AMERICAN CRIMINAL PROCEDURE IN A EUROPEAN CONTEXT

Mar Jimeno-Bulnes*

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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* Visiting Professor of Law at the Chicago-Kent College of Law (2011-2012) and Full Professor of Procedure Law at the University of Burgos (Spain); addresses for correspondence: mbulnes@kentlaw.iit.edu and Mjimeno@ubu.es. A first draft was presented on April 10, 2012 at the Chicago-Kent Spring Seminars; I appreciate the comments from Professors Joan Steinman, Carolyn Saphiro, César Rosado, Felice Batlan, Marsha Ross-Jackson, Richard Wright, and Sanford Greenberg. Also, many thanks to Professor Sarah Harding for her suggestions, to David Gerber and Nancy S. Marder for their encouragement; my gratitude to Professor Susan Adams and criminal defense attorney Steven W. Becker for their support. Last, but not least, I wish to thank Stephanie Crawford and Scott Vanderbilt for their resourceful research assistance and Antony Price for reviewing the English syntax. This research was conducted with funding from the Spanish Ministry of Education and the Regional Government of Castile and León.

I. INTRODUCTION

In Europe and the United States, two different global legal traditions exist: 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. 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.

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. In contrast to civil


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. Naftziger & 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 & PEREZ-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 converging9 due to the countless criminal proceedings around the world, coupled with the specific influence of the U.S. legal system.10 This phenomenon supports

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


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 possess 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

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\(^{11}\) 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
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\(^\text{16}\) (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.\(^\text{17}\)

Over many years, and especially in the 1960s,\(^\text{18}\) 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.\(^\text{19}\) In contrast, others sought to dispel the importance of

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\(^{17}\) *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).

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.\textsuperscript{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.\textsuperscript{21} Controversy arose between scholars due to the perceived similarity of judicial practices in Europe and miscarriages of justice in the United States.\textsuperscript{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,\textsuperscript{23} or vice versa. A

the presence of inquisitorial elements in the American adversarial system due to European influences at that time. \textit{Id.}

\textsuperscript{20} Abraham S. Goldstein & Martin Marcus, \textit{The Myth of Judicial Supervision in Three \textquotedblleft Inquisitorial\textquotedblright\ 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.

\textsuperscript{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 \textsc{Lloyd L. Weinreb}, \textit{Denial of Justice} 117-46 (1979); \textit{see also} John Thibaut & Laurens Walker, \textit{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).

\textsuperscript{22} See John H. Langbein & Lloyd L. Weinreb, \textit{Comparative Criminal Procedure: \textquotedblleft Myth\textquotedblright\ and Reality}, 87 YALE L.J. 1549 (1978). The authors address strong criticism to previous research by Abraham S. Goldstein and Martin Marcus, \textit{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 \textit{Comment on Continental Criminal Procedure}, 87 YALE L.J. 1570 (1978), supporting their previous statements. More recently, see, for example, Keith A. Findley, \textit{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).

A 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; even following an appeal of the two accused that led to their acquittal. 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.

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).

One may ask whether the terms should be...
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,
respecting the existence of the mixed model\(^\text{\textsuperscript{27}}\) that is, in contrast,
upheld by European scholars. There is a rich history in Europe
supporting this third model.\(^\text{\textsuperscript{28}}\) In particular, the Napoleonic \textit{Code
d'Instruction Criminelle}, adopted in France in 1808, is hailed as a
landmark and starting point of this model.\(^\text{\textsuperscript{27}}\) The number of existing models of criminal procedure passed
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supporting this third model.\(^\text{\textsuperscript{28}}\) In particular, the Napoleonic \textit{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

\(^{27}\) 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.” \textit{Id.} at 1016. The bipartite position is also adopted in
English scholarship. See \textit{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, \textit{A HISTORY OF CONTINENTAL CRIMINAL
PROCEDURE} (1913) (translating into English the original French version, \textit{HISTOIRE DE
LA PROCÉDURE CRIMINELLE EN FRANCE, ET SPECIALEMENT DE LA PROCÉDURE
INQUISITIOIRE 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.\textsuperscript{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.\textsuperscript{30}

\textbf{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.\textsuperscript{31} The model replaced trials by battle and ordeals, which were definitively prohibited in 1219 by Henry III.\textsuperscript{32} Common law emerged in England in the 12th century, where a sort of royal justice had existed since the times of the Anglo-

\textsuperscript{29} Goldstein, \textit{supra} note 15; see Jacqueline Hodgson, \textit{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, \textit{Criminal Procedure in Scotland}, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 728 (1913); see also Allard Ringnalda, \textit{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.”).

