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**INNOVATION OR RENOVATION IN CRIMINAL PROCEDURE:
IS THE WORLD MOVING TOWARD A NEW MODEL OF
ADJUDICATION?**

Gerald S. Reamey

A universal system of criminal procedure offers the allure of efficiency, predictability, and enhanced crime control. For the first time in modern history, universality seems achievable. The criminal procedures employed by the world's major legal systems are converging. What was once distinctively "civil" or "common law" is now a blend of the two. The adversarial adjudicative approach of most common law countries now can be found in the most unlikely places, and civil law characteristics adorn the processes of some of the world's most aggressively adversarial systems.

While this movement has not gone unnoticed, the pace of change has accelerated, and the ways in which it has manifested itself have increased. This article begins by revealing how little systems actually differ in practice. It then analyzes how the gap that remains between these systems is closing by examining three illustrations of convergence: the growing use of lay judges and juries in civil law countries, the Italian reform movement incorporating adversarial techniques in a traditionally nonadversarial system, and the modernization of Chinese criminal procedure.

Following, or perhaps leading, this trend are a new breed of "hybrid" legal systems that borrow from several legal traditions and invent procedures freely. Beginning with the creation of multinational and supranational criminal tribunals following the end of World War II, new institutions and processes have been developed to deal with regional and international violations. Among the most important examples of the movement toward hybridization and multinational adjudication is the *Corpus Juris* project. Little known in the United States, this proposal represents a controversial effort within the European Union to harmonize—and perhaps to universalize—the criminal processes relating to protecting the Community's financial interests. Only some of the recommendations resulting from *Corpus Juris* have been instituted, but it nevertheless continues to impact thinking about unification and reform. Several tribunals already function with regional and international jurisdiction. The European Court

of Human Rights, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Court have somewhat distinctive rules of procedure, but all blend the traditions of the major legal systems in a slightly different mix.

Will the trend toward adversarial trials and hybrid rules of adjudication eventually produce, as some have predicted, a universal system? This article explains not only the influences propelling countries toward a similar view of criminal procedure, but also why that movement is inherently limited and unlikely to produce universality.

**INNOVATION OR RENOVATION IN CRIMINAL PROCEDURE:
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Gerald S. Reamey*

I. INTRODUCTION

Comparativists for some time have noted that the world's major legal systems, at least in their broadest characteristics, are becoming less distinctive.¹ Casual students of comparative law may continue to describe these systems by reference to their degrees of adversariness, or to the presence or absence of procedural features, or perhaps to their differing views of sources of law.² But increasingly, the reality is much more difficult to confine within the traditional parameters.³

* Professor of Law and Co-Director of International Legal Programs, St. Mary's University School of Law. I was assisted in researching this article by St. Mary's law students Cassandra Charles, Andrew Skemp, Pim Skulkaew, Matthew Ort, and Megan Schad. Very helpful comments, contributions and critiques were provided by my St. Mary's colleagues Michael Ariens, Dorie Klein, and Gary Liu, and by my favorite lawyer, Kay Reamey. This work, and my interest in this field, was inspired by many conversations with my very good friend and sometime co-teacher, Professor Frank Hoepfel of the University of Vienna. His comments on drafts of the article provided the perspective of an academic schooled in a different legal tradition that every comparative work needs. While I am truly grateful for the essential help I received from each of these talented people, they share none of the responsibility for the views I express.

¹See, e.g., RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 31 (5th ed. 1988); DAVID LUBAN ET AL., *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 136 (2010); Vincenzo Ferrari, *Law and Society Studies and Legal Education*, 55 *J. LEGAL EDUC.* 495, 498-99.

²See generally, SCHLESINGER ET AL., *supra* note 1, at 229-525 (comparing common and civil law methods and sources); MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* (2d ed. 1999) (comparing "civil law traditions" and "common law traditions"); Maximo 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, 7-26 (2004) (discussing different approaches to the adversarial and inquisitorial legal systems).

³This confusion is reflected in Professor Pizzi's difficulty defining the difference in American and Continental European trial systems:

When some respected judge or trial attorney gives a lecture at my law school and announces with fervor that "ours is an adversary system," confident that he or she has expressed some obvious and basic truth about our American legal system, I nod in agreement like the rest of the audience. But deep down I do not understand the distinction being drawn and what is supposed to separate the American trial system, and

It is not entirely clear, for instance, why criminal procedures in European courts seem to be growing more similar to those in the United States. At the same time, Mexican criminal trials look very different from ones in Germany or Italy, even though those countries share a common legal heritage with Mexico. Perhaps the explanation lies in the increasing access to information; a variation on the “world is shrinking” view that people previously separated by geography, culture, and cumbersome communication will affect each other more rapidly as they have more contacts. Or, it may be that new political and—more importantly—economic and trade alliances are pushing societies to “harmonize” in the interest of efficiency and productivity.⁴ Whatever the explanations, it is at least demonstrable that in important ways, and at a rate well in excess of the usual pace of evolution in law, the understanding of what defines a “legal system” is changing.⁵

“Convergence” is the word often used to describe this change, and indeed, there has been a noticeable tendency in reform efforts to look outside the traditional processes of one’s own legal system and incorporate features borrowed from other forms.⁶ This has resulted in “civil law” countries adopting certain “common law” procedures, and “common law” countries departing from the methods usually associated with the common law system. As examples accumulate of nations moving toward a common, hybridized view of criminal procedure, it is important to investigate some of the reasons for this reform—which sometimes is quite radical—and to consider the ways in which these reforms are being applied.

In this article, I describe first what people know, or think they know, about the traditional order⁷ before demonstrating that for a long time the differences in the criminal procedures of the major legal systems have not been as

presumably the English system, from other western trial systems. The world that seems black and white to others seems to be only gradations of gray to me: some dark, some light, but all shades of gray.

William T. Pizzi, *The American “Adversary System”?*, 100 W. VA. L. REV. 847, 847 (1998).

⁴See Emma Phillips, *The War on Civil Law? The Common Law as a Proxy For the Global Ambition of Law and Economics*, 24 WIS. INT’L L.J. 915, 917 (2007) (noting that “the contest between civil law and common law can be seen as a proxy for an ideologically informed debate about the purpose of law in state formation and the flow of capital, and the regulation of markets”). For an example of an effort to harmonize a body of law within the European Union, see Bernhard A. Koch, *The “European Group on Tort Law” and its “Principles of European Tort Law”*, 53 AM. J. COMP. L. 189 (2005).

⁵See Colin B. Picker, *International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT’L L. 1083, 1094 (2008) (discussing whether classical characteristics of legal systems are fading or spreading).

⁶See LUBAN ET AL., *supra* note 1, at 136.

⁷See *infra* Part II.

great as commonly believed.⁸ Next, I explore a few significant ways in which the gap between the systems has been narrowing in recent years. To do this, I consider the increasing use of juries and lay judges in places where lay participation either has never existed or has not existed for a long time.⁹ I then review the extraordinary reform efforts in Italy, breaking with its historical approach to criminal justice and moving deliberately toward a “middle-ground.”¹⁰ Finally, I describe the movement in China away from an entirely different kind of legal system to one that—at least in principle—is imbued with modern aspects borrowed from several procedural schemes.¹¹

While these changes have been occurring, legal systems have been developing at the supranational level. In both regional and international tribunals established for special purposes, whole legal regimes have been created, without traditions of their own, but borrowing liberally in smorgasbord fashion from others.¹² These examples—the European Court of Human Rights, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Court—play an important role in leading or reflecting the hybridization of criminal procedure.¹³ In this regard, I also review the impact of the European Union’s *Corpus Juris* project—a possible precursor to a unified system of criminal procedure for an entire continent of diverse and sovereign nations.

Against this backdrop, I discuss why I think these changes are occurring and what the prospects are that they will continue and result in adoption of a universal “third-way” of adjudicating criminal cases. Is this convergence the result of a deliberate attempt to harmonize and homogenize systems? Is it a common recognition of a better way to achieve criminal justice? Or is this “trend” really only a fad or coincidence? The answers to these questions lie not only in law, but in an understanding of common values, geopolitics, cultural change, the impact of world markets, and the information revolution.

II. THE PRINCIPAL LEGAL TRADITIONS AS THEY ARE COMMONLY UNDERSTOOD AND MISUNDERSTOOD

In order to grasp the magnitude and reach of these movements toward convergence and to speculate about the causes for them, I will revisit the most common characterizations of these systems. The world’s major legal systems¹⁴

⁸ See *infra* Part III.

⁹ See *infra* Part IV.A.

¹⁰ See *infra* Part IV. B.

¹¹ See *infra* Part IV.C.

¹² See *infra* Part V.

¹³ See LUBAN ET AL., *supra* note 1, at 137 (stating decisions by regional human rights tribunals “push states in the direction of procedural fairness and recognition of defendants’ rights”).

¹⁴ The use of “major” to describe these systems is entirely my own. Other systems,

traditionally are divided into three: those in the “common law” tradition; others (most) in the “civil law” tradition; and a smaller but significant group in the “communist/socialist” tradition.¹⁵ As noted, significant differences exist within each of these categories.¹⁶ The English practice common law in a way that is quite distinct from the version we use in the United States.¹⁷ Among the civil law countries, some nations employ variations that would be barely recognizable to others in the same tradition. Not so long ago, with the collapse of the Soviet Union, China was the leading exemplar of a communist approach to justice. Now, like Russia, it is a changing legal system with vestiges of the past and sometimes awkward reform features of the future.

If these differences are set aside and the “major systems” are categorized by those who have little interest in, and exposure to, the detailed workings of those systems, the stereotypical characterizations might look like this: those of us who follow the common law tradition see the decisions of courts, especially higher appellate courts, as a legitimate source of law. While we also recognize the legislative branch of government as a creator of law, and while we might even consider statutes and constitutions to control over “judge-made” law, in the absence of such conflict, the rules crafted by courts are seen as binding, not just on lower courts, but on society as a whole.

The English-influenced varieties of common law also share another

important in their own right and often of growing prominence, may deserve a place that I have not reserved for them in this article. For example, the importance of Islamic law deserves attention, but I have chosen not to incorporate “religion-based” legal systems within this analysis because their nature does not allow the same kind of change that secular systems do. Over time, significant modifications may occur in these systems, but they do not provide a good barometer for worldwide change due to the tenets upon which they are founded.

