 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1246 (2002). In relation to prosecutorial discretion in the U.K., see Chrisje Brants & Stewart Field, *Discretion and Accountability in Prosecution: A Comparative Perspective on Crime Out of Court*, *in* CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY, *supra* note 9, at 127 (discussing the Dutch system, as well). A recent example of such prosecutorial accountability can be found in George A. Weiss, *Prosecutorial Accountability After* Connick v. Thompson, 60 DRAKE L. REV. 199 (2011).

130 *See, e.g.*, CONSTITUCIÓN ESPAÑOLA art. 124 (Spain), *available at* http://www.senado.es/web/index.html; LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM] art. 105 (Spain), *available at* http://noticias.juridicas.com/base_datos/Penal/lecr.html.

131 *See* Peter Western, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229 (2006) (providing a comparative view of both principles and exposition of judicial practice in U.S. courts).

132 *See* Robert Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483, 488 (1970); Pieter Verrest, *The French Public Prosecution Service*, 8 EUR. J. CRIME CRIM. L. & CRIM. JUST. 210, 233 (2010); *see also* Jacqueline Hodgson, *The French Prosecutor in Question*, 67 WASH. & LEE L. REV. 1361 (2010).

133 *See* Freed, *supra* note 127, at 738; Ploscowe, *supra* note 127, at 386 (providing an historical explanation); *see also* Goldstein & Marcus, *supra* note 20, at 251; Langbein & Weinreb, *supra* note 22, at 1552.

On the contrary, a prosecutor is attached to the initiation of the criminal proceeding by request of the victim, who can demand that civil liability be processed with criminal liability.[134] More prosecutorial discretion is present in Germany,[135] where both mandatory and prosecutorial principles coexist,[136] as well as in Italy following the enactment of the new Criminal Procedural Code in 1988, which introduced several adversarial elements to Italian criminal procedure.[137] In contrast, Spain still maintains the principle of strict mandatory prosecution according to the legality principle while retaining the institution of private prosecution for any citizen and not only for the victim.[138]

The existence of the exclusionary rule, particularly in the U.S., is another formative element of adversarial criminal procedure. In essence, the exclusionary rule provides that "the fruits of all police procedures judged to be illegal by the courts or legislatures must be excluded."[139] The exclusionary rule, applicable to improperly

134 *See* C. PR. PÉN., art. 2; *see* Jean Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965).

135 *See* STPO § 153 (dealing with the non-prosecution of petty offenses—with or without the approval of the court—according to the seriousness of the facts). Another example is the provision contained in section 172, which contemplates the possibility of the victim compelling public charges by lodging a complaint before the court if the prosecutor has dropped the case on the ground of insufficient cause. *Id.* § 172. *See also* Hans-Jörg Albrecht, *Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany*, 8 EUR. J. CRIME CRIM. L & CRIM. JUST. 245, 246 (2000); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443 (1974); Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970) (providing a historical background).

136 *See* Volkmann-Schluck, *supra* note 75, at 20. The general rule of compulsory prosecution is founded in *Legalitätsprinzip*, while discretionary prosecution is based in *Opportunitätsprinzip*. *See* Glenn Schram, *The Obligation to Prosecute in West Germany*, 17 AM. J. COMP. L. 627 (1969); Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974).

137 *See* C.p.p., arts. 405 *et seq*. Art. 112 Costituzione [Cost.] (It.). *available at* http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf. While the principle of mandatory prosecution is present in Article 112 of the Italian Constitution, discretional prosecution has emerged in contemporary Italian legislation. *See* Amodio & Selvaggi, *supra* note 24, at 1218; Grande, *supra* note 126, at 252.

138 L.E. CRIM., art. 101. *See* CONSTITUCIÓN ESPAÑOLA, §125 (providing for lay participation in the administration of justice). *See also* Murray, *supra* note 106, at 16; Julio Pérez Gil, 25 LAW & POLICY 151, 154 (2003). For discussion of private prosecution in the context of the U.S., see *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955); Weigend, *supra* note 124, at 1240 (offering a comparative angle).

139 STEVEN R. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 1 (1977). In fact, the exclusionary rule has been qualified as the "centerpiece of the constitutional criminal procedure framework." Robert

obtained evidence, operates as a *privilege*.[140] The rule particularly addresses the police because its origins are attached to the state's lack of control over the police in the U.S., as opposed to the hierarchical structure in European legal systems.[141] A landmark decision is *Mapp v. Ohio*,[142] where the exclusionary rule was extended—not only to apply in state courts on the basis of the Due Process Clause in the Fourteenth Amendment—but also to evidence taken in violation of other constitutional provisions.[143] Nevertheless, its wider application relates to the guarantees of the Fourth Amendment, especially in reference to "unreasonable searches and seizures."[144] While the exclusionary rule helps ensure

M. Bloom & Mark S. Brodin, CRIMINAL PROCEDURE: THE CONSTITUTION AND THE POLICE 183 (6th ed. 2010); *see also* KAMISAR ET AL., *supra* note 82, at 785; WAYNE R. LAFAVE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: INVESTIGATION 56 (2009); L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS 385 (2011); DAVID S. RUDSTEIN, CRIMINAL PROCEDURE: THE INVESTIGATIVE PROCESS 627 (2008); RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 252 (2008).

140 *See* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 364 (E.W. Cleary ed., 2d ed. 1972) [hereinafter MCCORMICK'S HANDBOOK]; *see also* Kenworthey Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 151 (2012) (discussing "dirty," "tainted," "contaminated," and "infected" evidence).

141 *See* Volkmann-Schluck, *supra* note 75, at 16; *see also* Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255 (1961); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1029, 1031 (1974) (refering to the justification of the rule's existence in U.S.). Kaplan believes that "the United States is the only nation that applies an automatic exclusionary rule" due to "uniquely American conditions." *See also* Kunert, *supra* note 110, at 126 (comparing the exclusionary rule in the U.S. to German criminal procedure).

142 Mapp v. Ohio, 367 U.S. 642, 660 (1961) ("[The Court's] decision gives to the individual no more than that which the Constitution guarantees him, to the police officer no less that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."). Previous decisions discussing the issue include Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); Wolf v. Colorado, 338 U.S, 25 (1949); Rochin v. California 342 U.S, 165 (1952); and Elkins v. United States, 364 U.S. 206 (1960). Morever, further limitations on the exclusionary rule have occurred. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974); Thomas S. Schrock & Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

143 In summary, the enforcement of the exclusionary rule applies to "four major types of" violations: searches and seizures that violate the Fourth Amendment; confessions obtained in violation of the Fifth and Sixth Amendments; identification testimony obtained in violation of these amendments; and evidence obtained by methods so shocking that its use would violate the Due Process Clause. *See* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

144 *See* Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 246 (1961); James E. Spiotto, *Search*

due process of law by excluding illegally obtained evidence (often considered "fruit of the poisonous tree")[145] from presentation at trial, it has been and still is contested by some scholars and practitioners,[146] who argue that its enforcement converts the fight against crime into an obstacle race.

