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Why Bring a Comparative Perspective Into a Basic Bar Course Like Criminal Procedure?

The criminal procedures of all countries, have, in a sense, been the result of the mixing of different legal traditions and thus been products of comparative law *par excellence*. Systems of criminal procedure have also tended to follow similar progressions in their development, or to vacillate between discernable models, depending on social, political, and economic conditions.

Hunters and gatherers and early agricultural societies tended to be egalitarian and communitarian and their criminal procedures compensatory, conciliatory, and non-punitive. Decision making was in the hands of trusted arbitrators, village elders, or the collective.¹ Restoring the peace was paramount: punitive revenge was limited to the red-handed or hand-having capture, a kind of “unwritten law” justifying even homicide.² Decentralized egalitarian agrarian and feudal societies would tend to communitarian justice, to the use of groups of citizens to smooth out internal conflicts: to juries, or to *Schöfften* (forums in which lay persons sit together with professional judges).³ The same held true for early city-state democracies, in Athens and

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1. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 60-64 (2d ed., Oxford, 2004), calls such legal systems “ethnonic,” rather than “folk,” “primitive,” or “customary,” generally connoting their “ecological” base.
2. Uwe Wesel, *Frühformen des Rechts in vorstaatlichen Gesellschaften* 133-36 (Suhrkamp, Frankfurt am Main, 1985) (discussing Greenland Eskimos). Thus under the Nuer in Somalia, adultery normally resulted in compensation of six head of cattle, but could result in death if the culprit were caught in the act. P.P. Howell, *A Manual of Nuer Law* 156 (Oxford, 1954); for a similar custom under the Ifugao in the Philippine highlands, see Roy Franklin Barton, *Ifugao Law*, 15 *Univ. of Cal. Publ'n American Archaeology & Ethnology* 8, 73 (Berkeley, Cal., 1919).
3. John P. Dawson, *A History of Lay Judges* 5 (Cambridge, Mass., 1960); Adhémar Esmein, *A History of Continental Criminal Procedure with Special Reference to France* 32-34 (Boston, 1913).

Republican Rome.⁴ The gradual centralization of the territories that would make up the modern nation-states led to hierarchical systems of justice subordinate to the centralized power, whether monarchic or theocratic. Judging was done by officials of the central power. Lay elements were either suppressed or co-opted and subjugated to centralized authority.⁵

Adjudication was done in public, through witness testimony, the swearing of oath-helpers, or through use of irrational ordeals, and the judgment was pronounced orally by the jurors, *Schöffen*, or trusted elders. Few people were literate and there was by and large no effective method of recording witness testimony. Decisions were final and not subject to review.⁶ With the advent of printing, the development of cities, the systematic cultivation of learning (in Europe in the Renaissance, perhaps earlier in Egypt, China, and perhaps other parts of Asia),⁷ and the centralization of political power under kings and self-appointed rulers, criminal procedure became a means to control the population: the economic surplus could support a class of magistrates, professors, and judges who could pursue legal careers full-time.⁸ The procedure went indoors, was clothed in secrecy, and was carried out without lay participation “partly in the darkness of the torture chamber and partly on the green file table before learned men in wigs” who judged “based on the dead writings of torture and witness transcripts.”⁹

The earliest forms of criminal procedure in all societies were likely *accusatorial*, brought by the victim or his/her family or clan, for there were no public officials who could act as accusers. Some procedures were *adversarial*, pitting accuser against accused, in contests of swearing (use of compurgators) or of strength (duels, battle). Some forms were inherently *inquisitorial*, subjecting the accused (or the accuser at times) to a procedure designed to determine the truth: inquiry by a self-informing jury or inquest, ordeals of hot iron or cold water where god allegedly decided guilt or innocence, or secular or divine inquisitions using torture to complement other circumstantial or witness evidence.

Migrations, conquests, intermarriage, and travel led to the adopting of new and adapting of old traditions. Sometimes conquering nations imposed their

4. Dawson, A History of Lay Judges, *supra* note 3, at 11-18.

5. Mirjan R. Damaška, *The Faces of Justice and State Authority* 32-33 (New Haven, Conn., 1986).

6. Esmein, A History of Continental Criminal Procedure, *supra* note 3, at 4-7. See generally Ian Wood, Disputes in Late Fifth- and Sixth-Century Gaul, in *The Settlement of Disputes in Early Medieval Europe* 7-22 (Wendy Davies and Paul Fouracre eds., Cambridge, 1986).

7. Gutenberg appears to have created the first printing press in Europe in 1448, Chwe Yoon Eeye having founded a similar device in Korea in 1234.

8. Wesel, *Frühformen*, *supra* note 2, at 34-35.

9. Gustav Radbruch, *Zur Einführung in die Carolina in Die peinliche Gerichtsordnung Kaiser Karls V. von 1532 (Carolina)* 22 (6th ed., Reclam, Stuttgart, 1996).

legal systems, sometimes they co-opted the extant legal system or gave the conquered peoples freedom to accept or reject the new forms.¹⁰

American criminal procedure has also been comparative from early times. The English common law was brought to American shores, but in early colonial days had to compete with ecclesiastical and fundamentalist Biblical legal sources before it was accepted throughout the land.¹¹ Immigrants from Continental Europe influenced the early codification of American law, and the Bill of Rights owed as much to the thinking underpinning the French Revolution as it did to the earlier English constitutional sources.¹² The fact that each state has its own constitution, codes, and jurisprudence that have influenced the jurisprudence of the U.S. Supreme Court as much as its jurisprudence has modified state practices, means that to know American criminal procedure means to be able to think comparatively.