¹⁵See LUBAN ET AL., *supra* note 1, at 135 (stating that the “main distinction” is between common law tradition and civil law tradition but socialist law tradition also could be identified); Picker, *supra* note 5, at 1095 (stating that common law and civil law systems are in “Western” tradition; others are in the “non-Western”); William Partlett, *Re-Classifying Russian Law: Mechanisms, Outcomes, and Solutions for an Overly Politicized Field*, 2.1 COLUM. J. E. EUR. L. 1, 24 (2008). As Partlett notes, some comparativists have “written off” communist and socialist systems as insignificant or extinct. *Id.* at 39-41. As I write this, I can imagine many legal comparativists cringing at my use of any of these outdated descriptions. I have used the terms precisely because they remain so firmly associated with a body of notions about differing processes of adjudication that, for my purposes in this article, they serve as a ready shorthand for a cumbersome conglomeration of fact and fiction.

¹⁶See LUBAN ET AL., *supra* note 1, at 136.

¹⁷John Hatchard, *Criminal Procedure in England and Wales*, in *COMPARATIVE CRIMINAL PROCEDURE* 176, 180 (J. Hatcher, B. Huber & R. Vogler eds., 1996). I am reminded in this regard of Professor Henry Higgins’s lyric in “My Fair Lady” to the effect that English has not been spoken in America for years. Just as we are two peoples divided by a common language, our legal systems bear similarities, but with distinctive accents.

distinguishing characteristic. They all are, to varying degrees, “adversarial” in their adjudicatory processes. As has been discussed extensively by many capable comparativists, this feature relegates the common law trial judge to the role of neutral referee,¹⁸ rather than an active participant in the gathering of evidence and its presentation at trial.¹⁹ The lawyers (advocates) shape and control the investigation, accusation, trial, and appeal of the case.

By contrast, the stereotypical civil law system supposedly pays little or no attention to the decisions of appellate judges in deciding what the law “is.” Law is made by the legislature or the executive; judges read and apply the law, and perhaps occasionally interpret the law, but only within very limited bounds. What the judges have to say about the application of the law is of importance only to the parties; it is of scant concern to other courts within the same system, and of no formal precedential value.

In adjudication, the civil law judges—usually professionally trained, but sometimes sitting collegially with lay colleagues—control the trial.²⁰ Often, magistrates also play a role in the investigation phase, and may even have extensive supervisory powers over it.²¹ Prosecutors in these systems tend to be relegated to more preliminary tasks and may have relatively little discretionary authority.²² It is not unusual to find prosecutors and judges functioning within the same branch of government, in cooperation, and perhaps as interchangeable career professionals who have never ventured outside this professional track to serve in other capacities.

Communist legal systems share many of the procedural features of civil law systems.²³ The overt political control exercised by the state over the criminal

¹⁸See CHRISTOPH SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 217-18 (2001) (stating that the role of judge in the adversary system is comparable to an “umpire” in sports contests); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 *STAN. L. REV.* 1009, 1017-18 (1974) (comparing the roles of lawyers and judges in adversarial and accusatorial proceedings); Raja D. Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 *ARIZ. J. INT’L & COMP. L.* 113, 131 n.40 (2004) (“A typical, if somewhat oversimplified, example of an ‘adversarial’ system of justice is the English Common Law system where traditional theories of jurisprudence regard the duties of the judge not to ‘inquire into the truth’—as is done in an ‘inquisitorial’ system of justice—but to act as a neutral umpire in an ‘adversarial’ contest between two active parties”).

¹⁹Of course, the degree to which the judge is detached or an active participant differs from country to country and judge to judge. The relative inactivity of the trial judge nevertheless remains a common feature of adversarial systems, and is usually associated with common law origins.

²⁰See SAFFERLING, *supra* note 18, at 217.

²¹See Goldstein, *supra* note 18, at 1018-19.

²²See *id.* at 1019 (finding little or no discretion lies with the prosecutor).

²³See John C. Reitz, *Doubts About Convergence: Political Economy as an Impediment to Globalization*, 12 *TRANSNAT’L L. & CONTEMP. PROBS.* 139, 156 (2002) (stating that

justice system distinguishes this kind of legal system from others using the civil law form.²⁴ Judicial independence may be lacking entirely,²⁵ or may be compromised heavily by the perceived needs of the state in service to the ideological ends it pursues. Seeing the judiciary and indeed the entire criminal justice mechanism as an arm of state policy results in processes that usually are detached in practice from the expressed principles embodied in the laws of the nation. For example, lay assessors sometimes play a prominent role in criminal trials—a visible acknowledgment of the people’s relationship to the state²⁶—although the assessors actually have little or no real independence. Higher courts often have expansive power to “correct” lower court findings seen as not being in the interest of the state. Lawyers within the system may see their role, not as protectors of the accused, but as partners in the state’s justice apparatus. And lawmakers, usually members of one dominant political party, can be expected to cooperate with the ruling political elite.²⁷

As the leading practitioners of communism have trended toward market economies and trading alliances with non-communist governments and capitalist states, hybrid forms of law and procedure have developed to facilitate their economic needs.²⁸ Since this is a relatively recent phenomenon, hybrid legal systems have developed with features inconsistent with the stereotypical model, even while they retain characteristics rooted in the more “pure” communist ideology of the past.²⁹ This, of course, provides comparativists with a virtual laboratory in which these experiments may be observed. In some cases, comparativist scholars are themselves called upon to help governments shape their

Russian law more strongly influenced by Continental civil law than by American-based common law).

²⁴See Ira Belkin, *China, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 92 (Craig Bradley, ed., 2d ed. 2007) (finding that the “Chinese judicial system is embedded in a political system that does not tolerate challenges to the authority of the Chinese Communist Party” and that the “courts are not independent”).

²⁵See *id.*

²⁶See *id.* at 104 (noting that the “people assessor system developed during Maoist era as a way to bring justice closer to the common people”).

²⁷Although these features usually do exist within an ideologically motivated legal system, they also may be prevalent in states with autocratic forms of government or totalitarian regimes.

²⁸See Wendy N. Duong, *Ghetto'ing Workers with Hi-tech: Exploring Regulatory Solutions for the Effect of Artificial Intelligence on "Third World" Foreign Direct Investment*, 22 TEMP. INT'L & COMP. L.J. 63, 132 n.279 (“Take the most fundamental example: the law of contract in Vietnam rests on principles that do not always parallel contract common law as we know it in the U.S. Nor is the contract law of Vietnam purely based on a civil-code system like many European countries. Vietnamese contract law is somewhat a hybrid creature—somewhere between a code of morality, social flexibility and remnants of a communist economic and political system.”); Partlett, *supra* note 15, at 49.

²⁹See Partlett, *supra* note 15, at 49.

systems to meet new needs.³⁰

In addition to rather commonly recognized legal traditions, one more kind of “legal system” must be added.³¹ This is the *ad hoc* development of criminal processes designed and adopted by the various international criminal tribunals.³² These invented systems, taking their cues from the Nuremberg War Crimes Tribunal, employ a mix of features borrowed from adversarial and non-adversarial systems,³³ cobbled together to serve the peculiar requirements of courts with mixed-nationality benches, advocates, and parties, and dealing with crimes defined by international law rather than a legislative body. These, too, test new combinations of old processes—and sometimes new processes—in a public forum, arguably one that is detached from the overpowering influence of any single state’s culture, language, politics, or legal tradition.

III. Things Aren’t What They Seem: Why Legal Systems Are More Alike Than Usually Believed

A. Sources of law

These generalizations about legal systems are too often inaccurate, misleading, or at least overstated.³⁴ While this criticism is justified, there are

³⁰See Mathias M. Siems, *Legal Originality*, 28 OXFORD J. LEGAL STUD. 147, 151 (2008) (Eng.) (stating that comparativist scholars do not merely compare different approaches; they make policy recommendations based on comparisons). Consultants may influence change in the direction of the systems they represent. When American lawyers and judges advise emerging democracies, for example, they are likely to counsel adoption of procedures with which they are familiar.

³¹This “system” can scarcely be called that. It is more accurately a collection of variants and combinations. See Mark A. Drumbl, *Atrocity, Punishment and International Law*, 13 J. CONFLICT & SEC. L. 477, 479 (2007) (stating that “[t]he system of international criminal law is relatively new and its development has been disjointed as we have had a variety of ad hoc international tribunals, the International Criminal Court (ICC), national approaches and a range of hybrid tribunals”).

³²See Patricia M. Wald, *International Criminal Courts - A Stormy Adolescence*, 46 VA. J. INT’L L. 319, 337-39 (2006) (discussing how hybrid tribunals “represent one powerful model through which national and international legal systems are communicating and influencing one another”); Picker, *supra* note 5, at 1087-88.

³³See CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE, 30A Fed. Prac. & Proc. Evid. § 6360 (1st ed. 2010) (stating that the Nuremberg tribunal employed a hybrid procedure); Picker, *supra* note 5, at 1087-88 (stating that the mixed processes of ICTY and ICTR have caused problems, and ICC may experience similar difficulties).

³⁴See, e.g., Pizzi, *supra* note 3, at 847; Phillips, *supra* note 4, at 922; Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 481 (1975).

other, less-often repeated observations that demonstrate how much narrower the gap actually is between supposedly distinguishing characteristics.

Even the most disengaged American can scarcely avoid hearing public political figures decrying “activist judges” and “legislating from the bench.”³⁵ Those same politicians would identify the American legal system as a “common law system” formed in the English tradition. The inconsistency of calling, on the one hand, for a very limited role for judges and, on the other hand, applying a label that incorporates the view of judges as rule-makers and a legitimate source of law, seems to be lost on many observers. This misunderstanding of the essential nature of common law judging does highlight, however, the current view and reflects the diminished role that judge-made law is seen to have in the development of law, even within in the United States.

Statutes now play a dominant part in law creation.³⁶ American judges, often to the surprise of Europeans, rarely craft entirely new legal doctrine, and probably do not see themselves as having that responsibility.³⁷ To the extent that American judges “make” law,³⁸ it is more likely to involve the interpretation of statutes. If that interpretation is by a higher appellate court, it has precedential effect and binds lower courts within the same jurisdiction. It is in this limited realm that the American “common law” judge “makes” law, and not in the free-wheeling fashion some may imagine.³⁹

³⁵See Larry V. Starcher, *A Judicial Philosophy: People-Oriented Justice*, 111 W. VA. L. REV. 411, 452 (2009) (“After three decades of hearing these arguments, my conclusion is, if you agree with my interpretation of a statute or constitutional provision, I am a ‘strict constructionist.’ If you disagree with my interpretation, I’m an ‘activist judge’ legislating from the bench! Take your pick!”); Keenan D. Kmeic, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1442-43 (2004) (explaining that in the past few years, politicians and media pundits have issued harsh rhetoric condemning so-called “activist judges” for “legislating from the bench”).