However, similar rules that prohibit illegal methods of obtaining evidence and declare such evidence inadmissible are set forth in the criminal procedure codes of European legal systems. For example, France has a nullity penalty (*peine de nullité*) that relates to domicile searches, identity checks, and wiretapping, so that when legal requirements are not observed, the result is the removal of this evidence from the file (investigative dossier).[147] Moreover, the German Criminal Procedural Code declares evidence inadmissible whenever violence or illegal threats are used

and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 J. LEG. STUD. 243 (1973); *see also* Tyler Regan Wood, *Why Can't We All Just Get Along? The Relationship Between the Exclusionary Rule, the Good-Faith Exception, and the Court's Retroactivity Precedents After* Arizona v. Grant, 80 UMKC L. REV. 485 (2011) (discussing specific precedent related to search and seizure police practices, particularly including a comparative analysis of *Arizona v. Grant*, 556 U.S. 332 (2009) and *New York v. Belton*, 453 U.S. 454 (1981)). For a discussion of the application of the exclusionary rule to the Fourth Amendment, see R.M. BLOOM, SEARCHES, SEIZURES AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 19 (2003).

145 *See* KERRI MELLIFONT, FRUIT OF THE POISONOUS TREE: EVIDENCE DERIVIED FROM ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE (2010); KAMISAR et al., *supra* note 82, at 785; LAFAVE ET AL., *supra* note 139, at 459. The "fruit of the poisonous tree" principle is considered the "simplest of the exclusionary rule." *Id.* at 525. The idea is that exclusion is "not only the direct result of an illegality but also that which flowed from the illegality." BLOOM, *supra* note 144, at 19.

146 *See, e.g.*, Frank J. McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 266 (1961); William T. Pizzi, *The Need to Overrule* Mapp v. Ohio, 82 U. COLO. L. REV. 679 (2011) (arguing that the exclusionary rule is not consistent with the U.S. criminal justice system); *see also* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 354 (5th ed. 2010) (proposing the abolition of the exclusionary rule); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585 (2011); CHARLES H. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 44 (1986) (analyzing the costs of the exclusionary rule and discussing other potential remedies for these constitutional violations). These authors, in the aggregate, propose civil remedies such as: actions for damages; criminal remedies (such as criminal sanctions for illegal police conduct); and even non-judicial remedies (such as internal review procedures within a police department of its own misconduct). Nevertheless, the authors conclude that despite criticism of the exclusionary rule and its alternatives, it is a fundamental institution of the American criminal law system.

147 C. PR. PÉN., arts. 59, 78(3), 100(7). *See* Frase, *supra* note 90, at 212; *see also* Robert Vouin, *The Exclusionary Rule Under Foreign Law C. France*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 271 (1961).

to obtain it.[148] In general, obtaining evidence in violation of any rule intended to safeguard the defendant's basic procedural rights to obtain evidence shall lead to its immediate exclusion. The same applies to evidence obtained from illegal searches, seizures, and wiretapping without proper judicial authorization. However, a broad general rule against the employment of such illegally obtained evidence is advanced in the Italian[149] and Spanish legal systems. In the latter, a general rule is provided for all different (and not only criminal) procedures, which excludes any type of evidence obtained due to the violation of fundamental rights.[150] In contrast, in England—where criminal procedure is categorized as adversarial and/or accusatorial and the state structure, as decentralized or coordinated,[151] has no general exclusionary rule for improperly obtained evidence—it is the court that exercises its discretion over the exclusion of evidence that is unfairly obtained.[152]

The pretrial investigation, giving way to the preconstitution of evidence, is a fundamental aspect of criminal procedure for two primary reasons. First, the employment of more sophisticated and accurate investigative techniques, due to modern technology and scientific knowledge, carried out by experts or in some cases, police officers, is crucial to fact-finding. The best example of this is the forensic science of DNA analysis,[153] but general expertise

148 STPO, § 69, para. 3, § 136a, para. 3 (detailing the examination of witnesses and the defendant in the German system); *see* Weigend, *supra* note 125, at 251 (refering to various constitutional and German Supremes Court case-law); *see also* Walter R. Clemens, *The Exclusionary Rule Under Foreign Law D. Germany*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 277 (1961).

149 C.p.p., art. 191; *see* Van Claeve, *supra* note 126, at 327.

150 LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 11(1) (Spain), *available at* http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/pjexaminarlegislacion.
html&dkey=242&TableName=PJLEGISLACION; *see also* M. MIRANDA ESTRAMPES, EL CONCEPTO DE PRUEBA ILÍCITA Y SU TRATAMIENTO EN EL PROCESO PENAL (2005).

151 *See* Damaška, *supra* note 7, at 522 (regarding the exclusionary rule). The author theorizes that exclusionary rules are more vigorously enforced in common law jurisdictions than they are in civil law jurisdictions. *Id.* While this is true in some civil law countries (i.e. Spain, where the exclusionary rule was introduced in 1985), it is not accurate in all common law countries, like England, where the law has consistently stopped short of such a regulation.

152 Police and Criminal Evidence Act, 1984, C. 60, § 78 (Eng.) *available at* http://www.legislation.gov.uk/ukpga/1984/60/contents; *see* Feldman, *supra* note 76, at 163; Glanville L. Williams, *The Exclusionary Rule Under Foreign Law B. England*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 272 (1961).