The incorporation debate that preoccupied the U.S. Supreme Court from the passage of the Fourteenth Amendment in 1865 up through the late 1960s Warren Court decisions largely revolved around exercises in comparative law by the justices. When state defendants tried to compel the Supreme Court to incorporate important federal constitutional rights into the Fourteenth Amendment guarantee of due process and make them binding on the states, the justices looked abroad, to Europe or the United Kingdom, and found “civilized nations” that did not recognize institutions such as trial by jury, double jeopardy protection against appeals of acquittals, or the privilege against self-incrimination.¹³

With the “criminal procedure revolution” unleashed by the Warren Court’s nearly complete incorporation of the federal guarantees of the Bill of Rights and its development of these rights in such landmark cases as *Mapp v. Ohio* and *Miranda v. Arizona*, the U.S. Supreme Court’s influence began to reach overseas and to change the countries on the European Continent to whom the opponents of incorporation had appealed. Exclusionary rules and *Miranda* rights are recognized, in one form or another, in most of the formerly inquisitorial

10. When the Aryans brought Vedic law to Northern India, they allowed chthonic legal traditions to persist until the new law was adopted through persuasion; on the contrary, the invasions of the Muslims and the British led to massive replacement of Hindu law, which remained only in the area of family law. Glenn, *Legal Traditions*, *supra* note 1, at 272, 294. On the co-optation of chthonic English legal traditions by the Norman conquerors, see *id.* at 224.
11. Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U.Chi. L. Rev. 867, 871 (1994).
12. Glenn, *Legal Traditions*, *supra* note 1, at 248-51.
13. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In *Twining v. New Jersey*, 211 U.S. 78, 112-13 (1908), the Court noted that the interrogation of the accused is the practice in the Civil Law and that the Fourteenth Amendment did not prevent states from adhering to Civil rather than Common Law practices.

states of the European continent, as well as throughout Latin America and in some parts of Asia.¹⁴

Things changed, however, under the Burger and Rehnquist courts. The Supreme Court increasingly created exceptions to the exclusionary rules under *Mapp* and *Miranda* and in its retrenchment increasingly sealed itself off from looking overseas for comparative knowledge or inspiration. The “nativists” on the court would only look to U.S. legal tradition, as if it existed in a hermetically sealed vacuum, and even more radically, only to the perceived original meaning of the 1791 Framers of the Bill of Rights.¹⁵ While scholars have discerned a trend of “americanization” in reforms in Europe and elsewhere,¹⁶ in the area of criminal procedure reform, the model is and has always been the progressive measures taken by the Warren court and not the practices of the later courts. As America entered the twenty-first century as the only remaining superpower, it became arrogant on the international stage in its refusal to work with its traditional allies and other countries on issues such as the invasion of Iraq, the International Criminal Court, global warming, and human rights. Domestically there has been a “sovietization” of American law, with massive imprisonment of segments of the population (poor and minorities), draconian punishments, and an erosion of the jury trial through the use of oppressive plea-bargaining.¹⁷ American prosecutors have become fully as dominant in the American system as the *prokuratura* was in Soviet criminal justice,¹⁸ and the judiciary has become just as compliant as the former Soviet judges. Secret, uncontrolled, warrantless eavesdropping by the executive takes a page from the methods of the Soviet Communist Party, where the collection of information in secret regardless of its admissibility in court was deemed to be more useful than merely following the Soviet law, as lenient as it might have been.¹⁹ Once one knows through illegal means that evidence may be found,

14. See Stephen C. Thaman, *Miranda in Comparative Law*, 45 St. Louis U. L. J. 581 (2001). The Korean Supreme Court recognized a version of *Miranda* warnings in its decision of March 11, 1994, 93 Do 938, cited from Kuk Cho, *The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea*, 30 Denv. J. Int’l L. & Pol’y 377, 384 (2002).
15. See Justice Scalia’s opinion upholding the death penalty for minors in *Stanford v. Kentucky*, 492 U.S. 361, 368-75 (1989), referring to the state of the law when the Bill of Rights were enacted and then solely to whether a consensus among the American states exists as to whether juvenile death penalties should be abolished.
16. See Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int’l L. J. 1 (2004), who sees the spread of plea bargaining in Europe and Latin America as manifestations thereof.
17. See Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?*, 44 St. Louis U. L. J. 999, 1011-17 (2000).
18. On the dominant role of the Soviet and Russian procuracy, see Stephen C. Thaman, *The Reform of the Procuracy and Bar in Russia*, 3 Parker Sch. J. E. Eur. L.1, 3-7 (1996).
19. Eric Lichtblau and Scott Shane, *Basis for Spying in U.S. Is Doubtful*, N. Y. Times, Jan. 7, 2006, at A1. On October 25, 2001, then-Attorney General John Ashcroft declared that the main priority of his office was preventing terror acts, rather than prosecuting them.

one can always manufacture “probable cause” to cleanse the evidence for use in court.²⁰

This trend seems to be weakening, as the Supreme Court, under the guidance of Justice Anthony Kennedy and others, has begun to refer to international human rights law and foreign law to determine how to interpret our Bill of Rights.²¹ The latest example of this jurisprudence was *Roper v. Simmons*, where the Court struck down the death penalty for juveniles, after noting that we were virtually the only country, and definitely the only democracy, that still permitted this scandalous practice.²² Because American criminal law has gradually become one of the most repressive and unjust systems in the world with its over-determined penalty structures (continual use of the death penalty, life imprisonments for non-violent recidivist thieves and drug dealers²³) and accompanying corruption of its truth-finding capacities resulting in conviction of countless innocent persons,²⁴ it is time for our courts and our students to be aware of how other countries process their criminal cases, to determine whether we can learn from them. My experience has been that through comparative analysis one can better detect the flaws as well as the strong points of our system, and can thus direct reform efforts in positive directions, informed by the wealth of options comparative law provides.

Archetypes of Criminal Procedure as Teaching Tools

A panoply of diverse criminal procedures has historically been available in most systems to deal with different types of crimes or evidentiary situations. In my casebook on comparative criminal procedure²⁵ I used three as leitmotifs for the text: the flagrant crime, the “who-done-it?” circumstantial evidence

John W. Whitebread and Steven H. Aden, Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives, 51 Am. U. L. Rev. 1081, 1083 (2002).