³⁶See Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw out That Baby*, 87 CORNELL L. REV. 309, 358 (2002) (Noting that “[i]t would be useful and illuminating to develop a body of scholarship that counsels legislators about the design and drafting of statutes given the dominant role of statutes in the modern state. The failure of scholars to do so thus far is partially attributable to the juro-centrism of legal scholarship . . .”).

³⁷See Matthew Weisberg, *Hon. John Richard Padova Senior U.S. District Judge, Eastern District of Pennsylvania*, 56-MAY FED. LAW. 26, 27 (“The judge is not inclined to give his judicial philosophy a label, matter-of-factly stating that trial judges in most matters do not really have the opportunity to ‘make new law.’”).

³⁸With respect to criminal law, many states in the United States have completely abandoned common law crimes, and require that offenses be defined by statute. See, e.g., TEX. PENAL CODE ANN. § 1.03(a) (West 2003).

³⁹See Jill Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1072-73 (2000) (stating that “[j]udge-made law is generally more stable and consistent than legislation, which is affected by politics, and that courts are limited in the scope of the changes they can effect by the nature of the

Even the English judge—the quintessential common law figure—plays a secondary role in making law. The English Parliament is considered the primary law-making body, with judges playing a much more restricted part.⁴⁰ Statutes control and expand in influence; judge-made law shrinks in importance.

But is it not much the same in the civil law? In a legal regime in which codes, and only codes, are considered to be law,⁴¹ do the decisions of courts have no force? Actually, they do have considerable importance. Obviously, the parties are affected by these rulings. From their perspective, the trial judge who interprets a code, even incorrectly, has made “law,” at least for them. More broadly, the decision of a country’s supreme court or constitutional court is viewed with interest by lower court judges and practitioners because it permits the legal actors and society in general to predict what the result is likely to be in a similar case.⁴²

The decision of a civil law court may not be seen as binding precedent on lower courts, or even on the court rendering the decision—as, indeed, it is not, strictly speaking, in the United States⁴³—but it would be overstatement to assert

cases brought before them”).

⁴⁰See *Abbott v. The Queen* [1977] A.C. 755, 767 (appeal taken from Trin. and Tabago) (“Judges have no power to create new criminal offences; nor in their Lordships’ opinion for the reasons already stated, have they the power to invent a new defence to murder which is entirely contrary to fundamental legal doctrine accepted for hundreds of years without question. If a policy change of such a fundamental nature were to be made it could, in their Lordships’ view, be made only by Parliament. Whilst their Lordships’ strongly uphold the right and indeed the duty of the judges to adapt and develop the principles of the common law in an orderly fashion they are equally opposed to any usurpation by the courts of the functions of Parliament.”); *Kneller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions*, [1973] A.C. 435, 464-65 (holding that courts no longer have the power to make criminal law, but where parliament has not legislated, the courts are free to continue enforcing common law).

⁴¹See Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 382 (2008) (stating that civil law systems are characterized by their reliance on legislation instead of judge-made law).

⁴²See Jeffrey G. Miller, *A Generational History of Environmental Law and its Grand Themes: A near Decade of Garrison Lectures*, 19 PACE ENVTL. L. REV. 501, 512 (2002) (“Most of the world’s legal systems are code systems, not common law systems, and do not adhere to the *stare decisis* use of precedent as does the Anglo-American common law system. That does not mean they are without jurisprudence or legal doctrine”); Eu Jin Chua, *The Laws of the People’s Republic of China: An Introduction for International Investors*, 7 CHI. J. INT’L L. 133, 136 (2006) (stating that since China is a civil law system, prior cases have no binding effect; however, due to an increase in foreign litigants, some provincial judges are writing their decisions with more legal analysis to provide better guidance for legal practitioners); PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 262 (2007).

⁴³Common law courts always retain the power to overrule prior decisions. The principle of *stare decisis* imposes a systemic respect for precedent, even when those earlier opinions have become suspect or reflect thinking that is no longer in vogue. An example of this can

that the opinion has no influence on the application of the law. In a civil service system in which advancement through the ranks of the judiciary is determined in part by a judge's ability to avoid excessive reversals by higher courts, it would be surprising if the views of the highest-level judges were not followed closely by the trial courts.⁴⁴ Consistency is a necessary goal of any legal system that seeks legitimacy. Random and entirely *ad hoc* rulings quickly undermine the confidence of a people in their courts and are not likely to be tolerated. This notion of predictability is, in American courts, advanced by deference to precedent (or *stare decisis*), generally understood to mean that the previous opinions of a given court should be followed and, further, that lower courts should follow the legal decisions of higher courts.

Isn't the ruling of an American court "law" with respect at least to lower courts? While one might say quite correctly that the decision of an intermediate state appellate court is "binding" precedent on trial courts within its jurisdiction, that decision usually has no binding effect on trial courts in areas of the state that may fall under the jurisdiction of a different intermediate appellate court with a conflicting view or no expressed view. The decision is perhaps persuasive authority in that other region, but only in the way a civil law appellate court's opinion would be persuasive. And even the trial courts subject to the jurisdiction of the deciding court may distinguish the higher court's opinion or find other ways to avoid the strict application of its ruling. The highest-level appellate court in the state can, if asked, overrule what briefly was "law" announced by a lower appellate court, but the state high court's decision is not safe from statutory modification or, in some cases, review and reversal by a federal court.

be seen in *Dickerson v. United States*, 530 U.S. 428, 430 (2000), a decision in which Chief Justice William Rehnquist, writing for the majority, labels the rule of *Miranda v. Arizona* constitutionally-based. That decision depended in large part on the fact that *Miranda* had been the recognized rule for many years and its famous warnings have "become embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.* at 430. As the Court noted, "Even in constitutional cases, *stare decisis* carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification." *Id.* at 429. In spite of this reluctance to tinker with what their predecessors have done, common law appellate judges sometimes feel compelled to refine, modify, or even abandon earlier iterations of the law. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

⁴⁴*See* Allen Shoenberger, *Change in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent into the Civil Law System*, 55 LOY. L. REV. 5, 5-6 (2009) ("In one of the discussions with a justice of the Italian Supreme Court, the justice stated that if an Italian judge in a lower court ignored a decision of his court without explaining why (or distinguishing it) that judge might be subject to judicial discipline under the Italian system! In another discussion at the European Court of Justice in Luxembourg, an Advocate General for the Court (a position that corresponds to the Solicitor General of the United States) stated that prior cases decided by the court are not technically precedent; however, the principles within the prior decisions must be followed by national courts (i.e. the courts of the 27 nation states in the European Union).").

Ultimately, American courts do make law, but only in a limited sense. The divide between common law and civil law looms larger in characterization than in reality with respect to sources of law. It is more a matter of degree than a difference in kind.⁴⁵

B. Means of Adjudication

Perhaps, as some have suggested, the difference lies not in the role of codes versus opinions, but in the means by which disputes are adjudicated.⁴⁶ If the American and British systems, and those common law systems they have influenced, are inherently adversarial in nature, and the civil law countries employ a non-adversarial approach, that distinction may be sharper and more meaningful than the sources of law. Even here, however, the differences—while real—are not as vast as imagined.⁴⁷

The most casual observer could not fail to notice that in an American or English trial, the lawyers are more active than the judges. They decide on the theory of the client's case and how it will be presented. If the case is to be tried by a jury, the lawyers will organize the evidence and formulate their questions in a way that is easiest for the jurors to understand, and most effective in shaping the way the jurors will view the evidence. The trial court judge sits mute while the questioning is conducted by the lawyers, afraid to interject the obvious unasked question or to make the most innocuous remark for fear that a reviewing court will consider the judge's participation to be an inappropriate comment on the evidence tainting the supposed neutrality of the jury.⁴⁸

Indeed, the American trial lawyer, particularly in a state court, will use all of the available procedural devices in order to produce from a larger body of potential jurors, the group that will be most receptive to his or her presentation. Either side usually is permitted to take the fact-finding function from the judge and give it to a jury, leaving the American trial judge with little to do other than rule on motions and objections, and formulate a jury instruction—subject, of course, to suggestions and objections from the respective lawyers.

⁴⁵There are, of course, significant differences remaining, even if the distinctions are not as sharp as imagined. See J.R. Spencer, *Introduction*, in *EUROPEAN CRIMINAL PROCEDURES* 27-37 (Mireille Delmas-Marty & J.R. Spencer eds., 2002) (cataloging differences in English and continental European criminal procedures, particularly in the investigative and appeal phases).

⁴⁶SAFFERLING, *supra* note 18, at 207 (2001) (noting that “trial [] without doubt . . . [is] where differences . . . [in] legal traditions are most obvious”).

⁴⁷See Denis Salas, *The Role of the Judge*, in *EUROPEAN CRIMINAL PROCEDURES* 488, 489 (Mireille Delmas-Marty & J.R. Spencer eds., 2002) (noting the distinction between accusatorial and inquisitorial systems is outdated and not particularly apposite).

⁴⁸See SAFFERLING, *supra* note 18, at 211 (noting that some see “summing-up” of case as opportunity to slant the evidence).

Even if justice might be subverted by the failure of a lawyer to object to evidence, ask an important question, make a particularly effective argument, or avoid harmful strategies, the American trial judge sits and watches and listens without intervening.⁴⁹ This passive role is made somewhat easier for the judge because she or he is almost totally ignorant of the evidence that will be presented. The judge hears the facts when the jurors hear them.

The English judge traditionally has been more active than his American counterpart.⁵⁰ In England, judges have been much less reticent to play a more active role, even in the presence of the jury and despite potential reversal of a conviction for interventions that might influence the jurors.⁵¹ While the examination and cross-examination of witnesses is conducted by the lawyers in a fashion strongly resembling that used in the United States, there is much less opportunity for English lawyers to shape the jury through selection strategies. As in many features of the American method of adjudication, this difference reflects a fundamental and thorough distrust of government, even as represented by the relatively benign and independent figure of the judge.⁵² Ironically, this divergence in the American and English procedural forms may be explained by an attitude about government learned largely from America's colonial experiences with the English crown.