\textsuperscript{30} This practice largely came to an end in Europe during the 12th and 13th centuries. See Robert Bartlett, \textit{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/latera4.htm. According to this statement, trial by battle (duels) had been prohibited before trial by fire and water.

\textsuperscript{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, \textit{supra} note 28, at 18. Nevertheless, inquisitorial elements gradually developed in Roman criminal procedure during the period of Republic. See Kai Ambos, \textit{El Principio Acusatorio y el Proceso Acusatorio: Un Intento de Comprender su Significado Actual Desde la Perspectiva Histórica}, in \textit{PROCESO PENAL Y SISTEMAS ACUSATORIOS}, \textit{supra} note 26, at 49, 51.

\textsuperscript{32} Ploscowe, \textit{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, \textit{supra} note 30, at 103-05; see also Paul R. Hyams, \textit{Trial by Ordeal: The Key to Proof in the Early Common Law}, in \textit{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). The activity of the royal court paved the way for important treatises compiled by Glanvill and Bracton 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.” The first treatise was also a crucial component in the emergence of common law practice, compiling a “law of the writs” 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. 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).

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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.


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 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” 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. 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

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.”).
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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).

heresies in Europe (especially in the South of France)\textsuperscript{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,\textsuperscript{49} nor was it the first inquest in history. In fact, another sort of inquest existed under the name of \textit{pesquisa} that began in the 11th century in some parts of Europe as an exemption to the earlier ordeals.\textsuperscript{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.\textsuperscript{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.\textsuperscript{52} With this new model, the magistrate or judge was authorized to undertake an objective investigation of

\begin{footnotes}
\footnote{48 Esmein, \textit{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, \textit{Inquisitions and Other Trial Procedures in the Medieval West} (2001) (relating to ecclesial procedures); John H. Langbein, \textit{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. \textit{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 torture was a more humane system of proof. \textit{Id.} at 6.}

\footnote{49 Esmein points to the use of the inquest as an alternative to the \textit{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 \textit{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, \textit{Prosecuting Crime in the Renaissance: England, Germany, France} 5-6 (2005).}

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

\footnote{51 Illuminati, \textit{supra} note 24, at 301.}

\footnote{52 See \textit{Esmein supra} note 31; see also Langbein, \textit{supra} note 49, at 129 (discussing the role played by the church and Roman-canon law).}
\end{footnotes}
the crime without having to wait for a formal accusation.\textsuperscript{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 juridical knowledge over time. As a result, a new complex and technical law of evidence, coined legal proof (\textit{preuve légale}), emerged.\textsuperscript{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 \textit{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.\textsuperscript{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,\textsuperscript{56} but it reached its peak with the Criminal Ordinance of 1670 (\textit{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.\textsuperscript{57} The ordinance was even referred to as the \textit{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

\textsuperscript{53} Ploscowe, \textit{supra} note 18, at 447.
\textsuperscript{54} \textit{European Criminal Procedures}, \textit{supra} note 11, at 9.
\textsuperscript{55} \textit{Esmein}, \textit{supra} note 28, at 251.
\textsuperscript{56} \textit{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. \textit{Id.}
\textsuperscript{57} The declaration “I am the state” (l’État c’est moi) by Louis XIV is now famous. \textit{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.\textsuperscript{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 prosecutorial 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;\textsuperscript{59} it provided channels for appeals; and the right to a double degree of jurisdiction was upheld.

\textbf{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.\textsuperscript{60} It is nevertheless included because its emergence 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 (\textit{Code d'Instruction Criminelle}),\textsuperscript{61}

\textsuperscript{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).

\textsuperscript{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.” \textit{Id.} Article 8 makes reference to the compulsory swearing of oath by the accused: “[i]f the 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). \textit{Id.}


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, 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. It has been argued by some scholars that the system represents a compromise between the former Criminal Ordinance of 1670 and English criminal procedure.

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. 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. 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_tm.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 DERECHO 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 secret68 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 Spain71. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{73} New legislation has been proposed and is currently under discussion. See Actividad Legislativa, MINISTERIO DE JUSTICIA, GOBIERNO DE ESPAÑA, http://www.mjusticia.gob.es/cs/Satellite/es/1215198252237/DetalleActividadLegislativa.htm l (last visited June 21, 2012).