153 *See* Ryan M. Goldstein, *Improving Forensic Science Through State Oversight*, 90

may also be included. Second, the emergence of new criminal realities give way to more sophisticated offenses and crimes that criminal procedure must recognize. Thus, the use of a broad spectrum of mostly intrusive investigative measures, which often touch upon fundamental rights of citizens, is necessary. Specifically, these investigative measures include searches and seizures,[154] surveillance of telecommunications or network surveillance (e.g., wiretapping),[155] and even means of investigation

TEX. L. REV. 225 (2011) (discussing DNA and forensic analysis in U.S. practice). The "infallibility" of DNA analysis and its use only as evidence "beyond a reasonable doubt," as a required standard of evidence in adversarial criminal procedure has raised concerns. *See* Katharine C. Lester, *The Affects of* Apprendi v. New Jersey *on the Use of DNA Evidence at Sentencing – Can DNA Alone Convict of Unadjudicated Prior Acts?*, 17 WASH & LEE. J. CIV. RTS. & SOC. JUST. 267 (2010). The collection of DNA by governments is often controversial and may result in a violation of fundamental rights, particularly under the Fourth Amendment of the U.S. Constitution. *See, e.g.*, Ashley Eiler, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201 (2011); Kelly Lowenberg, *Applying the Fourth Amendment When DNA Collected for One Purpose is Tested for Another*, 79 U. CIN. L. REV. 1289 (2010). In contrast, defense of such policy is advanced by Jessica A. Levitt, *Competing Rights Under the Totality of the Circumstances Test: Expanding DNA Collection Statutes*, 46 VAL. U. L. REV. 117 (2011) (proposing the adoption of state legislation expanding respective DNA collection statutes, including samples from arrestees, but always with provision of adequate (procedural) safeguards).

154 Searches and seizures are not necessarily only of homes and their contents. *See* Leanne Andersen, People v. Diaz*: Warrantless Searches of Cellular Phones, Stretching the Search Incident to Arrest Doctrine Beyond the Breaking Point*, 39 W. ST. U. L. REV. 33 (2011); Camille E. Gauthier, *Is it Really That Simple?: Circuits Split Over Reasonable Suspicion Requirement for Visual Body-Cavity Searches of Arrestees*, 86 TUL. L. REV. 247 (2011); James T. Stinsman, *Computer Seizures and Searches: Rethinking the Applicability of the Plain View Doctrine*, 83 TEMP. L. REV. 1097 (2011). In addition, new technology is now used by police officers in these searches and seizures, such as the placement of global positioning system (GPS) devices in vehicles or elsewhere. There has also been discussion of the restriction of the citizens' right of privacy. *See* Joshua A. Lunsford, *Prolonged GPS Surveillance and the Fourth Amendment: a Critical Analysis of the D.C. Circuit's "The-Whole-is-Greater-than-the-Sum-of-its-Parts" Approach in* United States v. Maynard, 38 OHIO N.U. L. REV. 383 (2011); Brian Andrew Suslak, *GPS Tracking, Police Intrusion and the Diverging Paths of State and Federal Judiciaries*, 45 SUFFOLK U. L. REV. 193 (2011).

155 A sort of surveillance law and wiretapping law has been outlined by scholars. *See* Patricia L. Bellia, *Designing Surveillance Law*, 43 ARIZ. ST. L. J. 293 (2011); J. Peter Bodri, *Tapping into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1327, 1332 (2011). *See also* Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L. TECH. & POL'Y 281 (2011); David J. Stein, *Law Enforcement Efficiency or Orwell's 1984? Supreme Court to Decide Whether 'Big Brother' is Here at Last*, 2011 U. ILL. J. L. TECH. & POL'Y 487 (2011) (applying famous literary references to the new surveillance tools such as GPS). In contrast, the Supreme Court and Congress have also attempted to adapt the Fourth Amendment to emerging technologies, in line with the Court's ruling in *Katz v. United States*, 389 U.S. 347 (1967), and by drafting anti-wiretapping statutes. *See* Michelle K. Wolf, *Anti-Wiretapping Statutes: Disregarding Legislative Purpose and the*

such as dragnet investigations,[156] entrapment, or other specific investigative acts carried out by police officers.[157] Lastly, as new forms of criminality emerge, such as terrorism and organized crime, there is good reason to expand the content of this investigative period.[158]

B. Trial

The trial phase has been characterized as the "jewel in the crown" of adversarial criminal procedure[159] and this is specifically

Constitutional Pitfalls of Using Anti-Wiretapping Statutes to Prevent the Recording of On-Duty Police Officers, 15 J. GENDER RACE & JUST. 165 (2012) (analyzing the same statutes implicated to prohibit the recording of police activities by private citizens).

156 By use, for example, of former GPS surveillance. *See* Lunsford, *supra* note 154, at 396; Anna-Karina Parker, *Dragnet Law Enforcement: Prolonged Surveillance & the Fourth Amendment*, 39 W. ST. U. L. REV. 23 (2011). Practices of "dragnet investigations" can be found in sections 98a and 98b of the German Code of Criminal Procedure regarding the investigation of certain crimes, which permit searches through existing data on large numbers of people in order to determine the identity of a suspect. *See* BOHLANDER, *supra* note 88, at 88.

157 *See* DRESSLER & MICHAELS, *supra* note 146, at 539 (discussing entrapment); Adam A. Khalil, *Knock, Knock, Who's There?: Undercover Officers, Police Informants, and the "Consent Once Removed" Doctrine*, 41 SETON HALL L. REV. 1569 (2011) (describing other police investigative measures). For a comparison of U.S. and European police techniques, see Christopher Slobogin, *Comparative Empiricism and Police Investigative Practices*, 37 N.C. J. INT'L L. & COM. REG. 321 (2011).

158 Attempts have been made to coordinate the accusatorial or adversarial and inquisitorial systems. *See* Erin Creegan, *Cooperation in Foreign Terrorism Prosecutions*, 42 GEO. J. INT'L L. 491 (2011). The author justifies difficulties in cooperation as stemming from different backgrounds of common law and civil law countries. Cooperation and interest in the fight against terrorism as a whole has increased, especially after September 11, 2001 (9/11). This event had a tremendous impact on worldwide criminal procedures and resulted in the reworking of the balance between civil liberties and law enforcement. The most significant law to have followed 9/11 has been the enactment of the USA PATRIOT Act. *See* BLOOM & BRODIN, *supra* note 139, at 349; *see also* Mar Jimeno-Bulnes, *After September 11th: The Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples*, 10 EUROPEAN L.J. 235, 237 (2004) (discussing the USA PATRIOT Act, the U.K. Anti-Terrorism, Crime and Security Act of 2001, as well as Spanish and European regulations). For further discussion of the PATRIOT Act, see John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002). For a modern reading of 9/11, see Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1 (2011). *See generally* JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW (2011).