A trial in a non-adversarial, civil law court appears very different.⁵³ The lawyers are relegated to the role of minor functionaries throughout the taking of evidence. They come to modest life in argument about guilt or, more likely, appropriate punishment. A prosecutor's most important function may be to recommend a particular disposition. Examination of witnesses by either side in a criminal trial is often quite limited lest the presiding judge interpret the suggested

⁴⁹To the extent that ineffective assistance of counsel claims and rules of professional responsibility are designed to prevent such failures, they do so, if at all, only after the harm has been done. Disciplining a poor lawyer provides no remedy for the ill-served defendant, and ineffective assistance claims are notoriously difficult to win.

⁵⁰See SAFFERLING, *supra* note 18, at 210 (recognizing that English judges have more prominent roles than their American counterpart, particularly in "summing-up" to the jury).

⁵¹See David Feldman, *England and Wales*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 149, 188 (C. Bradley, ed., 2d ed. 2007) (noting that "[t]he jury is told to disregard any indication which the judge might seem to give of his view of the evidence, but the freedom to comment on evidence allows the judge to "steer" the jury in a particular direction (although too obvious a steer may lead to reversal on appeal).").

⁵²Further separating the American state trial judge from the influence of a central government is the fact that these officials often are popularly elected, sometimes without political party affiliation. In spite of the independence an American judge enjoys from the control of other branches of government, the historic vestiges of the colonial period seem firmly rooted in the national psyche, effectively preventing significant movement away from the jury or toward more active involvement by the judge.

⁵³See generally Gordon Van Kessel, *Adversary Excess in the American Criminal Trial*, 67 *NOTRE DAME L. REV.* 403, 435-38 (1992) (discussing relative lack of zeal of advocates in civil law courts).

questions as implied criticism of the judge's competence. Barring trial testimony that is inconsistent with the version of facts related by the witness during the investigative phase of the prosecution, no one in the courtroom hears the evidence for the first time at trial. The *dossier*, carefully compiled by the trial judge from materials largely obtained under the direction of the prosecutor or an investigating magistrate prior to trial, and made available in its entirety to the defendant, constitutes the trial evidence before the trial event occurs. The script is written, edited, and learned by the players well before its production to the public.⁵⁴

There usually is no American or English-style jury in these civil law proceedings, although lay judges may form a collegial bench with the professional judge or judges.⁵⁵ The absence of unguided lay participants obviates the need for extensive and complicated rules of evidence, most of which are designed to ensure that jurors do not hear anything unduly prejudicial or unreliable. Since the professional judge can give hearsay and other questionable forms of evidence the weight they deserve, and can guide any lay colleague who sits in judgment alongside him, many evidentiary and procedural rules are simply unnecessary. There is no time-consuming jury selection process, no problems with sequestration or jury misconduct, and no need for jury instructions. Judges are free to seek the truth collaboratively with the lawyers who appear before the court.

All of this presents a conceptual gulf between the adversarial process and the so-called "inquisitorial" one. Again, however, the reality is less stark. In England and the United States, as well as other common law countries, the incidence of jury trials is quite small.⁵⁶ Most cases are disposed of by a bench trial or, far more likely in America, by entry of a negotiated plea of guilt that negates the entire trial procedure. Rules of evidence still limit what may be presented to the judge, but hearsay testimony might be introduced in a bench trial and latitude usually is given to the attorneys because the judge supposedly will discount any tainted or unreliable evidence.

⁵⁴In some countries, like Mexico, there is never any significant public production of the evidence. Guilt is determined primarily on a written record without the kind of continuous, public event Americans associate with "trial."

⁵⁵See LUBAN ET AL., *supra* note 1, at 149-50 (jury trials in criminal cases are far from the norm in most other legal systems but lay judges are used in some systems).

⁵⁶In an important work describing the decline in jury trial in both civil and criminal cases, Marc Galanter notes that:

From 1962 to 1991, the percentage of trials in criminal cases remained steady between approximately 13 percent to 15 percent. However, since 1991, the percentage of trials in criminal cases has steadily decreased (with the exception of one slight increase of 0.06 percent in 2001): from 12.6 percent in 1991 to less than 4.7 percent in 2002.

Since jury trials account for such a small percentage of the total number of criminal dispositions, the opportunity for full adversarial contests is diminished.⁵⁷ It is true that motion practice in anticipation of a trial that may never occur remains adversarial, as does the discovery process to some degree. But in the United States, plea bargaining plays such a dominant role in the resolution of criminal cases that motions may not be filed at all, and even if they are, the “fight” over them often has more to do with gaining leverage in the plea negotiation that will take place later, than in the preparation of a case for actual trial.

Potentially adversarial motions, including those for change of venue, suppression of evidence, and reduction of bail, may be preempted by pre-trial diversion and other litigation avoidance techniques. Criminal prosecutions that result in the accused accepting anger management counseling, restitution and dismissal, substance abuse classes, or deferred adjudication, either do not require an aggressively adversarial posture or curtail the usual adversarial progress of a case through trial and possible appeal. More recent efforts to mediate criminal cases or employ restorative justice techniques early in the process further limit the extent to which an American prosecution is fully adversarial.

Discovery, which is routine in countries without an adversarial trial culture, can be quite contested in America. While the government must disclose certain materials in its possession to the defense as a matter of due process, constitutional constraints prevent the disclosure requirement from being truly reciprocal. Consequently, and in an apparent effort to “level the playing field,” courts and state legislatures sometimes afford the accused in the United States very little information about the prosecution’s case as a matter of right, leaving the management to the discretion of trial judges. The result, particularly in cases in which the resources or willingness of the defendant’s lawyer to conduct vigorous independent investigation of the facts of the case are limited, is a choice of bad options. Either the defense counsel will negotiate a plea without complete information about the government’s case—effectively buying what the government is selling, sight unseen—or the lawyer will elect the expensive, time-consuming, and risky trial, a contest that becomes something of a “trial by ambush” because the lawyer is less than fully informed.

These peculiar American aspects of the adversarial process have been lamented,⁵⁸ but remain largely unchanged. In this respect, the adversarial character of the American legal system is very unlike the more common, non-adversarial trial used in most of the world. But, this feature ultimately has more to do with the likelihood of a just result than it does with the degree of adversariness found in the system. It is not the adversarial model that puts justice at risk; it is the inappropriate application of that model. In England, rules requiring disclosure

⁵⁷The same is true in England, where few cases are actually tried to a jury. See Spencer, *supra* note 45, at 18.

⁵⁸See generally Kessel, *supra* note 53.

of the Crown's evidence operate to prevent the flow of information to the accused from becoming an adversarial struggle without changing the essential nature of the trial process, something that also can be seen in American jurisdictions that have adopted more open disclosure requirements.

IV. CLOSING THE GAP: SOME EXAMPLES OF CONVERGENCE

While there may be less distance between common law and civil law (or adversarial and non-adversarial) systems than commonly believed, even the remaining gap appears to be narrowing. Examples of this shift can be seen in such diverse procedural aspects of these systems as the institution or reinstatement of juries, shifts in control of the trial process from the judge to or from the lawyers, implementation of more vigorous direct- and cross-examination, and increased judicial independence.

A. The Increasing Use of Juries

While Americans would understand the term quite differently, to say that another country has a "jury" means little more than that it uses lay participants in the judging of cases. "Jurors" of this type are sometimes called "lay judges" or "lay assessors," but their role is not the same as the British or American jury. In these common law countries and others, the lay members of the jury decide the facts of a case without the direct involvement of the professional judge beyond receiving the judge's instructions on law orally or in writing. Deliberations are conducted in closed sessions in a manner that is left largely unexplored. These systems, perhaps not knowing how better to answer difficult and perplexing questions of credibility and the like, simply lock away the jurors in a little room with the ultimate question and instructions that are largely unintelligible to them, and wait for the untrained citizens, like the Oracle of Delphi, to appear with an unexplained and unquestioned answer.

Other countries, apparently not trusting lay judges to work without supervision, incorporate them into a collegial bench, guided by one or more professional judges.⁵⁹ In some cases this approach is an artifact of earlier experiences with lay participation,⁶⁰ while for others it is an innovation.⁶¹

⁵⁹Austria, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Greece, Hungary, Latvia, Liechtenstein, Macedonia, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, Switzerland, and Ukraine employ some form of collaborative adjudication. John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 95-98 (2006).

⁶⁰See, e.g., *id.* at 95-98.

⁶¹For a short but illuminating history of the use, disuse, modification, and development of

Movements toward or away from increased lay involvement in judging are revealing on several levels, but the effect these institutions have on adversariness may be independently significant.

The presence of a jury of any sort does not, by itself, necessitate adversarial methods. Nevertheless, as has been noted, introducing a lay adjudicative body in the trial—especially an independent one—changes the courtroom dynamic and tends to promote a degree of adversariness. If, for example, the jury will be “selected” by means that are not entirely random, some process must be used to sort out how decisions will be made. Lay jurors who do not deliberate collegially with professional judges are more susceptible to the influences of less-than-reliable evidence, which leads to concern by the lawyers that the influence will be improper.⁶² Consequently, the lawyers will be inclined to request corrective action by the judge, or to take advantage of the opportunity to make arguments or introduce evidence that might sway the lay observers in their favor. Rules of evidence may be expanded to counter these efforts, all of which creates a more adversarial atmosphere in the trial process.

A number of countries have introduced or re-introduced jurors in their criminal procedure in recent years, and relatively few have abandoned the practice. Germany is among those countries with a civil law tradition that uses lay judges.⁶³ The twelve-member jury was abolished in Germany in 1924, replaced by a system of lay judges, sometimes referred to as “honorary judges.”⁶⁴ In a model employed by many European countries,⁶⁵ the lay participants in a German trial question witnesses, deliberate on guilt, and decide sentences just as their professional colleagues on the mixed bench.⁶⁶ Questions exist about the actual independence of these lay participants, and care must be taken to avoid giving them access to the trial *dossier* that would allow them to prejudge the guilt of the accused,⁶⁷ but they nevertheless continue to function to “promote a general understanding of the administration of criminal justice and strengthen[] public

the jury practice in certain European countries, see generally RICHARD VOGLER, *A WORLD VIEW OF CRIMINAL JUSTICE* 233-53 (2005).