\textsuperscript{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 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.

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. 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.

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

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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).


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.\textsuperscript{80} It should be recognized as an overarching principle in all European constitutional rules, as well as in supranational European texts.\textsuperscript{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”\textsuperscript{82} which emerged during the Warren Supreme Court era, the best example of which is the Court’s ruling in \textit{Miranda v. Arizona}.\textsuperscript{83} Thus, to discuss

\textit{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. \textit{Id.}

\textsuperscript{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.), \textit{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 \textit{William Merritt Beany, The Right to Counsel in American Courts} 142 (1977).


\textsuperscript{83} \textit{Miranda v. Arizona}, 384 U.S. 436 (1966); \textit{see Welsh S. White, Miranda’s Waning Protections} 1 (2004) (describing \textit{Miranda} as the most famous criminal
inquisitorial criminal procedure is a *contradictio in terminis.* 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

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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.


89 See Montero Aroca, supra notes 79 passim; supra note 86, at 19.
how to best reconstruct the criminal procedure of its own countries,\textsuperscript{90} Anglo-Americans, and especially American academics, are voicing their disappointment with adversariness and are also reevaluating their approach to Europe’s criminal procedure.\textsuperscript{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.\textsuperscript{92} Despite this, terminology differentiating both concepts is not pervasive and most related scholarship uses both terms.


\textsuperscript{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. \textit{Id}.
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. This conception is especially present at the trial stage, which is party-centered, unlike European criminal procedures, which are judge-centered. In the adversarial context, the roles of the prosecution and defense counsel become essential to controlling 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.


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).

predominant in adversarial systems, as proceedings usually include a body of laypersons (jury) and only sometimes a professional judge, as opposed to a passive or neutral judge serving as the decisionmaker. 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.

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

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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 proceedings). See generally Theodore L. Kublicek, 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. Both must gather their own evidence in order to persuade the passive decision maker (the juror) in this reactive adversarial model. Thus, complex evidentiary rules are provided in an attempt to streamline the process and assist the decision maker’s inferences. The concept of discovery therefore becomes essential in the adversarial context when, in contrast, it is unknown in European criminal procedure. In Europe, the investigative dossier (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.

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, 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
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, although of limited scope as recently reviewed in Berghuis v. Tompkins). 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 entitlemen 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).

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), among all other sorts of evidence. The accused’s declaration is considered the most important source of information. 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 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, 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


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).

account. In particular, the plea bargain, a pervasive aspect of American criminal procedure will be discussed at length.\footnote{118 See Langer, \textit{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. \textit{See also} Schünemann, \textit{supra} note 10, at 290.} 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\footnote{119 See Jörg et al., \textit{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. \textit{See, e.g.} Jimeno-Bulnes, \textit{supra} note 11, at 91. The best example of this is the negotiation of procedural rights, which has become very problematic. \textit{See} Mar Jimeno-Bulnes, \textit{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); \textit{see also} Mar Jimeno-Bulnes, \textit{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, \textit{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; \textit{see also} T.N.B.M. Spronken & D.L.F. de Vocht, \textit{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, \textit{Procedural Harmonization in Europe}, 43 AM. J. COMP. L. A. 401 (1995) (discussing procedural harmonization in the context of civil procedure).} will likely have sufficient support.

\textit{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,\footnote{120 Kratocki & Walker, \textit{supra} note 3, at 98.} and for this reason, it is recognized that they also have powers to
communicate the notice of the crime (notitia criminis).\textsuperscript{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),\textsuperscript{122} as opposed to the public prosecutor, or in some cases, the police in Anglo-American models.\textsuperscript{123}

Some European countries\textsuperscript{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,\textsuperscript{125} and Italy, where in 1988, the giudice delle indagini preliminary became the responsible body for


\textsuperscript{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).

\textsuperscript{123}This was the case in England and Wales until the establishment of the Crown Prosecution Service and the enactment of the Prosecution of Offences 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).

\textsuperscript{124}See generally Goldstein & Marcus, supra note 20, at 246; Langbein & Weinreb, supra note 22, at 1549; Ploscowe, supra note 18, at 460; Volkman-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).