20. Similar “hands-off” procedures have been documented in Los Angeles since the 1980s, thus obviating the need to inform suspects after they have been wiretapped. See Whitaker v. Garcetti, 291 F.Supp. 2d 1132 (C.D. Cal. 2003).
21. Jeffrey Toobin, Swing Shift, New Yorker, Sept. 12, 2005, available at <http://www.newyorker.com/fact/content/articles/050912fa_fact> (last visited Dec. 12, 2006).
22. 543 U.S. 551, 575-78 (2005).
23. Harmelin v. Michigan, 501 U.S. 957 (1991); Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003).
24. As of December 2005, at least 164 innocent persons had been cleared by DNA testing, Shaila Dewan, After 24 Years in Prison, Man Has a Reason to Smile, N.Y. Times, Dec. 8, 2005, at A26. At least 125 persons convicted since 1973 for capital murder have been released from death rows across the country due to their factual innocence. Amnesty International U.S.A., Abolish the Death Penalty, available at <<http://www.amnestyusa.org/abolish/factsheets/factsinnocence.html>> (last visited Dec. 12, 2006).
25. Stephen C. Thaman, Comparative Criminal Procedure: A Casebook Approach (Durham, N.C., 2002).

case, and the secret victimless crime. Our experiences in the United States since September 11, 2001, have led me to envision a fourth category: special procedures for the “other,” the outsider, the enemy of the people, the “enemy combatant.”

The flagrant crime, where the culprit was caught in the act red-handed or “hand-having” (with loot in hand), was often punished immediately with death through self-help of victim or witness, or after perfunctory procedures giving no protection to the accused. The flagrant offender could, in early inquisitorial procedure, be tortured if he did not admit guilt, such was the presumption of guilt.²⁶ Because of the strong presumption of guilt, flagrant crimes give rise today in nearly all jurisdictions to special procedures, such as arrest without a warrant, search of one’s person, possessions, or premises incident to arrest, or expedited trial with a leapfrogging of the preliminary investigation.²⁷ In the United Kingdom, if one is arrested *in flagrante* and questioned by police, one’s silence may be used as evidence of guilt at trial. In France, if one is arrested in possession of contraband entering the country, the burden of proof switches to the suspect to prove a guilt-excluding fact, such as lack of knowledge.²⁸

Where a crime has been committed, but there are no eyewitnesses or no arrest at the time of or immediately afterward many procedures developed in customary legal systems for determining guilt: ordeals of hot iron or cold water, duels, or trials by battle, the summoning of witnesses of the suspect’s honesty (oath-helpers or compurgators), or conciliation and restitution procedures (*wergeld* and *composition*) were used to reach a conclusion of guilt and restore the peace of the community.²⁹ Such crimes seldom ended in death penalties, likely out of communitarian reasons: the death of a member of the tribe or village or clan meant the loss of a productive member of society. While there may not have been a presumption of innocence, there was a drive to give a suspect means to reintegrate himself in the community.³⁰

These primitive procedures were replaced by jury trial in England and the inquisitorial official investigation on the European Continent, both of which claimed to be more humane and capable of determining the truth. The formal rules of evidence in inquisitorial Europe, derived from Catholic

26. *Id.* at 4-5. Contrast Thomas Weigend, *Deliktsoffer und Strafverfahren* 36-42 (Berlin, 1989).

27. Thaman, *Comparative Criminal Procedure*, *supra* note 25, at 5, 39-40, 44-48.

28. *Id.* at 170-71.

29. *Id.* at 6-8. In more detail, see generally Robert Bartlett, *Trial By Fire and Water: The Medieval Judicial Ordeal* (New York, 1986); Wood, *Disputes*, *supra* note 6, at 7-22.

30. Montesquieu noted: “Our fathers, the Germans, did not allow but pecuniary punishments. Those fighting and free men deemed their blood should not be allowed to flow except with arms in hand.” Charles de Secondat Montesquieu, 1 *De L’esprit Des Lois* 220 (GF-Flammarion ed., Paris, 1979); *id.* at Vol. 2, 337-38. Among the Cheyenne, the predominant punishment was exile but was often rescinded and the culprit reintegrated into the tribe. Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* 132-37 (Buffalo, N.Y., 2002). A similar mildness could be found among the Nuer. Howell, *A Manual of Nuer Law*, *supra* note 2, at 39-41.

Canon law, made it very difficult to prove guilt in the absence of flagrancy and, as in Islamic and Talmudic law, made conviction impossible without a number of eyewitnesses.³¹ The European way out was to authorize torture if there was one eyewitness or other sufficient circumstantial evidence of guilt, short of that required for conviction.³² As with ordeals, the person who survived torture would not be convicted. Like ordeals, torture punished the suspect based on probable cause, amounting to a kind of *Verdachtsstrafe* (punishment based on suspicion) which gathered in many innocents along with the possibly guilty.³³ Pretrial detention, typically in squalid, disease-ridden jails, was also eminently life-threatening and was vociferously condemned during the Enlightenment as being punishment without trial, or a type of torture which was aimed at compelling a confession as effectively as was torture.³⁴ Finally, one could even claim that the methods of trial themselves were a kind of punishment, even if the defendant were acquitted.³⁵

If the crime was not flagrant, evidence had to be gathered in a preliminary investigation, and one could perhaps speak of a presumption of innocence to