159 *See* KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1358 (1990). The subsequent edition of this book, published in 1994, does not include any such reference to the adversary system in the chapter on criminal trial. *See supra* note 82.

applicable to American criminal justice, where it represents the stage on which all aspects of adversariness play their part. The confrontation clause provided in the Sixth Amendment of the Constitution,[160] which gives the defendant the right to face adverse witnesses, creates a fundamental obligation that is executed in cross-examination,[161] which is arguably the most characteristic feature of adversarial trial in the United States. Generally, evidence must fulfill the highest standard of proof—beyond reasonable doubt[162]—in order for the prosecution to obtain the conviction of the accused. It has been argued that the right of cross-examination does not exist in European criminal procedures because any questioning at trial takes place through the appropriate trial judge or court.[163] However, this statement is not completely accurate because cross-examination was adopted by statute in several European jurisdictions; particularly, in France,[164]

160 *See* Maryland v. Craig, 497 U.S. 836, 845-46 (1990). *Craig* is considered a leading case on the issue. Although exceptions to face-to-face confrontation are defended, the Court recalls the aim of the Confrontation Clause, which is "to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact," as well as how "the combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purpose of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings," with reference to past precedent. *See also* MARK E. CAMMACK & NORMAN M. GARLAND, ADVANCED CRIMINAL PROCEDURE 414 (2006); MILLER & WRIGHT, *supra* note 139, at 1301; Robert K. Kry, *Confrontation at Crossroads: Crawford's Seven-Year Itch*, 6 CHARLESTON L. REV. 49 (providing a modern point of view on the Confrontation Clause).

161 The Supreme Court has characterized section 2 of Rule 26 of the Federal Rules of Criminal Procedure as the "greatest legal engine ever invented for the discovery of truth." *See* Maryland v. Craig, 497 U.S. at 846; California v. Green, 399 U.S. 149, 158 (1979). The original statement can be found in JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA (1940). *See also* LANGBEIN, *supra* note 42, at 291 (describing the origins of cross-examination in English Old Bailey courts); MCCORMICK'S HANDBOOK, *supra* note 140, at 43 (discussing the right to cross-examine).

162 *See* Barbara Shapiro, *The Beyond Reasonable Doubt Doctrine: 'Moral Comfort' or Standard of Proof?*, 2 LAW & HUMAN. 149 (2008) (discussing the origins of this principle and commenting on JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008)). However, Whitman responded to Shapiro's criticism. *See* James Q. Whitman, *Response to Shapiro*, 2 LAW & HUMAN. 175 (2008) (responding to Shapiro's claims).

163 *See, e.g.*, Damaška, *supra* note 116, at 1088.

164 C. PR. PÉN., art. 312. However, it appears that, although permitted, cross-examination of adverse witnesses is rare in practice. *See* Frase, *supra* note 90, at 234.

Germany,[165] Italy,[166] and Spain, where the Criminal Procedure Act of 1882[167] remains in force to this day. Lastly, cross-examination is explicitly mentioned in European and international texts, such as the European Convention of Human Rights,[168] which is also enforced in European countries.

Another classic feature of the adversarial system is the right to a jury trial.[169] The right to jury trial hardly exists in European countries, let alone to the magnitude it does in the Sixth Amendment of the Constitution and in U.S. criminal procedure.[170] However, there is a sort of lay participation in the process of adjudication in criminal proceedings, which usually takes place in the mixed-court model.[171] In some cases, the Anglo-Saxon model

165 STPO, § 239. This provision has little practical relevance, as both the prosecution and defense can apply it jointly. However, this hardly happens and when it does, the assent of the presiding judge is required. As a result, the repeal of this provision has been proposed. *See* BOHLANDER, *supra* note 88, at 119.

166 C.p.p., art. 498. Though the presiding judge in Italy may question witnesses as well, according to Article 506; nevertheless, this judicial questioning may occur only after direct cross-examination by the parties. *See* Van Claeven, *supra* note 126, at 343.

167 L.E. CRIM., art. 708. Similar to Italy, in Spain the presiding magistrate can also ask questions, but only after questioning has been conducted by the parties. In fact, it appears that Spain became the first country to incorporate cross-examination at the trial stage. *See* Volkmann-Schluck, *supra* note 75, at 1. Confrontation between witnesses and the accused is even provided by Article 451 of the statute. *Id.* art 451. *See also* comments by Murray, *supra* note 106, at 44.

168 ICPPR, art. 14(3)(e), *supra* note 81; ECHR, art. 6(3)(d), *supra* note 81; *see* Marianne Holdgaard, *The Right to Cross-Examine Witnesses—Case Law Under the European Convention on Human Rights*, 71 NORDIC J. INT'L L. 83 (2002). The European Court upheld a violation of Article 6(3)(d) as far as the applicant was "unable to test the truthfulness and reliability of T's evidence by means of cross-examination." *See* Al-Khawaja & Tahery v. United Kingdom, 2011 Eur. Ct. H.R. 2127, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108072.

169 *See* Valerie P. Hans, *U.S. Jury Reform: the Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85 (2002) (detailing the jury system in the adversarial model). For discussion of the right to a jury trial in American jurisprudence, see Kimberly A. Mottley et al., *An Overview of the American Criminal Jury*, 21 ST. LOUIS U. PUB. L. REV. 99, 100 (2002) and Marder, *supra* note 98, at 35.

170 *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869 (1994) (offering a historical background within the U.S.); Symposium, *The Common Law Jury*, 62 LAW & CONTEMP. PROBS. 1 (1999); WORLD JURY SYSTEMS (N. Vidmar, ed., 2000) (providing a general view of the jury in common law countries); Vogler, *supra* note 2, at 193 (offering an international perspective on the jury trial).

171 For example, *Cour d'asisses* in France, *Schöffengericht* in Germany, *Corte di assisi* in Italy, *Tribunal dó juri* in Portugal. *See* Jimeno-Bulnes, *supra* note 72, at 305. For references to different European models, see the study conducted by John D. Jackson and Nikola Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 94 (2006). For a general approach, see Symposium, *Le Jury Dans le Procès Pénal au XXè*

of jury court has been adopted, like in Spain. Criminal procedure legislation in France, Germany, Italy, and Portugal has adopted this mixed-court model, with the interaction of lay assessors and professional judges, following the diminuition of jury courts some decades ago.[172] In contrast, Spain instituted its jury model in 1995, inspired by the common law system, which included distinctive characteristics dating back to its earlier juridical history.[173] These features, related to the requirement for a reasoned verdict,[174] make the institution unique in the context of European criminal procedure models. Since their introduction, jury trials in Spain have functioned according to a schema very close to the classic Anglo-Saxon model, despite the reluctance of many scholars, practitioners, and the courts themselves.[175]

However, the greatest American influence in European criminal procedures is a controversial mechanism with a very recent history: the plea bargain.[176] It is a modality of the guilty

Siècle (Lay Participation in the Criminal Trial in the 21st Century), 72 REVUE INTERNATIONALE DE DROIT PÉNALE 1 (2001), as well as Vogler, *supra* note 2, at 233. On the joint functioning of lay assessors and professional judges, see S. Kutnjak Ivkovic, *An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals*, 25 LAW & POL'Y 93 (2003) (providing several examples of personal interviews).