\textsuperscript{125}See Strafprozessordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, § 160(1) (Ger.), available at http://www.iuscomp.org/gla; see also Bohlender, 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. Currently, the investigative magistrate exists in countries such as France and Spain, although attempts have been made in France to replace this judicial authority, 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. 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-


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. This is in contrast to European models, where mandatory prosecution has prevailed as a general rule since the enactment of the “legality” rule. 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. This is the case in France, where the prosecutor has discretion to apply correctionalization. In essence, a criminal offense may be reduced to a misdemeanor, which then transfers competence from a jury trial at the Assize Court to the criminal court, which consists of only a panel of judges and no judicial investigation.
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. More prosecutorial discretion is present in Germany, where both mandatory and prosecutorial principles coexist, 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. 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.

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.” The exclusionary rule, applicable to improperly
obtained evidence, operates as a privilege.\textsuperscript{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.\textsuperscript{141} A landmark decision is \textit{Mapp v. Ohio},\textsuperscript{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.\textsuperscript{143} Nevertheless, its wider application relates to the guarantees of the Fourth Amendment, especially in reference to “unreasonable searches and seizures.”\textsuperscript{144} While the exclusionary rule helps ensure

\begin{itemize}
  \item \textsuperscript{141} See \textit{Volkmann-Schluck, supra note 75, at 16; see also Monrad G. Paulsen, \textit{The Exclusionary Rule and Misconduct by the Police}, 52 \textit{J. Crim. L. Criminology & Police Sci.} 255 (1961); John Kaplan, \textit{The Limits of the Exclusionary Rule}, 26 \textit{Stan. L. Rev.} 1027, 1029, 1031 (1974) (referring 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).
  \item \textsuperscript{142} \textit{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 \textit{v. United States}, 116 U.S. 616 (1886); \textit{Weeks v. United States}, 232 U.S. 383 (1914); \textit{Wolf v. Colorado}, 338 U.S. 25 (1949); \textit{Rochin v. California} 342 U.S. 165 (1952); and \textit{Elkins v. United States}, 364 U.S. 206 (1960). Moreover, further limitations on the exclusionary rule have occurred. See, e.g., \textit{United States v. Calandra}, 414 U.S. 338 (1974); \textit{Thomas S. Schrock & Robert C. Welsh, \textit{Up From Calandra: The Exclusionary Rule as a Constitutional Requirement}}, 59 \textit{Minn. L. Rev.} 251 (1974).
  \item \textsuperscript{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 \textit{Dallin H. Oaks, \textit{Studying the Exclusionary Rule in Search and Seizure}}, 37 \textit{U. Chi. L. Rev.} 665 (1970).
  \item \textsuperscript{144} See \textit{Francis A. Allen, \textit{The Exclusionary Rule in the American Law of Search and Seizure}}, 52 \textit{J. Crim. L. Criminology & Police Sci.} 246 (1961); James E. Spiotto, \textit{Search...
due process of law by excluding illegally obtained evidence (often considered “fruit of the poisonous tree”)

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).

Moreover, the German Criminal Procedural Code declares evidence inadmissible whenever violence or illegal threats are used

145 See KERRI MELLIFONT, FRUIT OF THE POISONOUS TREE: EVIDENCE DERIVED FROM ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE (2010); KAMISAR et al., supra note 82, at 785; LAFAYE 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.

to obtain it. 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 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. In contrast, in England—where criminal procedure is categorized as adversarial and/or accusatorial and the state structure, as decentralized or coordinated, 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.

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, but general expertise

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148 StrPO, § 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 (referring 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.
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.
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,\textsuperscript{154} surveillance of telecommunications or network surveillance (e.g., wiretapping),\textsuperscript{155} and even means of investigation


\textsuperscript{155} A sort of surveillance law and wiretapping law has been outlined by scholars. See Patricia L. Bellia, \textit{Designing Surveillance Law}, 43 ARIZ. ST. L. J. 293 (2011); J. Peter Bodri, \textit{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, \textit{The Judicial Response to Mass Police Surveillance}, 2011 U. ILL. J.L. TECH. & POL’Y 281 (2011); David J. Stein, \textit{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 \textit{Katz v. United States}, 389 U.S. 347 (1967), and by drafting anti-wiretapping statutes. See Michelle K. Wolf, \textit{Anti-Wiretapping Statutes: Disregarding Legislative Purpose and the
such as dragnet investigations, entrapment, or other specific investigative acts carried out by police officers. 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.