31. At least two witnesses needed for Islamic *Hadd* crimes in absence of confession. See Islamic Law: Myths and Realities, available at <http://muslim-canada.org/Islam_myths.htm> (last visited Jan. 4, 2007). Maimonides, in reaffirming the requirement of "witnesses who testify that they have clear and indubitable knowledge of the occurrence" of a crime, notes "the worst that can happen is that a transgressor will go free; but if we punish on the strength of probabilities and suppositions, it may be that one day we shall put an innocent person to death, and it is better and more desirable that a thousand guilty persons go free than that a single innocent person be put to death." *Nagar v. State of Israel*, 35(i) P.D. 113 (Ct. App. 1980), in Menachem Elon et al., *Jewish Law (Mishpat Ivri): Cases and Materials* 201 (New York, 1999).
32. John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* 4-5 (Chicago, 1977).
33. In relation to coerced confessions, Beccaria wrote: "This infamous crucible of truth is a still extant monument of the ancient and savage legislation, when the ordeals of fire and boiling water were called 'judges of God.'" Cesare Beccaria, *Dei Delitti e Delle Pene* 62 (Giangiacomo Feltrinelli ed., New York, 1995). He also bemoaned the number of innocents sacrificed to this practice. *Id.*
34. John H. Langbein, *The Origins of Adversary Criminal Trial* 49 (New York, 2003). See also Luigi Ferrajoli, *Diritto e Ragione: Teoria del Garantismo Penale* 562-66 (5th ed., Rome, 1998).
35. While I am unaware in the West of any tradition of actual punishment inflicted during public trial, such as whipping a defendant who refused to admit guilt as used to occur in Tibet, Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* 317 (Ithaca, N.Y., 1995), this notion underlies our approach to double jeopardy, which is aimed at preventing the "embarrassment, expense and ordeal" of a second trial. *Green v. United States*, 355 U.S. 184, 187 (1957). Compare with the Netherlands, where prosecutors have been known to prosecute in absence of sufficient evidence in cases of complicated white-collar fraud so at least the defendant will have his "comeuppance in the media." Chrisje Brants and K.L.K. Brants, *De Sociale Constructie van Fraude* (Utrecht, 1991), cited in Chrisje Brants, *Consensual Criminal Procedures: Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure* (National Report: The Netherlands) for International Congress of Comparative Law (Utrecht, Neth., 2006).

counteract the all-too-common feeling that where there is smoke there must be fire. European jurisdictions required reasons given by professional judges to justify reaching conclusions of guilt based on circumstantial evidence.³⁶ Summary procedures are not suitable where there is no flagrancy, or no confession. Acquittals should be tolerated.

Victimless crimes are crimes against the state (or the church) *par excellence*. No one is personally harmed by them, no one complains or brings private prosecution. There can be no accusatorial or adversarial altercation to decide guilt. The prototype for the development of the inquisitorial model of criminal procedure is the investigation of sedition, blasphemy, and heresy. That method's motto is secrecy. Its goal is to penetrate the interior recesses of a suspect's mind or his or her abode.³⁷ The methods were torture, compelled testimony under oath, or general warrants to search homes or other buildings in the good old days.³⁸ Today these methods are augmented by wiretaps, bugs, undercover informants, *Carnivore*, and national security letters and are applied to the war against drugs, the war against organized crime, the war against terrorism, and the prosecution of other crimes that otherwise leave no traces other than in one's own home: possession of drugs, pornography, weapons.³⁹ Just as probable cause was needed in the famous 1532 German code, the *Carolina*, before a torture warrant would issue,⁴⁰ it is now normally needed for search warrants, wiretaps, and in European countries such as Germany, for using undercover informants or doing long-term surveillance.⁴¹ Theoretically, these techniques were aimed at investigating either crimes already committed or ongoing criminal activity. There is always a danger—again, the threat of Sovietization—that they will be used simply to preventively gather evidence on the citizenry in general, to be used when the law enforcement apparatus deems it necessary.

36. Thaman, Comparative Criminal Procedure, *supra* note 25, at 200-13.

37. According to Montesquieu, "one needs a secret judiciary; because the crimes which they punish, always profound, are formed in secrecy and in silence. This judiciary needs to have a general inquisition; because it does not need to stop the evils which it recognizes, but to prevent those which it does not know." Montesquieu, 1 *De L'esprit des Lois*, *supra* note 30, at 137-38.

38. In pursuing "secret actions" which "injure Divinity," Montesquieu asserted that "there is no public act, there is no material for crime: all goes on inside the person, and God knows the measure and time of his vengeance." He criticized the magistrate who "investigates the hidden sacrilege...conducts an inquisition into a type of act where it is not even necessary" and "destroys the liberty of citizens." *Id.* at 330.

39. On this computer search technology, see Trenton C. Haas, *Carnivore and the Fourth Amendment*, 34 Conn. L. Rev. 261 (2001); 18 U.S.C. § 2709(b) (codified at § 505 of the USA Patriot Act); Thaman, Comparative Criminal Procedure, *supra* note 25, at 13-14.

40. Thaman, Comparative Criminal Procedure, *supra* note 25, at 8-9.

41. *Id.* at 72 n.12. Since invasions of privacy are illegal and usually criminal without probable cause, can we also not characterize these measures as punishment upon probable cause, whether or not guilt is ever ascertained?

Finally, consider special treatment for the “other.” Small closely knit societies were notoriously lenient with their own when they violated local rules or customs, or committed crimes. Unless a person was caught *in flagrante* and immediately killed, the procedures were often conciliatory, aimed at reestablishing the judicial peace and reintegrating the offender with his or her community. The procedural outlets were limited and death penalties were more common if an outsider, a highwayman, was caught robbing, stealing, or murdering.⁴² Society itself was not losing an able-bodied man or woman, though conciliation could be required to fend off a feud or a war with another tribe, clan, or community.⁴³ The notion of special rules for the “other” can also be seen in societies split by class or racial differences. England had a two-tier system of justice for the counseled well-to-do and for the counsel-less “wretches” who so often ended on the gallows.⁴⁴ The United States clearly had, and many would say still has, a two-tier system for the wealthy and the poor, the white and the black.⁴⁵

But the positing of a social enemy—organized crime in the 1980s and 1990s and now terrorists and Islamists in the new century—has always been a clarion cry to toughen criminal sanctions, to chip away at the protections for the criminally accused, and even to introduce parallel procedural systems without the guarantees given to the homegrown folks. This is most apparent today with the unlimited detention without any due process of “enemy combatants,” and their trial without the ability to subpoena witnesses or provide an effective defense.