172 *See* Francois Gorphe, *Reforms of the Jury-System in Europe: France and Other Continental Countries*, 27 J. CRIM. L. & CRIMINOLOGY 155 (1936); Hermann Manheim, *Trial by Jury in Modern Continental Criminal Law*, 53 L. Q. REV. 388 (1937); *see also* Valerie P. Hans & Claire M. Germain, *The French Jury at Crossroads*, *Symposium on Comparative Jury Systems*, 86 CHI.-KENT L. REV. 737 (2011); Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972); Juan Montero Aroca, *Las "Corti di Assisi" en Italia*, REVISTA DE DERECHO PROCESAL 2, 325 (1970); Arturo Alvarez Alarcón, *El Jurado en Portugal: Estatuto, Competencia y Procedimiento de Delección*, ANUARIO DE LA FACULTAD DE DERECHO 5, 249 (1987) (discussing the jury systems in France, Germany, Italy, and Portugal, respectively).

173 *See generally* Mar Jimeno-Bulnes, *Lay Participation in Spain: The Jury System*, 14 INT'L CRIM. J. REV. 164 (2004); *see also* Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L COMP. L. REV. 241 (1998); CARMEN GLEADOW, HISTORY OF TRIAL BY JURY IN THE SPANISH LEGAL SYSTEM (2000).

174 *See* Mar Jimeno-Bulnes, *A Different Story Line for 12 Angry Men: Verdicts Reached by Majority Rule—The Spanish Perspective*, 82 CHI.-KENT L. REV. 759, 769 (2007); Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in* Taxquet v. Belgium, 86 CHI.-KENT L. REV. 613, 630 (2011).

175 *See* Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI.-KENT L. REV. 585, 602 (2011) (referring to the practice of restricting the competence of jury courts). The anticipated settlement of particular agreements between the accused and the prosecutor is considered a sort of plea bargaining, which is not provided for in the current law pertaining to juries. *Id.*

176 Plea bargaining in England and the U.S. did not become prominent until the 19th century, when efficiency of the criminal process became an issue in both countries. *See*

plea[177] and is considered both a product and a failure of the adversarial model of criminal procedure. It is a product of the adversary model in that it takes place in a party-centered criminal procedure where practical considerations often favor the disposal of the proceeding. Thus, the plea bargain emerges a sort of contract, if not compromise[178] between prosecutor and accused or, more exactly, the defense counsel, similar to a settlement between litigants in the civil justice system.[179] Due to the complicated and time-consuming nature of the adversarial system, this substitutive mechanism is now the general rule in U.S. courts.[180]

In fact, it appears that a two-tier system in criminal procedure exists. Two models of justice are now present: (1) the jury trial, a more complicated one that should be the general rule and (2) the

John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 262 (1979); *see also* Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1 (1979); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979); Jay Wishingrad, *The Plea Bargain in Historical Perspective*, 23 BUFF. L. REV. 499 (1973). On plea bargaining in English Law, see John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287 (1979). For a comparative view between both common law systems, England and U.S., see H.H.A. Cooper, *Plea Bargaining: A Comparative Analysis*, 5 N.Y.U. J. INT'L L. & POL. 427 (1972).

177 *See* FED. R. CIV. P. § 11(c) (2010). The "plea agreement" is also called a "plea negotiation" by some authors. *See* LAFAVE ET AL., *supra* note 139, at 999. FED. R. CIV. P. § 11(a)(1) also distinguishes three categories of pleas: not guilty, guilty, and *nolo contendere* (which, in contrast to a guilty plea, does not require a formal admission of guilt). The plea bargain is a guilty plea; however, not all guilty pleas are result of a plea bargain. A plea bargain implies a guilty plea by the defendant in exchange for any sort of concession or benefit from the prosecution. *See* CAMMACK & GARLAND, *supra* note 160, at 265. There are also different types of bargains according to former FED. R. CIV. P. § 11(c)(1), such as "charge bargain" or "sentence bargain," relating to agreements on charges and sentences, respectively. *See* MILLER & WRIGHT, *supra* note 139, at 1101.

178 *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992). In contrast, criticism on the contractual approach of plea bargaining is supported by Jennifer Rae Taylor, *Restoring the Bargain: Examining Post-Plea Sentence Enhancement as an Unconscionable Violation of Contract Law*, 48 CAL. W. L. REV. 129, 136 (2011) (reasoning that the contract model cannot be applied here because no judicial protection for the defendant is provided in these bargains).

179 *See* Volkmann-Schluck, *supra* note 75, at 25; *see also* Dominick R. Vetri, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964) (providing examples of plea arrangements between prosecutor and defense through figures and statistics); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968) (arguing that the prosecutor can act as administrator, advocate, judge or legislator with different motives in order to grant concessions in all cases).

180 *See* KAGAN, *supra* note 6, at 66 (criticizing and reviewing executions in the U.S. after sequential appeals).

plea bargain, a more simple model.[181] The plea bargain, as an alternative to the jury trial, operates like an advantageous deal for the defendant,[182] as well as the prosecutor and judge. Despite the absence of any judicial intervention or oversight,[183] the plea bargain provides a fast-track solution to an overloaded administration of justice. As has been said, "the defendant waives his right to trial in exchange for a more lenient sanction," meanwhile, "the prosecutor is relieved of the need to prove the accused's guilt and the court is spared having to adjudicate it."[184] For this reason, on the basis of its administrative convenience, the Supreme Court has recognized its constitutionality.[185] The same economic point of view[186] has made plea bargains essential for the survival of the system, as no less than ninety percent of criminal cases in the U.S. criminal justice system result in guilty pleas.[187]

181 *See* Weigend, *supra* note 19, at 405 (arguing that the prototype of this two-tier system is American criminal process).

182 Plea bargains are often referred to as an advantageous deal. *See* WAYNE R. LAFAVE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION 436 (2009); Thaman, *supra* note 8, at 469.

183 *See* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUMB. L. REV. 1059, 1060 (1976).

184 John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 8 (1978) (criticizing the practice of plea bargaining). The author draws a comparison between medieval torture and plea bargaining in the twentieth century based upon the understanding that criminal procedure today mirrors the historical medieval experience, as the adjudicative function is eliminated in both cases and a concessionary system is applied. In addition, both systems are coercive and differences may only be appreciated in "degree, not kind." *Id.* at 13.