B. Trial

The trial phase has been characterized as the “jewel in the crown” of adversarial criminal procedure 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).

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.


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, which gives the defendant the right to face adverse witnesses, creates a fundamental obligation that is executed in cross-examination, which is arguably the most characteristic feature of adversarial trial in the United States. Generally, evidence must fulfill the highest standard of proof—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. However, this statement is not completely accurate because cross-examination was adopted by statute in several European jurisdictions; particularly, in France.

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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).


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, Italy, and Spain, where the Criminal Procedure Act of 1882 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, which is also enforced in European countries.

Another classic feature of the adversarial system is the right to a jury trial. 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. 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. 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.


171 For example, Cour d’assises in France, Schöffengericht in Germany, Corte di assisi in Italy, Tribunal dô 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 diminution of jury courts some decades ago. 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. These features, related to the requirement for a reasoned verdict, 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.

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

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*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.


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\textsuperscript{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\textsuperscript{178} between prosecutor and accused or, more exactly, the defense counsel, similar to a settlement between litigants in the civil justice system.\textsuperscript{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.\textsuperscript{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

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\item[177] See \textit{FED. R. CIV. P.} § 11(c) (2010). The “plea agreement” is also called a “plea negotiation” by some authors. See \textit{LAFAVE ET AL.}, supra note 139, at 999. \textit{FED. R. CIV. P.} § 11(a)(1) also distinguishes three categories of pleas: not guilty, guilty, and \textit{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 \textit{CAMMACK & GARLAND}, supra note 160, at 265. There are also different types of bargains according to former \textit{FED. R. CIV. P.} § 11(c)(1), such as “charge bargain” or “sentence bargain,” relating to agreements on charges and sentences, respectively. See \textit{MILLER & WRIGHT}, supra note 139, at 1101.
\item[179] See Volkmann-Schluck, supra note 75, at 25; see also Dominick R. Vetri, \textit{Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas}, 112 \textit{U. PA. L. REV.} 865 (1964) (providing examples of plea arrangements between prosecutor and defense through figures and statistics); Albert W. Alschuler, \textit{The Prosecutor’s Role in Plea Bargaining}, 36 \textit{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).
\item[180] See \textit{KAGAN}, supra note 6, at 66 (criticizing and reviewing executions in the U.S. after sequential appeals).
\end{enumerate}
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plea bargain, a more simple model. The plea bargain, as an alternative to the jury trial, operates like an advantageous deal for the defendant, as well as the prosecutor and judge. Despite the absence of any judicial intervention or oversight, 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.” For this reason, on the basis of its administrative convenience, the Supreme Court has recognized its constitutionality. The same economic point of view 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.  

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. LAFAYE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION 436 (2009); Thaman, supra note 8, at 469.


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 and reformers, and even indirectly by its detractors, 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” to the point where there are now plea bargaining institutions in France, Germany, Italy 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).


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 patteggiamento 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 (\textit{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

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\(^{195}\) 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, \textit{La Justicia Negociada}, in LA CRIMINALIDAD ORGANIZADA ANTE LA JUSTICIA 85 (Faustino Gutiérrez-Alviz Conradi 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 Martínez, \textit{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, \textit{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, \textit{The Ineffective Assistance of Counsel Era}, 63 S.C. L. REV. 425 (2011).
accepts the guilty plea.\textsuperscript{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.

\textbf{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 \textit{ius commune} (common law).\textsuperscript{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\textsuperscript{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


\textsuperscript{201} See \textit{supra} note 9 and accompanying text; see also Ugo Mattei, \textit{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).
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grafted onto different corpus iuris and the difficulty is increased if, in this case, criminal procedures belong to different legal systems. 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). 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.

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. 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.


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.


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*). Taking this into account, the real challenge is achieving an ideal criminal procedure. 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. 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. Furthermore, the degree of defense attorney commitment is often commensurate with the amount of money the defendant is able to provide. Undoubtedly, the court caseload appears much more prejudicial for indigent defendants, who are represented by court-appointed lawyers or public defenders. Due to this representation, criminal courts are regarded as “marketplaces in which the only commodity traded seriously is


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.
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. The discovery rule furthered in *Brady v. Maryland*, 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. 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.

If there is concern over fairness and the observance of due

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214 JACKSON, supra note 211, at 77.


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).

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

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\(^{221}\) 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.


\(^{223}\) 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); 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