⁶² For an interesting exploration of the kind of influence an adversarial advocate may have on a jury, see generally Annie Cossins, *Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?*, 33 *Melb. U. L. Rev.* 68 (2009).

⁶³ VOGLER, *supra* note 61, at 246; VOLKER KREY, *GERMAN CRIMINAL PROCEDURE LAW* 67-68 (2009); ANKE FRECKMANN & THOMAS WEGERICHT, *THE GERMAN LEGAL SYSTEM* 113-14 (Th. Wilhelmi et al. eds., 1st ed. 1999); Barbara Huber, *Criminal Procedure in Germany, in* *COMPARATIVE CRIMINAL PROCEDURE* 143 (John Hatchard et al. eds., 1996).

⁶⁴ VOGLER, *supra* note 61, at 243-44; FRECKMANN & WEGERICHT, *supra* note 63, at 113-14.

⁶⁵ Jackson & Kovalev, *supra* note 59 at 96-97.

⁶⁶ See FRECKMANN & WEGERICHT, *supra* note 63, at 113 (noting that lay judges have “full voting rights”); KREY, *supra* note 63, at 67 (“professional and lay judges cooperate with equal rights in the decision on . . . guilt and . . . sentencing”).

⁶⁷ See KREY, *supra* note 63, at 68.

confidence in its independence and fairness.”⁶⁸

Germany’s southern neighbor, Austria, also uses this form of lay judging, but retains a British or American style jury as well.⁶⁹ While lay judges, sitting collegially with professional counterparts, are used in certain felony cases, an independent eight-person jury decides guilt in the most serious felony cases and in political cases.⁷⁰ This American-style jury hears evidence that is produced during a trial governed by a three-judge panel of professionals, but the deliberations on guilt take place outside the presence of the judges.⁷¹ Sentencing is a collaborative process, with the jurors and the professional judges deciding the matter together.⁷² The trial itself is conducted in the usual “civil law” or “inquisitorial” fashion, with the evidence being assembled and introduced by the presiding judge and his professional colleagues, and not primarily by the lawyers representing the parties.

As in other countries with lay judges or jurors, Austria seeks by this procedural device to democratize its criminal adjudicative process and to introduce a common language to the proceedings.⁷³ Austrian law professor Herbert Hausmaninger notes that, “lay participation allows for democratic input in criminal procedure and helps to keep the process understandable to the public at large.”⁷⁴ This sentiment is echoed for the German system by Drs. Freckmann and Wegerich:

The main reason for installing honorary judges in the courts is that they create a link between the judiciary and the people, and, due to this, ensure that justice is exercised in a generally comprehensible way and manner. Honorary judges are regarded as representatives of the general public and contribute their specific knowledge about society and their ability to assert particular interests. It is intended that social views and experiences of the honorary judges find an expression in the ruling of the courts. Moreover, professional judges are required to explain their legal arguments and assessments in a simple and comprehensive way which honorary judges—just as the ordinary people—will understand. This is a further check before the judgment is rendered.⁷⁵

The jury selection process can, of course, encourage or exacerbate

⁶⁸See Huber, *supra* note 63, at 143.

⁶⁹Jackson & Kovalev, *supra* note 59 at 95 (noting that independent juries also exist in Belgium, Denmark, Malta, Norway, Russia, Spain, Sweden, and parts of Switzerland).

⁷⁰HERBERT HAUSMANINGER, *THE AUSTRIAN LEGAL SYSTEM* 191 (2d ed. 2000).

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

⁷⁵FRECKMANN & WEGERIC, *supra* note 63, at 113-14.

adversarial tendencies, even if other non-adversarial features are used in the trial itself. Not only will opposing counsel be inclined to posture for the prospective fact-finders during the selection encounter, but he or she will seek to introduce, sometimes surreptitiously, suggestions about how the evidence should be viewed, and perhaps even to allude to the evidentiary facts that will be developed. The mixed bench model avoids this simply by removing any selection process from the purview of trial counsel; they are presented with judges usually chosen by appointment well before the trial begins. Similarly, for the Austrian version of the jury, selection is random and no *voir dire* or challenge procedure exists.⁷⁶ It would seem, therefore, that the political and social benefits of a jury system need not be tied to a pure adversarial struggle, but may be achieved in part without doing violence to inquisitorial ideals.⁷⁷

Whatever impacts jury procedure has on the adversariness one finds in criminal processes, countries continue to institute or revive jury systems, including independent juries. Russia, Spain, and Japan, all with civil law legal traditions, have joined the ranks of those relying in part on lay fact-finders.⁷⁸ Argentina only recently has begun to implement a mixed-bench jury trial procedure that existed in its Constitution for many years,⁷⁹ while South Korea is experimenting with an independent jury system.⁸⁰

In a highly publicized return to use of a jury, Japan held its first jury trial in August of 2009.⁸¹ This reform has been called “the most dramatic change to Japan’s criminal justice system since the end of World War II.”⁸² Like other countries returning to a tradition of jury trial, the transition in Japan has not been without its legal and cultural difficulties.⁸³ Korea, in an “enormous change”⁸⁴ to

⁷⁶See Jackson & Kovalev, *supra* note 60, at 102 (noting the random selection of jurors used in Austria).

⁷⁷See, e.g., Pizzi, *supra* note 3, at 849 (noting that Norway, a seemingly “inquisitorial” country, uses juries without adopting other trappings of the American “adversarial” system).

⁷⁸See VOGLER, *supra* note 61, at 247, 252-57 (noting Spain restored the jury in 1995; Russia began the process in the mid-1990s and extended its reach to all regions in 2007); Hiroko Tabuchi & Mark McDonald, *In First Return to Japan Court, Jurors Convict and Sentence*, N.Y. TIMES, Aug. 7, 2009, at A4.

⁷⁹See Paul Edwards-Kevin, *The Emergence of Trial by Jury in Argentina*, 11 GONZ. J. INT’L L. 1 (2009); Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 633-34 (2008).

⁸⁰See Su Hyun Lee, *Justice is Swift for Novice Korean Jurors*, N.Y. TIMES, (July 17, 2008), at A11; Leib, *supra* note 79, at 634.

⁸¹See Tabuchi & McDonald, *supra* note 78, at A4; Setsuko Kamiya, *First Law Judge Trial Kicks Off in Tokyo: Defendant, 72, Pleads Guilty; Thursday Ruling is Scheduled*, THE JAPAN TIMES, Aug. 4, 2009, available at <http://search.japantimes.co.jp/cgi-bin/nn20090804a1.html>.

⁸²Tabuchi & McDonald, *supra* note 78, at A4.

⁸³See *id.*; Kamiya, *supra* note 81.

⁸⁴See Su Hyun Lee, *supra* note 80.

its justice system, also has experienced growing pains with its jury experiment.⁸⁵

Even if the increased use of juries and lay judges does not necessarily say much about the growth of adversarial characteristics, or establish a clear trend toward a “middle way,” it at least is evidence that strict adherence to the “usual” adjudicative processes of the inquisitorial model has eroded. Because the movement from the stereotypical norm is, so far at least, one-sided,⁸⁶ experimental, and differentiated, it is premature to attach much significance to this phenomenon alone. There are other reforms under way, however, that represent much more important movement away from the traditional methods of civil law.

B. An Intentional Shift Toward Adversarial Trials—The Italian Example

Italy presents an example of remarkable and deliberate reform from a traditional civil law, non-adversarial system of criminal procedure to one with distinctively common law, adversarial elements.⁸⁷ This shift began in 1988, a relatively short time ago in the universe of law,⁸⁸ with the passage of legislation, followed in 1989 by its implementation.⁸⁹

Even minor reforms to procedure law seem to jar the systems in which they occur. Imagine, then, the upheaval brought about by changes to the fundamental procedural premises on which a system is built. It is not surprising that reform of this magnitude generated opposition. In spite of strong resistance, constitutional changes in 1999 cemented the new Italian model in place.⁹⁰

These changes fall in three areas: shifting responsibility for investigation

⁸⁵*See id.*

⁸⁶So far, abandonment of law judging appears relatively rare. Countries following the common law tradition of juries have not shown any strong inclination to move toward the “other side,” although some commentators lament perceived diminution of the institution through various procedural devices.

⁸⁷*See Rachel A. Van Cleave, Italy, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 303 (C. Bradley ed., 2d ed. 2007). Stephen P. Freccero, An Introduction to the New Italian Criminal Procedure, 21 AM. J. CRIM. L. 345, 348-49 (1994); Antoinette Perrodet, The Italian System, in EUROPEAN CRIMINAL PROCEDURES 348, 368-69 (Mireille Delmas-Marty & J. R. Spencer eds., 2002).*

⁸⁸My observation, based on no empirical research, is that the legal profession in the United States changes at a glacial pace, usually requiring at least a decade to fully employ significant changes in the usual way of doing business. Appellate review and “fine-tuning” of those “new” procedures can go on indefinitely. From that perspective, the Italian reforms are, at best, in their adolescence, and in many important ways, in their infancy.

⁸⁹Van Cleave, *supra* note 87, at 303-49; Freccero, *supra* note 87, at 348-49.

⁹⁰*See William T. Pizzi & Mariangela Montagna, The Battle to Establish an Adversarial Trial System in Italy, 25 MICH. J. INT’L L. 429, 430-31 (2004) (describing the battles between the Italian Parliament and Constitutional Court over adherence to the 1989 reform measures); Van Cleave, supra note 87, at 304; VOGLER, supra note 61, at 170-711.*

from a magistrate to the public prosecutor;⁹¹ enhancing the control of the trial lawyers at the expense of the judge;⁹² and introducing a limited form of plea bargaining.⁹³ This “revolutionary”⁹⁴ change left intact many of the traditional “inquisitorial” procedures,⁹⁵ grafting on to the system only these relatively few—but momentous—modifications.

The impetus for this change is not entirely clear, but involves a combination of circumstances of history, culture, and political and legal tradition. It has been suggested that the codes of the fascist period were viewed as overly authoritarian,⁹⁶ prompting reforms in the direction of increased guarantees of

⁹¹See VOGLER, *supra* note 61, at 168-69. Regarding the abolition of the investigating magistrate, Vogler notes:

The *instruction* was abolished entirely and replaced by a “preliminary investigation”, very much on the German 1975 model. The office of examining magistrate disappeared and the pre-trial is now conducted under the surveillance of a “pre-trial judge” (*giudice per le indagini preliminari* - “*gip*”) who has almost no investigatory role. All major procedural steps—for example, searches or pre-trial detention—must be authorised by the *gip* and it is the responsibility of the prosecution, working with the assistance of the judicial police, to collect inculpatory evidence in all cases.