185 It has been qualified as an "essential component of the administration of justice" by the Supreme Court. *See* Santobello v. New York, 404 U.S. 257, 260 (1971) (according to the Court, plea bargaining, "properly administered, it is to be encouraged" because "if every criminal charge were subject to a full-scale trial, the states and the Federal Government would need to multiply by many times the number of judges and court facilities."); *see also* Brady v. United States, 397 U.S. 753, 762 (1970) (presenting the advantages of plea bargaining: for the defendant, "his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated," and for the state, "the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of the trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the state can sustain its burden of proof.").

186 For this reason, the expression "bargaining incentive theory" has been used; by which, the adversary system is looked at "not in terms of intellectual justifications, but in terms of its practical effects." *See* Goodpaster, *supra* note 94, at 139.

187 *See* MILLER & WRIGHT, *supra* note 139, at 1101; *see also* David S. Abrams, *Is Pleading Really A Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200 (2011); Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the*

Buoyed by its supporters[188] and reformers,[189] and even indirectly by its detractors,[190] the plea bargain has reached the European continent, where criminal procedure is intended to be judge-centered. It has advanced in a sort of "triumphal march of consensual procedures"[191] to the point where there are now plea bargaining institutions in France,[192] Germany,[193] Italy[194] and

Innocent, 46 CRIM. L. BULL. 5 (2010) (the latter arguing that the number of guilty pleas increased from 87%, in 1990 to 95%, in 2010). Between 1956 and 1962, there were approximately 80% guilty pleas or *nolo contendere*. *See* Packer, *supra* note 12, at 221; *see also* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975) (discussing statistics on guilty pleas and providing a contemporary example of a survey).

188 *See, e.g.*, Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509 (1979); Easterbrook, *supra* note 178; Scott & Stuntz, *supra* note 178.

189 *See* Editorial, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972). Experiments have also taken place in an effort to reform the system. *See, e.g.*, Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349 (1979). Finally, suggestions for comparative studies of other models of plea bargaining, such as those existing in Europe and particularly in Germany have been followed. *See* Markus D. Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547 (1997).

190 *See, e.g.*, Langbein, *supra* note 184; *see also* Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

191 Thaman, *supra note* 8, at 469. A sort of New Legal Bargaining Theory has even been created in a general context, in which plea bargaining can be included. *See* Robert J. Condlin, *Bargaining Without Law*, 56 N.Y.L. SCH. L. REV. 281, 283 (2011).

192 C. PR. PÉN., arts. 40-42 (under the name of *composition pénale* and in relation to such offenses with a penalty of up to five years of imprisonment). Specific provisions were subsequently introduced by the legislature. Loi 99-515 du 23 juin 1999 renforçant l'efficacité de la procédure pénale [Law 99-515 of June 23, 1999 Enhancing the Effectiveness of Criminal Proceedings], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 24, 1999, p. 09247. *See* Langer, *supra* note 10, at 58; Weigend, *supra* note 19, at 406. Both authors also make reference to plea bargaining in Germany and Italy.

193 The most significant provision today is Gesetz zur Regelung der Verständigung im Strafverfahren [Law Regulating Agreements in Criminal Proceedings], July 29, 2009, BUNDESGESETZBLATT, Teil I [BGBL. I] at 2353, § 257(c) (including a general regulation of *Absprach*); *see* BOHLANDER, *supra* note 88, at 120. However, plea bargaining already existed much earlier in Germany in judicial practice. *See* William L. F. Felstiner, *Plea Contracts in West Germany*, 13 LAW & SOC'Y REV. 309 (1979).

194 C.p.p., art. 446. The conditions for plea bargaining are established under Articles 444 through 448, entitled "Applicazione della pena su richiesta della parti," which translates to "Application of the Punishment upon the Request of the Parties." Nevertheless, the institution is commonly known as *patteggiamento*, which also means "bargain." There is also a punishment limit, which is once again a maximum of five years imprisonment. The introduction of this *patteggiament*o occurred during the renewal of the Italian Criminal Procedure Code. Decreto Presidente della Repubblica [D.P.R.] 22

Spain,[195] despite its extraneous origin. In fact, all criminal procedures apply the legality principle (*nulla poena sine lege*), are judge-centered, and the concept of a guilty plea as such is unknown.[196] Nevertheless, plea bargaining is another symptom of the "opportunity principle" (or discretional prosecution), which now operates as an exceptional rule in European criminal procedures, and the plea bargain has been welcomed for the same reasons as in the U.S. criminal justice system.

In this context, although plea bargaining regulations in France, Germany, Italy, and Spain present their inevitable and logical differences, a common aspect in relation to common law systems is that judicial control of the plea bargain reached between the prosecutor and defense counsel usually takes place at the appropriate hearing.[197] This judicial monitoring guarantees the fairness of the deal and should avoid some of the problems related to U.S. plea bargaining; particularly, the lack of legal counsel[198] and the pressure imposed by prosecutors so that the accused

settembre 1988, n. 47, in G.U. Oct. 24, 1988; n. 250 Suppl. Ord. (It.). *See* Grande, *supra* note 126, at 253; Pizzi & Montagna, *supra* note 24, at 437.

195 L.E. CRIM., art. 787. The original Spanish law still in force was enacted in 1882, a far-reaching amendment took place following the Italian example and thus, an abbreviated proceeding with this possibility of plea bargaining was introduced. De los Juzgados de lo Penal, y por la que se modifican diversos preceptos de las Leyes Orgánica del Poder Judicial y de Enjuiciamiento Criminal (B.O.E. 1988, 313) (Spain). Also, a punishment limit was required, in this case of up to six years of imprisonment. *See* SILVIA BARONA VILAR, LA CONFORMIDAD EN EL PROCESO PENAL (1994); Silvia Barona Vilar, *La Justicia Negociada*, *in* LA CRIMINALIDAD ORGANIZADA ANTE LA JUSTICIA 85 (Faustino Gutiérrez-Alviz Conradí ed., 1996).

196 *See* Langer, *supra* note 10, at 37. As mentioned previously, it is the institution of confession that takes place in European criminal procedures, as well as the admission of facts. For a difference between confession and admission, see MCCORMICK'S HANDBOOK, *supra* note 140, at 310.

197 This is demonstrated in Spain's Code of Criminal Procedure where it is the defense counsel who makes a request for a "judgment of conformity" from the magistrate or court before beginning to present the evidence. L.E. CRIM, § 787(1). *See* Juan Manuel Fernández Martinez, *El Control Judicial de la Conformidad en el Proceso Penal*, REVISTA ARANZADI DOCTRINAL 10, 41 (2012) (discussing judicial supervision in this context).