Application of Comparative Models in the Post-Investigative Stage of Criminal Procedure: “Bail To Jail”

Some areas of post-investigative procedure in which comparative material can help to broaden the discussion in fruitful ways are: (1) the role of the aggrieved party (victim) in the charging and prosecution of criminal cases; (2) the clash between the rules of mandatory and discretionary prosecution (legality and opportunity principles), and the procedural effect of guilty-pleas or confessions in the move to consensual, abbreviated, and expedited procedures; (3) the passive or active (inquisitorial) role of the trial judge and its relation to the presumption of innocence; (4) the use of written materials at trial pre-packaged by one of the parties and its clash with the right of confrontation; and

42. Barton, Ifugao Law, *supra* note 2, at 66, discussing the Ifugao highlanders of the Philippines. The Nuer did not consider it a wrong to kill a foreigner. Howell, A Manual of Nuer Law, *supra* note 2, at 207.

43. *Id.* at 27.

44. Langbein, Origins of Adversary Criminal Trial, *supra* note 34, at 315-17; as Alexander Pope wrote, “The hungry Judges soon the Sentence sign, and Wretches hang that Jurymen may Dine.” *Id.* at 25.

45. On the racist kangaroo courts for Black defendants in the South, see Alschuler and Deiss, A Brief History of Criminal Jury, *supra* note 11, at 880-90.

finally (5) the division of labor at trial in relation to the determination of the facts, guilt, and sentence between lay and professional judges.

The Role of the Victim in Charging and Prosecuting Criminal Cases

Ironically, many of the continental European justice systems remained much more accusatorial and adversarial than their Common Law counterparts in one area: the allowance of private prosecution by the victim or aggrieved party of minor offenses, such as battery, libel, and insults, but also, in Spain, of all cases including major felonies.⁴⁶ Despite all the high-profile trumpeting of victim's rights by prosecutorial organizations and their supporters in the United States, American prosecutors steadfastly refuse to give up their monopoly on prosecution. The victim's movement has been cleverly used as a mechanism to strip away the rights of the defense, pass more severe penalties, and allow victim impact evidence, after guilt has already been decided to inflame the passions of the jury.

The strong role of the victim in Spain, who files her own accusatory pleading, has a right to court-appointed counsel if indigent, may present evidence at every stage of the case, and may argue the case, will lead victims' advocates to ask why such a system does not exist in the United States.⁴⁷ One can discuss why the grand jury, a popular body before being completely co-opted by the prosecution, could not be transformed to allow charging upon motion of a victim in cases where the prosecutor refuses to do so. The role of the victim as civil party seeking damages as well as conviction can be discussed in relation to a case like that of O.J. Simpson. Would it have been preferable to combine civil and criminal actions in that case? Finally, many may conclude that the empowerment of the victim, and in Spain any member of the public as well as a popular prosecutor, could too clutter the criminal trial, violate the equality of arms by lining up two, three, or more prosecutors against a single defendant, and constitute a return to revenge as a motive for criminal prosecution.⁴⁸

Plea-Bargaining, Procedural Diversity, and the Legality Principle

In teaching American plea-bargaining, I like to emphasize that all criminal procedure systems have an official "procedure with all its guarantees" that comports with due process, and principles of orality, immediacy, confrontation, presumption of innocence, and a right to remain silent, which is trumpeted as the crown jewel of the justice system. In the United States, the crown jewel is the jury trial, and on the European Continent it is the full-blown preliminary

46. Thaman, *Comparative Criminal Procedure*, *supra* note 25, at 21-25.

47. Julio Pérez Gil, *Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain*, 25 *Law & Pol'y* 151 (2003).

48. For a criticism of the role of the victim as private prosecutor in the first year of Spanish jury trial, see Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 *Hastings Int'l & Comp. L. Rev.* 241, 397-401 (1998).

investigation by an impartial magistrate or prosecutor and a subsequent oral trial.⁴⁹ The reality of criminal procedure has always been more complex. There has always been procedural diversity, many ways to resolve a dispute labeled “criminal.” In medieval times there were ordeals, duels, trial by oath-helpers, victim-offender compoundment, and jury trials, and then the inquisitorial investigation.⁵⁰

In modern times, the participants in criminal procedure—prosecutors, judges, defense counsel, the defendant—have always sought ways to avoid the full-blown trial and come to swifter and more certain results. In jury systems, where outcomes were considerably less predictable than in trial courts composed of professional judges or mixed courts, a guilty plea with a reduced sentence or reduced charges eliminated the uncertainty of outcome and saved the state the considerable costs of a trial. In more judge-dominated systems, a “deal” would be crowned with a mitigated sentence or often a release from pretrial custody, based on procedural economy, saving time and resources, even though the outcomes of trials in such systems are certainly more predictable.⁵¹ The bargaining for guilty pleas was secret in the United States until the mid-twentieth century and the bargaining for trial-shortening confessions was secret in Germany until revealed in 1982 by a lawyer under the pseudonym “Detlev Deal.”⁵²

Since then there has been a “triumphal march of consensual procedures” laying waste to the keystone principles of continental neo-inquisitorial procedure: the principle of legality, that all crimes must be pursued, prosecuted, and punished; and the requirement of a judicial decision based on reasons to provide certainty in the results of criminal procedure. It is interesting for students to compare European practices with the wide-open American practice of plea-bargaining in cases ranging from misdemeanors to capital cases and in which prosecutors, thanks to the colossal raising of minimum and maximum terms of deprivation of liberty in the 1980s and 1990s, are in complete control, making any perceived “give and take” trumpeted by the supporters of plea-bargaining as a “contract” illusory. In no way can one say that a petty recidivist thief who is offered a five year sentence for his guilty plea, with life imprisonment the alternative if he is convicted by a jury,⁵³ makes a “voluntary

49. Stephen C. Thaman, *Gerechtigkeit und Verfahrensvielfalt: Logik der beschleunigten, konsuellen und vereinfachten Strafprozessmodelle*, in *Recht-Gesellschaft-Kommunikation. Festschrift für Klaus F. Röhl* 306, 316-17 (Stefan Machura and Stefan Ulbrich eds., Baden-Baden, 2003).

50. *Id.* at 306.

51. Mirjan R. Damaška, *Negotiated Justice in International Criminal Courts*, 2 *J. Int'l Crim. Just.* 1018, 1019, 1022-23 (2004).