Id.

⁹²See Pizzi & Montagna, *supra* note 90, at 431. The authors explain that:

[T]he changes in the 1988 Code of Criminal Procedure were only intended to adopt an adversarial system to the extent that power over the control of the criminal trial was to be shifted away from the trial judges and placed squarely on the shoulders of the public prosecutors and the defense lawyers, who would have the primary responsibility for presenting evidence and for examining (and cross-examining) witnesses.

Id.

⁹³See *id.* at 437-45 (describing “plea bargaining” and expedited trial processes within 1989 reforms).

⁹⁴See *id.* at 430 (explaining that comparative scholars viewed new Italian code as “revolutionary”); Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1211 (1989) (stating that the new Italian code was “the most outstanding event in the 20th Century” for comparativists).

⁹⁵See Pizzi & Montagna, *supra* note 90, at 465 (stating that Italy wants to protect adversarial values while it retains features of its civil law heritage); VOGLER, *supra* note 61, at 171 (noting that “significant residues of inquisitorial practice were still present”).

⁹⁶VOGLER, *supra* note 61, at 168; See Freccero, *supra* note 87, at 346-47; Amodio & Selvaggi, *supra* note 94, at 1224 (explaining that reforms reflect need to compensate parties for power denied them by dominant decisionmaker).

openness and efficiency, and away from rampant formalism.⁹⁷ Richard Vogler has suggested that increased American political and ideological influences following World War II contributed to the interest in an adversarial trial model.⁹⁸ Perhaps this interest was sparked in part by the hybrid model on display at the Nuremberg War Crimes Trial, or in the many romanticized examples depicted in American movies.⁹⁹ Whatever the causes, reform efforts began in Italy shortly after World War II, culminating in the 1988 legislation.¹⁰⁰

Italian prosecutors and defense lawyers now call witnesses and examine and cross-examine them, a job previously left almost entirely to the presiding judge.¹⁰¹ Instead of giving the judge access to a *dossier* filled with the results of the investigation,¹⁰² the lawyers develop the evidence at trial under rules of evidence that were not necessary in the old system of judge-dominated presentation.¹⁰³ The trial judge is relegated to a role more like a co-participant, having the authority to call witnesses and question them, but only to the extent the parties omit significant evidence.¹⁰⁴ Professors Amodio and Selvaggi describe the trial process under the new code in this way:

[T]he trial structure exhibits the most peculiar features of the adversary pattern. Following the opening speech about case presentation and motions to admit proof, both the prosecutor and the counsel for the defendant produce the evidence for their cases through direct and cross-examination of witnesses, experts, and the defendant himself. The examination of evidence may look simpler than that deeply rooted in the Anglo-American tradition. But the new Code retains the fundamental adversary character of the latter—the prosecution’s evidence (*prove a carico*) is distinguished from exculpatory evidence (*prove a discarico*). The burden of introducing evidence as well as the burden of persuasion have become the cornerstones of the

⁹⁷See Van Cleave, *supra* note 87, at 303; VOGLER, *supra* note 61, at 168.

⁹⁸VOGLER, *supra* note 61, at 168.

⁹⁹See *id.* at 157 (stating that the global resurgence in adversariality was driven by U.S. hegemony and “ideological influence symbolized by the Hollywood courtroom drama”).

¹⁰⁰See *id.* at 168.

¹⁰¹See *id.* at 169; V. CIRESE & V. BERTUCCI, *THE NEW ITALIAN CRIMINAL PROCEDURE FOR FOREIGN JURISTS* 161-62, 178 (2d ed. 1993).

¹⁰²See Van Cleave, *supra* note 87, at 303 (explaining that judge receives a “doppio” or limited *dossier* with much less material than previously available).

¹⁰³See VOGLER, *supra*, note 61, at 170; Van Cleave, *supra* note 87, at 303. This procedure has converted the Italian trial from its previous, inquisitorial form. It is, as two authors have stated, “no longer a trial on evidence, but a trial for evidence.” CIRESE, *supra* note 101, at 161.

¹⁰⁴Amodio & Selvaggi, *supra* note 94, at 1221.

new Italian system of criminal justice.¹⁰⁵

This shift in emphasis under the 1988 code is described by professors Pizzi and Montagna as placing the trial, rather than the investigative stage and the *dossier* it produced, at the “heart of the system” in which “the two contending parties were to produce the evidence and test the evidence at trial.”¹⁰⁶ To ensure that the trial judge had no more than limited access to information about the case before it was tried,¹⁰⁷ the reforms require a different judge to supervise the investigation phase than the one who presides over the trial.¹⁰⁸

Not every aspect of the Italian trial will look familiar to the Anglo-American lawyer. As noted, the Italian judge may call witnesses and may examine witnesses called by the parties.¹⁰⁹ While the latter may sometimes be seen in English courts, and even in American federal courts and those of some states, it is rather uncommon for state trial judges in the United States to engage in more than the most cursory and occasional questioning of a witness for fear that their questions will be misinterpreted by, or improperly influence, the jury.

This does not pose the same impediment in the Italian trial where professional judges sit collegially with lay judges in the German style, at least for the most serious crimes in the *Corte di Assise*.¹¹⁰ Lower level trial courts, the *Tribunale* and *Giudice di Pace*, do not employ a mixed bench, thereby avoiding the problem altogether.¹¹¹

While the introduction of adversarial procedure into the trial stage has perhaps made “criminal trials more consistent with the democratic principles of orality, immediacy, and publicity,”¹¹² it also has introduced the kind of inefficiency and delay that one would expect from a process dominated by opposing counsel rather than the judge.¹¹³ This, in turn, led to the institution of abbreviated trial procedures not entirely unlike those found in the American

¹⁰⁵*Id.* at 1220-21 (italicization added).

¹⁰⁶Pizzi & Montagna, *supra* note 91, at 435.

¹⁰⁷See Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 WASH. U. GLOBAL STUD. L. REV. 567, 571-72 (2005) (explaining that the “double dossier-system used to avoid corruption of trial judge’s “virgin mind”).

¹⁰⁸Pizzi & Montagna, *supra* note 90, at 435-36.

¹⁰⁹Amodio & Selvaggi, *supra* note 94, at 1221; *see also* Pizzi & Montagna, *supra* note 81, at 436-37; CIRESE, *supra* note 101, at 177 (stating that the trial judge has power to summon witnesses).

¹¹⁰Two professional judges sit in combination with six lay judges in the *Corte di Assise*, the trial court responsible for offenses that usually carry lengthy prison sentences. CIRESE, *supra* note 101, at 24-25.

¹¹¹*Id.* at 23.

¹¹²See Van Cleave, *supra* note 87, at 303.

¹¹³See Illuminati, *supra* note 107, at 578 (explaining that the accusatorial-adversarial system is time-consuming and expensive, demanding a duplication of activities).

practice of plea-bargaining.¹¹⁴ As noted by Rachel Van Cleave in her description of this result, it is ironic that the less democratic practice was necessitated by the more democratic reform.¹¹⁵

While the Italian version of plea-bargaining is very limited in comparison with its free-wheeling American counterpart, it nevertheless remains the “most important novelty in the new code.”¹¹⁶ To understand why plea-bargaining is viewed as novel in Italy, one need look no further than the strong-judge/weak-party model usually characteristic of Continental, inquisitorial systems. Plea-bargaining, by contrast, is essentially the placing of control over the issues of guilt and sentencing of the accused in the hands of the lawyers. It runs directly counter to the inquisitorial tradition of leaving such matters to the professional judges, acting either alone or collegially with lay judges.

Italy has softened the impact of its reforms on this tradition by retaining in the judge ultimate power to control and accept or reject any proposed arrangement reached by the parties.¹¹⁷ Also, the Italian model does not encompass, as does American plea-bargaining, what is known as “charge bargaining.”¹¹⁸ Only reductions in sentence are possible. Abbreviated or alternative trials are available for less serious offenses, but not for more serious ones, and only with the collaboration of the judge.¹¹⁹ The procedure code specifies the circumstances under which the accused is entitled to use one of these devices, and the prosecutor lacks the authority to “not bargain” if the accused desires it and the judge determines that an alternative to trial is preferable.¹²⁰

Because plea-bargaining is so deeply inconsistent with the foundational principles of inquisitorial or non-adversarial legal systems, it is truly remarkable that any form of the practice exists within a procedure that remains rooted in that tradition. As Pizzi and Montagna explain:

Plea bargaining would be a challenge to any country with a civil law heritage. It is not surprising that Italy has only approached the topic gradually and that the Italian system is trying hard to soften the challenge that plea bargaining makes to the principle

¹¹⁴See Van Cleave, *supra* note 87, at 304 (concluding that democratic reforms made trials “more complicated and time-consuming”).

¹¹⁵See *id.* at 303.

¹¹⁶CIRESE, *supra* note 101, at 223

¹¹⁷See Pizzi & Montagna, *supra* note 90, at 443-44 (noting that ultimate control in the judge preserves judicial independence).

¹¹⁸JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 273 (Hiram E. Chodosh ed. 2009).

¹¹⁹See *id.* at 142 n.22 (noting that plea bargaining available only for crimes with a sentence up to ten years).