198 The Supreme Court has recognized the waiver of counsel by the accused. *See* Johnson v. Zerbst, 304 U.S. 458 (1938); BEANY, *supra* note 80, at 61; *see also* Erin A. Conway, *Ineffective Assistance of Counsel: How Illinois Has Used the "Prejudice" Prong of* Strickland *to Lower the Floor on Performance When Defendants Plead Guilty*, 105 NW. U. L. REV. 1707, 1711 (2011) (detailing the relationship between guilty pleas and ineffective assistance of counsel; also pointing out that, despite the logical assumption, a portion of innocent defendants plead guilty, arguing that the cause of their unfounded pleas is the absence of legal counsel); Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425 (2011).

accepts the guilty plea.[199] The judicial authority should act as the main defender of the criminal proceeding and not merely remain mute, as happens in the adversarial systems.

V. CONCLUSION

Having presented the origins of different criminal procedural models under the common law and the civil law traditions, as well as some of the specific features attached to both adversarial and non-adversarial criminal procedures, it is apparent that adversarial characteristics have had varying degrees of impact on the criminal procedures of Europe. Accordingly, it may be said that up until the present, the one-way influence that has taken place, with European jurisdictions adopting aspects of U.S. criminal procedure, may be best explained by the arguable superiority of the American criminal model. This reasoning seeks to extend itself as a sort of medieval reception of *ius commune* (common law).[200] All European criminal systems are willing to become increasingly adversarial and projected reforms are usually designed to move their justice systems towards this ideal.

Nevertheless, concerns have been raised as to whether such legal transplants[201] can exist and thrive in an extraneous criminal procedure body, where principles and functions differ from the original pattern. Legal institutions are delicate and not easily

199 *See* Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 168 (1964) (providing examples of such inducements); *see also* George W. Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System*, 36 LA. L. REV. 947, 967 (1976) (referencing the peril of plea negotiation between the defense counsel and the prosecuting attorney under the "neutral hand of the judge" especially in the case of "vulnerable" (e.g., uneducated) defendants). Stronger criticism can be found in Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737 (2009) (discussing the use by the prosecution of a "threat" to take the defendant to trial), and H. Mitchell Caldwell, *Coercive Plea Bargaining: the Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011) (detailing on other prosecutorial abuses).

200 *See* Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 230 (1991) (drawing an interesting comparison between the reception of American Law today and reception of Roman Law in the Middle Ages in Europe); *see also* Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL L. REV. 351 (2002) (detailing U.S. influence on international judiciary models).

201 *See supra* note 9 and accompanying text; *see also* Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994) (relating to the shift from civil to common law).

grafted onto different *corpus iuris*[202] and the difficulty is increased if, in this case, criminal procedures belong to different legal systems.[203] The best example of a legal transplant is undoubtedly the plea bargain, which has been extended not only to European national procedures but also to international institutions such as the International Criminal Court (ICC).[204] In fact, the criminal procedure practiced before the ICC demonstrates the convergence of both legal traditions, giving place to a *sui generis* model with adversarial and non-adversarial elements.[205]

Admittedly, one may ask whether it is necessary to characterize international and national criminal procedures. However, what should be of general concern is not the formal taxonomy of criminal procedures, but instead, the taxonomy of the principles or values, especially in order to promote procedural fairness.[206] This goal is not always easy to achieve but it should be maintained and strived for at all times. It has been argued that the right to a fair trial corresponds not only to the accused but to the state as well.[207] In the author's view, the state—as the main

202 Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998) (criticizing what he calls "legal surgery"). Although the author makes no specific reference to criminal procedure, his theory can also be applied to it.

203 A good example is the Italian criminal procedure code, which is considered the most adversarial (or accusatorial) of European criminal procedure frameworks. However, since its enactment in 1988, it has endured several reforms regarding the coexistence of adversarial and non-adversarial elements are not easily rectified. *See* Panzavolta, *supra* note 24, at 591.

204 The plea bargain, initially, could be included within the general scope of Article 54, section (3)(d) of the Rome Statute. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (Jun. 15, 1998) [hereinafter Rome Statute], *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm; *see also* Mirjan R. Damaška, *Negotiated Justice in International Criminal Courts*, 2 J. OF INT'L CRIM. JUST. 1018, 1036 (2004).

205 *See* VOGLER, *supra* note 2, at 277-78; *see also* Kai Ambos, *International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1 (2003) (concluding on the existence of this *sui generis* or mixed model); Linda E. Carter, *The International Criminal Court in 2021*, 18 SW. J. INT'L LAW. 199, 200 (2011). The ICC "employs an adversarial model for trial with party presentation of evidence but also incorporates civil law features such as legal representation of victims by counsel and victim participation in the court proceedings." *Id.* An interesting relationship can also be drawn between the U.S. and the ICC with respect to criminal procedure. *See* Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: a Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528 (2011).

206 *See* Mirjan Damaška, *The Competing Visions of Fairness: the Basic Choice for International Criminal Tribunals*, 36 N.C. J. INT'L L. & COM. REG. 365 (2011) (relating to the ICC).

207 Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*,

provider of the administration of justice—has the more specific obligation to provide this procedural fairness because the state that holds the jurisdictional authority (*potestas*).[208] Taking this into account, the real challenge is achieving an ideal criminal procedure.[209] In this light, it appears that the adversarial system as demonstrated in the U.S. trial is the ideal criminal procedure model.

However, various failures in the U.S. criminal justice system have been identified and are currently being debated.[210] With regard to adversariness and the role played by both parties in a criminal trial, a pessimistic picture has been painted: one in which prosecutors are arguably more concerned with winning than with justice.[211] Furthermore, the degree of defense attorney commitment is often commensurate with the amount of money the defendant is able to provide.[212] Undoubtedly, the court caseload appears much more prejudicial for indigent defendants, who are represented by court-appointed lawyers or public defenders.[213] Due to this representation, criminal courts are regarded as "marketplaces in which the only commodity traded seriously is

60 S. CAL. L. REV. 1019 (1987) (striking a balance between the rights of the accused and the state).

208 *See supra* note 65 and accompanying text; Pedraz Penalva, *De la Jurisdicción Como Competencia a la Jurisdicción Como Órgano*, *in* CONSTITUCIÓN, JURISDICCIÓN Y PROCESO 43 (E. Pedraz Penalva ed., 2000).

209 *See* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 134 (1935). Arnold states that "[t]he ideal of a fair trial, of course, is constantly in conflict with other ideals." *Id.* at 143. For example, "an attorney should not take cases the winning of which imperils the forces of law and order; every criminal, however, is entitled to a defense; criminal lawyers, however, should not resort to mere technicalities; nevertheless they should do everything legally possible for their clients." *Id.* at 143-44. Also, on the difficulties of criminal justice in general, see POUND, *supra* note 46, at 36.