52. Thaman, *Gerechtigkeit*, *supra* note 49, at 310.

53. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). There the petty thief insisted on a trial and got life imprisonment and the Court found no violation of due process.

and knowing choice" when he decides to plead guilty, whether he is guilty or innocent.⁵⁴

Nearly all Western European countries that have laws introducing plea-bargaining-like mechanisms insist on controlled discounts, typically one-third to one-half, for a renunciation of the right to a full trial.⁵⁵ Even Germany's informal "confession" bargaining or *Absprachen* requires that the difference between maximum and offered punishment is not so extreme as to make the "deal" coercive.⁵⁶ Exceptions can be found in some former socialist republics, which have embraced more wide open American-influenced models of plea bargaining.⁵⁷

I like to ask students whether confessions in general should be bargained for in the United States with mandatory participation of defense counsel, as is done with the in-court confessions we call guilty pleas. Why should a suspect be able to confess to capital murder in the jailhouse and be sentenced to death without counsel, and yet be guaranteed the right to counsel during plea bargaining negotiations, after the die has already been cast and the defendant is outgunned by the prosecutor at every step?⁵⁸ Should the cost of

54. Damaška, *Negotiated Justice*, *supra* note 51, at 1028.
55. Discounts of no more than one-third are guaranteed in the Italian *patteggiamento* procedure (for crimes punishable by no more than five years), §§ 444.445 C.P.P. (as amended Mar. 27, 2001), in *Codice e leggi per l'udienza penale* 315-16 (Mario Chiavario et al., eds., Turin, 2004), the Russian procedure (crimes punishable by no more than ten years), § 314 UPK, Rossiiskoi Federatsii (as amended July 4, 2003), in *Ugolovno-Protsessual'nyi Kodeks, Rossiiskoi Federatsii* 150 (Moscow, 2005), and a new procedure for flagrant cases in Spain, in which a stipulation to the correctness of the charges or *conformidad* is entered to crimes punishable by no more than three years, where the one-third discounted punishment may also be suspended (§ 801 L.E. Crim. (as amended Oct. 24, 2002), in *Ley de Enjuiciamiento Criminal y Legislación Complementaria* 293-94 (17th ed., Madrid, 2002). The new French guilty plea procedure grants a discount of from one-half to one-third on fines and allows for punishments of no more than six months imprisonment for crimes punishable by up to five years. § 495-8 C.P. (as amended Mar. 9, 2004), Law no. 2004-204 (Mar. 9, 2004), *Journal Official*, Mar. 10, 2004 (in effect, Oct. 1, 2004).
56. The authoritative decision of the German Supreme Court of August 28, 1997, requires that the discount be proportionate to guilt so as not to coerce a confession. Thaman, *Comparative Criminal Law*, *supra* note 25, at 149.
57. Agreements between prosecution and defense in the 2005 Bulgarian Code of Criminal Procedure may apply to nearly all crimes and allow the judge to even sentence below the statutory minimum sentence. § 381 Nakazatelno protsesualen kodeks (Apr. 29, 2006), available at <<http://lex.bg/laws/ldoc.php?IDNA=2135512224>> (last visited Nov. 29, 2006); Georgia, §§ 679-1-7 CCP-Georgia, signed by the President on Feb. 13, 2004 (on file with author), and Moldova, §§ 504-509 Ugolovno-protsessual'nyy kodeks Respubliki Moldova 338-44 (2003), have recently added plea-agreement provisions seemingly modeled on American cooperation agreements. New Estonian plea bargain procedures apply to all crimes except those punishable by a minimum of four years and a maximum of life imprisonment and involve no statutory discounts, §§ 239-50 Estonian Code of Criminal Procedure (Feb. 12, 2003), available at <<http://www.legaltext.ee/text/en/x60027k3.htm>> (last visited Dec. 12, 2006).
58. Thaman, *Gerechtigkeit*, *supra* note 49, at 311.

using a suspect's confession be mandatory mitigation, inexorably removing the maximum punishment from the table?⁵⁹

Presumption of Innocence and the Inquisitorial Judge

The last three discussion areas I highlight deal mainly with the full-blown trial, whether in a Common Law adversarial system or a Civil Law, more judge-directed system. Of course their importance is rapidly diminishing with the expansion of alternative forms of trial. It is useful to ask students whether they believe that an active judge will improve the quality of American jury trials, by coming to the aid of defendants represented by incompetent or overwhelmed court-appointed lawyers, or to the aid of the rookie prosecutor who is being outmaneuvered by veteran defense counsel. Should the trial judge attempt to make the trial a better vehicle for the determination of truth by summoning supplementary witnesses or by engaging in more profound questioning?⁶⁰

Many students think this a good idea. They may be asked whether it would be a good idea to allow the trial judge to read the entirety of the prosecution's file (and perhaps the defense file as well) so that his or her truth-finding activity will be better directed. Of course, this is the model in many European systems, notably, in Germany, in the Netherlands, and in French and Russian trials without lay participation. But if one posits that the judge is also a trier of the facts, as is the case in those countries (except in Russian jury trials), then is it plausible to believe that he or she can actually presume the defendant to be innocent, after having read the prosecutor's file and determined (in Germany and Russia) that there is sufficient evidence to support a guilty verdict? Can a trial participant who sees himself or herself as an investigator of the truth be truly impartial, once he or she has developed a hypothesis of guilt?⁶¹ Should an investigating magistrate also act as trial judge? Of course nearly all persuasive authority rejects such a notion.⁶² Should the judge, in a jury trial or mixed court, be able to interrupt a trial which he/she thinks is headed for acquittal, and send the case back to the official investigator to look for further evidence of guilt? This practice, which exists in Russia, France, and the Netherlands,⁶³

59. Most European penal codes recognize confession as a mitigating factor, but not necessarily as obligatorily mitigating.

60. Federal R. Evid. 614(b) permits the judge to "interrogate witnesses, whether called by itself or by a party."

61. See the discussion on the role of judge in various European countries, with pertinent cases, Thaman, *Comparative Criminal Procedure*, *supra* note 25, at 173-81.