¹²⁰Pizzi & Montagna, *supra* note 90, at 440-43 (stating that the trial judge retains control and can accept proposed bargain despite prosecutor’s rejection). This is understandable in light of the typical rule of “mandatory prosecution” found in many European countries. See *id.* at 440-41.

that similar defendants should be treated similarly as well as to the independent authority of the trial judge to see that the sentence of the defendant is adequate for the crime in question. To date . . . 85 percent of all criminal cases go to trial. This, of course, contrasts sharply with the U.S. criminal justice system where the plea bargaining rate is over 90 percent in most jurisdictions.¹²¹

Although Italy's experiment in plea-bargaining has proven challenging and not altogether successful, it nevertheless has been influential. European countries, inspired by the Italian example and others, have begun to adopt the practice for the same reasons: efficiency and reduction of delays and costs, especially those associated with, or caused by, other procedural reforms.¹²² Russia and Bulgaria, for example, have adopted plea-bargaining procedures modeled on the Italian experience.¹²³

Even Germany has begun to employ an informal kind of negotiation, one that is wholly outside the long-standing formal prohibition on plea bargaining.¹²⁴ This practice has developed more as a matter of convenience and flexibility, rather than as part of an overt reform effort, and it is not modeled expressly on the practices of any particular country.¹²⁵ One author has referred to the spread of plea-bargaining over the past three decades as a "quiet revolution,"¹²⁶ that "illustrates several different ways in which criminal procedure practices in different legal systems can converge."¹²⁷

The convergence of European legal systems, and the institution of procedures within those systems bearing closer resemblance to features of the Anglo-American system, is significant, but not shocking. After all, in a world in which there is instantaneous communication, frequent and rapid intercontinental transportation, cross-pollination of economies, ideas, and cultures, the rise of English as a universal second-language, and the development of large multinational trading blocs, it is hardly surprising that Starbucks competes in Vienna with traditional cafes, or that Fiat has acquired a sizable, and potentially a majority, stake in Chrysler. The extension of these influences into law and legal systems seems inevitable. The reach of this realignment to such diverse regions as Latin America and China illustrates how pervasive this trend toward a "third way" has become.

Without much fanfare, Latin America has shifted quite remarkably in the

¹²¹*Id.* at 444-45.

¹²²*See, e.g.,* TURNER, *supra* note 118, at 138-42 (noting Russia considered plea bargaining to address costly reforms toward more adversarial proceedings).

¹²³*See id.* at 142, 160.

¹²⁴*See id.* at 73-129.

¹²⁵*See id.* at 73.

¹²⁶*Id.* at 1.

¹²⁷TURNER, *supra* note 118, at 271.

direction of accusatorial procedure within the past decade.¹²⁸ Richard Vogler notes that, "Compared with the deeply contested and protracted reform process in western Europe, the impact of adversariality on Latin America, at least at the level of procedural reform, has been little short of explosive."¹²⁹ All but a handful of countries in South and Central America have introduced a new "accusatorial" code over the past fifteen years.¹³⁰

C. Bridging a Very Large Gap—A Chinese System with Western Characteristics

The movement has begun in China as well. This level of systemic reform is all the more remarkable, given that the country's roots are communist rather than a Euro-centric civil law tradition. If it is true that the reform trends in Latin America have been motivated by "largely financial" considerations,¹³¹ the shift to a market-based economy in China also must be driving the adoption of rules and processes that are friendlier to the international community and its commercial concerns.¹³² While commerce may not seem, at first blush, to be

¹²⁸See VOGLER, *supra* note 61, at 172-75; Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007).

¹²⁹VOGLER, *supra* note 61, at 172.

¹³⁰Langer, *supra* note 128, at 631. Some Mexican states are also reforming their criminal procedure in the direction of the country's southern and northern neighbors. See Allen Pursey, *Justice in the Rough*, A.B.A. J., Jul. 2009, at 44, 49.

¹³¹VOGLER, *supra* note 61, at 172.

¹³²See Wang Zonglai & Hu Bin, *China's Reform and Opening-Up and International Law*, 9 CHINESE J. INT'L L. 193, 194 (2010):

Riding the wave of economic globalization, China has successfully built a socialist market economy and a corresponding legal system by drawing upon common international practices and the good experiences of other countries in the light of national circumstances. In trade and commercial areas, the principle of "giving precedence to international treaty over domestic law and using international custom as a standby rule in absence of an applicable rule" has been established, which has created a sound environment for bringing in foreign investment, advanced technology and management experience. By joining the World Trade Organization and other relevant institutions and acceding to international trade treaties, China has taken advantage of international economic and trade systems to expand development and effectively deal with trade disputes. In the recent endeavor to implement the "Going-out-of-the-country" Strategy, which encourages Chinese enterprises to expand business overseas, a good understanding and utilization of international law is undoubtedly an important linchpin.

concerned with criminal procedure rules, negative reaction from consumers limits the ability of global companies to do business with impunity in countries that pay little heed to human and civil rights, or that do not employ a criminal process that appears more “fair” and mainstream.

This impetus for reform in China has been attributed by Richard Vogler to the globalization of trade and the influence of China’s trading partners:

The next wave of post-war adversarial reform has resulted in the almost complete destruction of the concept of ‘socialist legality’ in the former Soviet bloc and China. As in Latin America, change has been rapid and is being accomplished under intense pressure from the U.S. and western Europe. However, despite competition from moderate forms of European inquisition-process, it is Anglo-American adversariality which has dominated the reform agenda. This dominance to some extent reflects the balance of influence amongst the donor countries, whose national expert groups have each been vocal in promoting the virtues of their own model systems.¹³³

As part of the pressure for change, Vogler also cites the Chinese campaign for WTO membership as moving the country toward due process and the “rule of law.”¹³⁴ The *People’s Daily* credited media exposure of “unjust cases” with providing impetus for reform.¹³⁵

In comparison with the reforms of the Italian and Latin American systems, those in China are modest. They represent, however, a much more radical break with tradition, which virtually assures that they will be implemented more slowly. While the traditional legal culture may slow acceptance of the shift toward due process and some adversarial characteristics, the power of the central government to effect and enforce national rule changes should not be underestimated.

To generalize, criminal procedure in China prior to 1996 was characterized by a court-controlled process in which defense counsel—when there was one—played no significant role. The “trial” was an event in which evidence already assembled by the police, procurator, and court was rarely questioned for fear of implying criticism of those organs. No presumption of innocence existed

Id. at 194-95.

¹³³VOGLER, *supra*, note 61, at 177.

¹³⁴*Id.* at 178.

¹³⁵*Yearender: Media’s Frequent Exposure of Unjust Cases Promotes China’s Judicial Reform*, PEOPLE’S DAILY ONLINE, http://english.people.com.cn/200512/19/print20051219_229034.html (last visited Sept. 2, 2010).

in any formal expression,¹³⁶ and the trial usually formalized guilt summarily before proceeding to the real purpose of the ceremony: sentencing.¹³⁷ Decisions were guided by the needs of the people (government), and lower court decisions could be reversed or modified for political reasons. Judicial independence did not exist in any significant degree.¹³⁸

The passage of criminal procedure reforms in 1996 signaled the introduction of fundamental changes, at least in principle, simultaneously both in the direction of greater regard for human rights and in more adversarial processes.¹³⁹ Although the presumption of innocence is not stated directly and clearly,¹⁴⁰ it is implied by various provisions of the 1996 Criminal Procedure Law.¹⁴¹ The judge's role as investigator has been curtailed, and the court's access to evidence gathered in anticipation of trial has been limited.¹⁴² Defendants enjoy the right to counsel during the investigative phase, and not merely days before trial as previously had been the case.¹⁴³ The right to silence has been instituted

¹³⁶See DANIEL C. K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 279 (2d ed. 2009). Professor Chow describes the pre-1997 environment as follows:

Under the 1979 CPL, many judges were biased in favor of finding guilt once a case was brought to trial based upon the notion that if the police and procuratorate had completed their investigation and decided to bring a public prosecution, then the defendant must be guilty to some degree. Aggressive police and procuratorates were also known to intimidate witnesses into confessions of guilt in criminal investigations. Not only did a presumption of innocence not exist under the 1979 CPL, many observers in the PRC were known to remark that in reality the opposite was true: a criminal suspect was usually presumed guilty until proven innocent.

Id.

¹³⁷See Belkin, *supra* note 24, at 105.

¹³⁸See generally Robert Davidson & Zheng Wang, *The Court System in the People's Republic of China With a Case Study of a Criminal Trial*, in *COMPARATIVE & INTERNATIONAL CRIMINAL JUSTICE SYSTEMS* (Obi N. I. Ebbe ed., 2d ed. 2000); CHOW, *supra* note 136, at 277; Belkin, *supra* note 24, at 91-106.

¹³⁹See CHOW, *supra* note 136, at 280-84.

¹⁴⁰Professor Chow refers to it as "nebulous and weak." *Id.* at 280.

¹⁴¹See *id.* at 280 (presumption of innocence embodied in articles 12, 34, and 162 of CPL); see also Robert Marquand, *New for China's Courts: trained judges, standard rules*, *The Christian Science Monitor* (Aug. 16, 2001), <http://www.csmonitor.com/2001/0816/pls3-woap.htm> (stating that 1996 reforms included "most importantly" a presumption of innocence) (last visited Sept. 19, 2010).

¹⁴²Robert Lancaster & Ding Xiangshun, *Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration Between a U.S. and a Chinese Law School*, 30 *FORDHAM INT'L L. J.* 356, 362 (2007).

¹⁴³CHOW, *supra* note 136, at 280-84.

and is being implemented in at least some provincial courts.¹⁴⁴ Defense lawyers, along with prosecutors, now have the ability to examine and cross-examine witnesses, while the trial judge plays a more passive role, hearing much of the evidence for the first time at trial.¹⁴⁵ And very importantly, trial judges have a degree of independence previously unknown.¹⁴⁶

Thirty years of reform,¹⁴⁷ however, have not necessarily produced dramatic change. Acquittal rates, which rose after the institution of reforms in 1996, fell subsequently, leading Professor Daniel C. K. Chow to observe that the rates “do not indicate whether more guilty or innocent defendants are being acquitted since the specifics of each case will vary, but they indicate that no extraordinary changes have occurred in the PRC criminal justice system.”¹⁴⁸

It is tempting to hope that improved access to trained lawyers and judges will lead to realization of the goals embodied within Chinese reforms. This hope is fueled by a gradual change from judges and lawyers with little or no legal background¹⁴⁹ to entry examinations and training in law for judges, prosecutors, and lawyers, all of which occurred during the time period of criminal procedure reform.¹⁵⁰ It was not until 2007, however, that qualifications approaching those found in most developed countries were required.¹⁵¹ Nevertheless, it remains possible to practice law in China without having obtained a college or university education, and incompetence within the legal profession remains a serious problem.¹⁵²

Although increased professionalism and higher qualification standards may eventually produce an improved adherence to the rule of law within the criminal justice system, it remains to be seen whether these goals can be achieved

¹⁴⁴*Right to Silence Debuts in China's Judicial System*, PEOPLE'S DAILY ONLINE, (Nov. 23, 2000), http://english.peopledaily.com.cn/english/200011/23/eng20001123_55901.html.