210 Editorials in U.S. periodicals often discuss the failures or shortcomings of the U.S. criminal system.

211 *See* BRUCE JACKSON, LAW AND DISORDER: CRIMINAL JUSTICE IN AMERICA 81 (1984) (arguing that "there is no way to measure the *quality* of justice garnered or served or delivered, but it is easy enough to count convictions, to calculate the win/lose ratio.").

212 *Id.* at 99 (stating that "[t]ruly energetic and extensive defenses are rare" and that "[t]he most common service rendered by court-appointed and public defender lawyers is that of middleman in a quickly negotiated plea of guilty.").

213 *See* Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 422 (2011) (presenting a strong relationship between plea bargains and representation of defendants by the public defender, insofar as "ninety-five percent of convictions are the result of plea bargains" and "most defendants who plead guilty are represented by public defenders."). Nevertheless, this is preferable to lack of counsel throughout plea bargaining arrangements; *see supra* note 198 and accompanying text.

time."[214]

In regards to the adversarial trial, which has emerged as the ideal, it may also be pointed out that some landmarks of adversariness itself are currently missing. For example, despite the right of cross-examination according to the Confrontation Clause, out-of-court statements by witnesses are now admissible in certain circumstances.[215] The discovery rule furthered in *Brady v. Maryland*,[216] under which prosecutors have a constitutional duty to disclose evidence that is favorable to criminal defendants, is not always observed (as the case itself reveals). In fact, complaints by practitioners and scholars have addressed this shortcoming.[217] However, the U.S. Supreme Court has yet to rule explicitly on this matter. It is a common wish amongst the legal community for the Court to dictate a standard regarding compulsory disclosure by the prosecution of evidence favorable to the defendant.[218]

If there is concern over fairness and the observance of due

214 JACKSON, *supra* note 211, at 77.

215 *See* Ohio v. Roberts, 448 U.S. 56 (1980) (thought overruled by Crawford v. Washington, 541 U.S. 36 (2004)). However, subsequent Supreme Court decisions make hearsay available for use following the distinction between "testimonial hearsay, which requires confrontation and non-testimonial, which does not." Marc McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 475 (2011). Criticism is also directed at recent Court decisions such as Michigan v. Bryant, 131 S.Ct. 1143 (2011), where a sort of "ongoing emergency" doctrine is introduced, in order to make available extrajudicial statements. *See* Mark S. Coven & James F. Comerford, *What's Going On? The Right to Confrontation*, 45 SUFFOLK U. L. REV. 269 (2012); K. Polonsky, *A Defense's Attorney's Guide to Confrontation after* Michigan v. Bryant, 36 VT. L. REV. 433 (2011); Shari H. Silver, Michigan v. Bryant*: Returning to an Open-Ended Confrontation Clause Analysis*, 71 MD. L. REV. 545 (2012).

216 *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). The Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id. See also* Daniel Conte, *Swept Under the Rug: The* Brady *Disclosure Obligation in a Pre-Plea Context*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 74, 78 (2012) (commenting on and criticizing the shortcomings in *Brady*).

217 *See* Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1136 (1982) (pointing to differences between the adversarial and inquisitorial systems). Impeachment evidence, the evidence to be used by the defendant in order to undermine the credibility of witnesses presented by the prosecutor, is an example of the type of evidence to be disclosed. This sort of evidence is typically introduced during cross-examination and presents problematic questions such as when and whether it should be disclosed at all. *See* R. Michael Cassidy, *Plea Bargaining, Discovery and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1431 (2011).

218 *See* Editorial, *Justice and Open Files*, N.Y. TIMES, Feb. 26, 2012, http://www.nytimes.com/2012/02/27/opinion/justice-and-open-files.html; *see also* Conte, *supra* note 216, at 101 (claiming there should be "clear and unambiguous legislation.").

process of law in adversarial trials, the avoidance of trial by entering a guilty plea and/or plea bargaining is highly questionable. The aforementioned lack of counsel, or pressure on the defendant to accept the deal, has recently been discussed in two Supreme Court decisions, where a broader right to counsel is suggested.[219] At the very least, it appears as though this important guarantee for a defendant shall be better provided for, as it is especially important in the context of plea bargains. Until recent times, the high number of plea bargains present in both federal and state courts[220] has yet to be solved, although scholars have suggested alternatives.[221] The conclusion at this point is that American criminal justice is being defined through plea bargaining practices, not through the adversarial trial which is the ideal model to copy.

This prompts questions of efficiency: the ideal adversarial trial is not always efficient, but efficiency is also a fundamental component of the administration of justice.[222] This is an old concern, with related examples presented by scholars at the beginning of the last century.[223] Hence the emergence of the aforementioned remedies such as the plea bargaining institution, which should operate as a just-in-case, "exhaust valve," but can never be a substitute for a fair trial. If the essential centerpiece of criminal procedure, the trial, is so complex and cumbersome that it becomes overly difficult to administer, there will be sufficient reason to rework the whole criminal procedure. In fact, legal

219 *See* Missouri v. Frye, 132 S.Ct. 1399 (2012); Lafler v. Cooper, 132 S.Ct. 1376 (2012).

220 Currently, it appears that ninety-seven percent of federal convictions and ninety-four percent of state convictions come from guilty pleas negotiated between prosecutors and offenders. Editorial, *A Broader Right to Counsel*, N.Y. TIMES, March 22, 2012, http://www.nytimes.com/2012/03/23/opinion/a-broader-right-to-counsel.html?_r=0.

221 *See, e.g.*, Pugh, *supra* note 199, at 961 (referencing the possibility of establishing fast-track trials). That author, in his presentation, draws a comparison between the American and the French criminal systems. *Id.* In the general context of reforms in both common law criminal procedures and civil law procedures, see Damaška, *supra* note 117, at 845.

222 *See* Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987) (drawing a comparison related to civil and criminal procedure between the U.S. and Germany).

223 *See* Henry B. Brown, *The Administration of the Jury System*, 17 GREEN BAG 623, 625 (1905) (describing the delays in criminal procedure at the time)l; *see also* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 742 (1906) (arguing that "our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, the direct results of the organization of our courts and the backwardness of our procedure . . . .").

procedures should be a means and not an end in themselves, in order to make criminal law effective,[224] recalling at all times that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."[225]

224 *See* Joseph D. Grano, *Implementing the Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure—Part I*, 32 WAYNE L. REV. 1007, 1007 (1986).

225 Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956). The same statement is included in Miranda v. Arizona, 384 U.S. 459, 480 (1966).