62. On the decisive case law of the European Court of Human Rights in this area, see Stefan Trechsel, *Human Rights in Criminal Proceedings* 69-74 (Oxford, 2005).

63. Although § 237 of the 2001 Russian Criminal Procedure Code sought to eliminate returning a case for further investigation, the Russian Constitutional Court resurrected this practice in a December 8, 2003 decision. *Postanovlenie Konstitutsionnogo suda Rossiyskoy Federatsii po delu o proverke konstitutsionnosti polozheniy statey 125, 219, 227, 229, 236-37, 239, 246, 254, 271, 283, 378, 405, 408, 463, a takzhe glav 35 i 39 Ugolovno-protsessual'nogo kodeksa Rossiyskoy Federatsii v svyazi s zaprosami sudov obshchey iurisdiktsii i zhalobami*

will seem alien to our students, especially when they are studying our notions of double jeopardy.

All in all, students will likely prefer our jury system with a passive judge and with strict notions of double jeopardy, to the inquisitorial trial judge in Germany and France. The trend in modern criminal procedure reform is also away from the inquisitorial judge as can be discerned by reforms in Italy, to a halting extent in Russia and the former Soviet Republics, and in much of Latin America.⁶⁴

The Right to an Oral, Immediate Trial and the Right to Confront Witnesses

Although the right to confrontation is usually not taught in criminal procedure classes in the United States, it is a crucial element in the discussion of criminal procedure reform around the world. Prior to the decision in *Crawford v. Washington* in 2004,⁶⁵ it appeared that the approach to the admissibility of hearsay and other statements and documents in the investigative or prosecutorial files in the civil and common law worlds was merging. European countries, pushed by decisions of the European Court of Human Rights, were beginning to limit the use of hearsay and witness statements, especially if those statements are the main evidence of guilt,⁶⁶ whereas decisions of the U.S. Supreme Court and British law were creating residual exceptions to the hearsay rule and letting in much "reliable" hearsay.⁶⁷

One can ask students whether it is fair that one party in the criminal trial, the prosecution, should be able to unilaterally prepare evidence in written form that reflects statements, opinions, or actions by others, and never call the witnesses whose statements, opinions, or actions are depicted therein. Does this seem like fair adversarial procedure or "equality of arms," as the jurisprudence under the European Convention on Human Rights puts it? Of course, this was the approach of inquisitorial countries on the European Continent and elsewhere, where trust in public officialdom (police, investigating magistrates, prosecutors, trial judges) was sufficient to outweigh the violations of the right to confrontation of witnesses and of the right of the trier of fact to see and hear the witnesses in open court.

grazhdan, Dec. 8, 2003, available at <http://ks.rfnet.ru/pos/p18_o3.htm> (last visited Nov. 29, 2006). See also Stewart Field et al., Prosecutors, Examining Judges, and Control of Police Investigations, in *Criminal Justice in Europe, a Comparative Study* 229-42 (Phil Fennell et al., eds., 1995).

64. Mirjan R. Damaška, Models of Criminal Procedure, 51 *Zbornik PFZ* 477, 480-81 (2001) (Collected Papers of Zagreb Law School).

65. 541 U.S. 36 (2004).

66. Thaman, *Comparative Criminal Procedure*, *supra* note 25, at 119-126.

67. *Id.* at 126-29, in relation to England and Wales; cf. *Ohio v. Roberts*, 448 U.S. 56 65-66 (1980).

The trend is to limit the admissibility of prior statements of witnesses and much hearsay in criminal procedure reform today, making formerly inquisitorial systems that relied on reading of documents more like the common law system. The Italian Code of Criminal Procedure of 1988 was the pioneer in this reform effort and has been copied or emulated in reforms in Spain (the Jury Law of 1995) and Latin America.⁶⁸ It is interesting to listen to students' opinions when asked if they think judges or juries could assess the probative value of hearsay using what Europeans call the "free evaluation of evidence" and reject it when unconvincing or accept it when reliable, thus obviating the need for a hearsay rule. This "let it all in" approach is advocated occasionally by American scholars in relation to hearsay,⁶⁹ but especially in the area of illegally gathered evidence, where the truth, supposedly, should "out."⁷⁰ Will there be more truth or less truth with the use of written documents?

An interesting resolution of this problem occurs in the growing use of pretrial depositions conducted by an impartial judge with participation of prosecution and defense in cases where there is fear that a witness may not be available or will change his or her testimony before trial. A more radical suggestion is to make the entire preliminary investigation *à la Européenne* adversarial to the extent possible, thus guaranteeing the right to confrontation during the gathering of all evidence subsequent to the defendant's arrest or charging and the subsequent admissibility of the evidence in emergency situations.⁷¹ Such a wide-open pretrial stage would also facilitate consensual resolution of cases through plea bargaining or prosecutorial penal orders.

Division of Labor between Lay and Professional Judge in Deciding Facts, Guilt, and Sentence

I like to discuss jury trial as an eminently political choice for countries, yet one that will not necessarily lead to better results in criminal trials. Though not of democratic origin, the jury trial became a symbol of the bourgeois revolutions in Europe and America that were inspired by democratic values. It provides effective popular participation in the judicial branch of government, just as elections provide it in the legislative and executive branches.⁷² I also argue

68. On Italy and Spain, see Thaman, *Spain Returns*, *supra* note 48, at 281-82, 297-301; on Venezuela, see Stephen C. Thaman, *Latin America's First Modern System of Lay Participation in Strafrecht, Strafprozessrecht und Menschenrechte*. Festschrift für Stefan Trechsel 770-71 (Andreas Donatsch et al., eds. 2002).

69. Richard O. Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 *St. Louis U. Public L. J.* 15, 18-19 (2002).

70. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757 (1994); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 *U. Ill. L. Rev.* 363.

71. Thaman, *Comparative Criminal Procedure*, *supra* note 25, at 33-39. Thaman, *Gerechtigkeit*, *supra* note 49, at 316.

72. Stephen C. Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001-2002 *St. Louis-Warsaw Transatlantic L. J.* 89, 93-95.

that only the classic jury, which deliberates separately from the professional bench, provides an arena where one has a truly impartial factfinder unsullied by material in the dossier and really able, with proper instructions, to entertain a presumption of innocence.⁷³

But I like to depict the history of jury trial in England and in its post-1789 manifestations on the European Continent, Latin America, and Asia as a constant battle between the professional judiciary and the lay judges over control of the guilt decision and, ultimately, the sentencing decision. Jurors could deny the judge the right to sentence by nullifying the law and acquitting even if convinced of guilt, if they felt the sentences were too harsh or the laws unjust. English judges tried to restrict juries in seditious libel cases to the naked historical fact of whether the defendant published the contested writing or gave the contentious speech. Defendants insisted that the jury had the inherent power to decide the legal question, as to whether the text was libelous. This was the heyday of the jury as a political institution. The protagonists of the law-finding jury won out with Fox's Libel Act of 1693.⁷⁴ This history led the French and later the majority of continental European countries to introduce trial by jury in the wake of the French Revolution.

But the European jury differed from the English jury in that jurors, in addition to deciding guilt, also answered a list of questions, a form of special verdict, which determined the elements of the crime and the aggravating and mitigating factors that could influence sentence. European cassational courts tried to limit juries to deciding just these constitutive questions and thus leave it to the professional judge to interpret the jury's answers and determine what particular crime the defendant was guilty of. European academics contended that guilt was a mixed question of fact and law and that jurors should not answer legal questions. They claimed that the mixed court, where lay and professional judges deliberated together on all issues of fact, law, and sentence was superior for this reason. Liberal, democratic forces stemmed the tide toward eliminating the jury systems until the totalitarian tsunami of the first half of the twentieth century wiped out democracies and constitutional monarchies, and the jury, in Russia, Italy, France, Japan, Spain, and Germany.⁷⁵

European jury verdicts were always majoritarian, never unanimous, and jury selection was always very quick with little *voir dire* and relatively few peremptory challenges. In discussing *Batson v. Kentucky*,⁷⁶ it is interesting to discuss with students whether we should abolish peremptory challenges,⁷⁷

73. *Id.* at 103-04.

74. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury* 318-55 (Chicago, 1985).

75. Thaman, *Comparative Criminal Procedure*, *supra* note 25, at 14-15.

76. 476 U.S. 79 (1986).

77. As suggested by Justice Marshall in his concurring opinion in *Batson*, 476 U.S. at 107-08.

and go to a super-majoritarian verdict (like the 10-2 verdicts allowed in England and Wales and Oregon), and leave, for instance, African-Americans or anti-death penalty jurors on jury panels, so as not to exclude their points of view, bearing in mind that a majority could outvote them.

Only with the decisions of the U.S. Supreme Court in *Jones v. United States*,⁷⁸ *Apprendi v. New Jersey*,⁷⁹ *Ring v. Arizona*,⁸⁰ *Blakely v. Washington*,⁸¹ and *United States v. Booker*,⁸² did it become apparent that the European special verdict, with questions related to elements of crimes and aggravating and mitigating factors, might be relevant to the U.S. discussion.⁸³ Obviously, the statutory schemes struck down in the *Apprendi-Booker* line of cases permitted judges to co-opt the bulk of the decision making from juries by labeling issues as varied as weight of drugs, type of weapon, seriousness of injuries, presence of racist motives, and the presence of aggravating facts in capital cases “sentencing” issues for the judge to be decided by a preponderance of the evidence, rather than issues for the jury to be decided beyond a reasonable doubt.⁸⁴ Although the bifurcated opinion in *Booker* has temporarily resurrected the U.S. Sentencing Guidelines as being advisory only, thus avoiding the question, *Blakely* and *Jones* clearly leave open the question as to whether these factual issues, most of them related to the commission of the crime and not criminal history of the defendant, should always be left to the jury if they have an impact on the minimum or maximum sentence ranges.⁸⁵

Conclusion

By immersing oneself in comparative law and the history of criminal procedure, one gains innumerable insights that help in understanding the advantages and the shortcomings of our domestic system of law, which is the focus of most of our teaching. It is illusory for Americans to think that our system of criminal procedure can be understood solely in terms of its own internal laws and jurisprudence, hermetically sealed off from other

78. 526 U.S. 227 (1999).

79. 530 U.S. 466 (2000).

80. 536 U.S. 584 (2002).

81. 542 U.S. 296 (2004).

82. 543 U.S. 220 (2005).

83. For a discussion of the special verdicts in the new Russian and Spanish jury systems, see Stephen C. Thaman, Europe's New Jury Systems, in *World Jury Systems* 319, 338-44 (Neil Vidmar ed., New York, 2000).

84. The use of special verdicts in relation to capital aggravators was rejected by the Florida Supreme Court after having been brought up in the wake of *Ring*. *Florida v. Steele*, 921 So.2d 538, 544-48 (Fla. 2005). On the desirability of moving to general jury sentencing in non-capital cases, see Adriaan Lanni, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)? 108 Yale L. J. 1775 (1999).

85. Sharing this view, see Justice Thomas' dissent, joined by Justices Stevens, Souter, and Ginsburg, in *Harris v. United States*, 536 U.S. 545, 574-81 (2002).

systems of law that have sought to deal with similar problems over the ages. The reception of principles we hold dear to us—adversary procedure, jury trial, the right to confrontation, the presumption of innocence—in systems with different philosophical and social underpinnings can only give us a broader perspective on the application and appropriateness of these principles. Even further, study of our ancient customary past, and the remarkable chthonic legal systems that functioned at the time of European colonization and still exist in varying degrees, provide us alternative examples of how to resolve the conflicts we have labeled as criminal. We can find the principles of community, reconciliation, restitution, and forgiveness expressly in our own Native American legal heritage and these could provide some important models for humanizing the monster that American criminal justice has become at the dawn of the twenty-first century.⁸⁶

86. See Llewellyn and Hoebel, *The Cheyenne Way*, *supra* note 30, at 329-30.