¹⁴⁵See CHOW, *supra* note 136, at 284 (noting that defense lawyers are now permitted to introduce evidence); Lancaster, *supra* note 142, at 369-70 (stating that a judge's responsibilities have shifted from collecting and evaluating evidence before trial to hearing and evaluating evidence at trial).

¹⁴⁶Lancaster, *supra* note 142, at 363.

¹⁴⁷CHOW, *supra* note 136, at 261.

¹⁴⁸*Id.* at 284.

¹⁴⁹See Marquand, *supra* note 141 (“China's judges have been drawn from a pool of retired military officers with no legal background”); Belkin, *supra* note 24, at 103 (stating that retired military officials with no judicial training were often appointed judges as a reward for loyal service).

¹⁵⁰See generally CHOW, *supra* note 136, at 228-58. The first national qualifying examination for lawyers in China was not required until 1986. *Id.* at 231; Lancaster, *supra* note 142, at 363-64.

¹⁵¹See generally CHOW, *supra* note 136, at 233-35.

¹⁵²See *id.* at 233-35, 253-56; Lancaster, *supra* note 142, at 364 (stating that professional licensure requires no legal education, and approximately half of those passing the qualifying exam have none).

without further structural change.¹⁵³ Professors Sida Liu and Terence Halliday recently concluded in this regard that:

[A]wareness of the structural configurations of power that underlie criminal procedure law in China helps avoid naïve notions that more precise formal law, more training of lawyers and judges, or more refinement of purely legal institutions will suffice to produce a criminal procedure law consistent with global norms without reconstruction of the state.¹⁵⁴

Such pessimism may be premature in a reform regime that is relatively young, but it also is too soon to declare the reforms successful. The articulation and codification of these goals, whatever the motivation or likelihood of success, represent significant change in direction, a direction that in many respects is consistent with other examples already examined.

V. HYBRID PROCEDURE FORMS—SOMETHING BORROWED, OR SOMETHING NEW?

These reform efforts in China, Italy, and countries within Latin America have been *ad hoc* rather than part of a coordinated international, regional, or multi-national reconsideration of procedure rules. Whether they are the result of external pressures or influences, or instead the product of internal, domestic forces, all of them were initiated by the individual states. Since criminal law and criminal procedure historically have been among the most localized and domesticated areas of law, it is not surprising that, while countries may look outside their borders for inspiration and example, they have been reluctant to cede any significant measure of autonomy on these issues.¹⁵⁵

The Nuremberg trials conducted at the conclusion of World War II marked the first modern imposition of international or multi-national norms and procedures by a group of nations to try individuals for crimes perpetrated by the

¹⁵³Marquand, *supra* note 141 (reporting that President Jiang Zemin counseled Senator Arlen Specter to be patient because the Chinese are “working on the rule of law”).

¹⁵⁴Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure Law*, 34 LAW & SOC. INQUIRY 911, 945 (2009).

¹⁵⁵For example, some members of the Supreme Court of the United States have expressed hostility toward consideration of international norms or the laws of other nations in deciding domestic matters. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring) (“We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.”)

defendants against their own people.¹⁵⁶ This was a remarkable event, made even more significant by the Allies' adoption and use of rules of procedure specially designed for this purpose, and adapted from both accusatorial and inquisitorial traditions.¹⁵⁷ The procedural rules used, however, were determined in large part by the nature of the evidence to be offered against the accused, and by the relatively large numbers of defendants tried in a single proceeding. Because the Nazi defendants had maintained voluminous and often meticulous records of their actions, the trials were dominated by written forms of evidence rather than live witness testimony. Lengthy trials of individuals, which would have frustrated the people of the victorious nations, were unnecessary due to the nature of the evidence.

While this seed of multinational adjudication took many years to germinate, the Nuremberg example eventually sprouted in a variety of forms. Its legacy includes regional legal regimes, such as that promulgated to enforce the norms embodied in the European Convention on Human Rights,¹⁵⁸ recent integration efforts within the European Union (the "E.U." or "Union"), *ad hoc* tribunals to prosecute war crimes and crimes against humanity in the former Yugoslavia, Rwanda, and Sierra Leone, and most recently, the permanent International Criminal Court. All of these are independently significant as studies in supranational enforcement of international or regional norms; collectively, they signify an influence on, or reflection of, shared procedural practices.¹⁵⁹

A. The European Court of Human Rights

The Council of Europe in 1950 adopted a declaration of human rights,

¹⁵⁶See LINDA CARTER ET AL., *GLOBAL ISSUES IN CRIMINAL LAW* 111 (2007) (noting that Nuremberg and Tokyo trial were first international criminal trials in modern times).

¹⁵⁷See Dianne Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 *IND. L.J.* 809, 818-19 (2000) (stating that the London Charter adopted by the Allies for the trial of Nazi war criminals bridged the divide between the traditions and amounted to an "international code of criminal procedure"). The Allies represented a wide spectrum of procedural traditions. Great Britain and the United States employed variations of the Common Law; France was quintessentially Civil Law; and the U.S.S.R. followed a socialist/communist form of inquisitorial process. Arriving at an acceptable common procedure undoubtedly posed a significant obstacle to the institution of a common tribunal.

¹⁵⁸The procedures used in the Nuremberg IMT have not been replicated exactly in any of these more recent institutional examples. Its form, which incorporated aspects of both an adversarial and non-adversarial approach, serves as an example of hybridization only. Whether one sees the IMT as a predominately adversarial procedure or a non-adversarial one, the view of international human rights law it spawned has had a lasting impact.

¹⁵⁹It also is extraordinary that, at least in most of these cases, states willingly ceded power to communal institutions to act as final arbiters of rules and processes that may be inconsistent with their own legal traditions.

which includes an enforcement mechanism for violations of the guarantees within it.¹⁶⁰ The European Court of Human Rights (the “ECHR”), sitting in Strasbourg, hears complaints of violations by member states, and its rulings are binding on those members.¹⁶¹ In effect, European member states treat this judicial body as an extraterritorial constitutional court with judges who are not necessarily their citizens, applying laws and procedures that may be very unlike those of the country whose case is being considered.¹⁶²

The court has proven itself quite successful in adjudicating European human rights complaints to the satisfaction of the states that are subject to its rulings. Its influence now extends beyond Europe, and within Europe, beyond the original Convention itself.¹⁶³

B. Harmonization or Unification of Criminal Procedure within the E.U.—The Corpus Juris Project

The ECHR demonstrates that supranational regimes may be layered over national legal systems, but it does not establish that countries will voluntarily abandon their domestic procedures and adopt a new common set in order to achieve the benefits of universality. The European effort to achieve that more elusive goal is the “Corpus Juris” project.

Although a multinational European effort to establish regional procedural rules beyond fundamental human rights was discussed as early as 1977, it was not until 1995 that the European Parliament commissioned a group of experts to consider uniform laws and procedural rules for EU member states regarding the protection of financial interests within the European Community (EC).¹⁶⁴ The

¹⁶⁰See Amann, *supra* note 157, at 826; CRIMINAL PROCEDURE IN EUROPE 15 (Richard Vogler & Barbara Huber eds., 2008) (noting that European Convention on Human Rights “was given practical application through its own enforcement mechanism involving the European Commission and the European Court of Human Rights”).

¹⁶¹See Amann, *supra* note 157, at 828; LUBAN ET AL., *supra* note 1, at 137 (2010) (noting that decisions by European Court of Human Rights and other human rights tribunals sometimes force “modifications in national rules to conform to regional and universal norms”).

¹⁶²Professor Amann notes that, “through a process that bears resemblance to the development of a constitutional criminal procedure in the United States, the European court has established a rule of law that all forty-one states now subject to its jurisdiction must abide.” Amann, *supra* note 157, at 828.

¹⁶³See *id.* at 829-30 (noting that “[t]he Convention’s principles matter outside Europe” and the Court’s opinions guide other tribunals and influence other national courts); CRIMINAL PROCEDURE IN EUROPE, *supra* note 160, at 15 (explaining that the ECHR “has exercised an ever-expanding role in the reform and the approximation of criminal procedure in Europe”).

¹⁶⁴EUROPEAN LEGAL AREA PROJECT, CORPUS JURIS: INTRODUCING PENAL PROVISIONS FOR THE PURPOSE OF THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION I

thrust of the experts' work was to study and propose a set of unifying substantive crimes and procedures in support of the essentially economic superstructure that is the heart of the European Union. The product of this effort (referred to as "Corpus Juris") has been variously described, depending on the perspective of the observer, but one European commentator summed it up as follows:

The *Corpus Juris* proposes a model of organized and structured "verticalization", by laying down a coherent but not exhaustive system of rules (explicit statement of the text) establishing some substantive criminal law provisions, concerning common offences and common general principles which should apply to them, and some criminal procedure provisions which develop two basic ideas: the establishment of a European Public Prosecutor and the principle of European territoriality.¹⁶⁵

The language of this statement that the "model" set forth by *Corpus Juris* would "verticalize" certain substantive and procedural rules, stands in contrast to any notion that the experts' proposal was intended as mere "harmonization" or horizontal integration of the differing codes and traditions within the EU. "Verticalization" describes a hierarchical, top-down ordering that would require EU countries to adhere to procedures adopted in Brussels. Contrast with this scheme the promulgation of a "model" procedure code or set of guidelines designed, not to impose a single set of rules, but to allow countries to modify their own systems in ways consistent with, but not necessarily the same as, those of their neighbors. For instance, if the ALI's Model Penal Code were to be imposed on all of the United States, that set of crimes would be vertically integrated. But if—as was the case—the MPC was published merely as a "suggestion" which states were free to adopt in whole or part, or to ignore completely, it might influence states to integrate horizontally their disparate criminal codes, or to harmonize them.

"Harmonization" measures are described in *Corpus Juris* as those taken "in order to reduce the most glaring differences between national laws, without actually going as far as to impose rules that are identical."¹⁶⁶ The difference in harmonization of procedure rules, and in the unification of such standards, occupies a central place in any effort to develop a workable set of processes to serve an entire global region.

While the United States successfully operates under a dual legal system

intro. (Mireille Delmas-Marty ed., Coleman trans., 1997) [hereinafter *CORPUS JURIS*]; Amann, *supra* note 157, at 835-36.

¹⁶⁵See Rosaria Sicurella, *Towards a European Legal Area: A Few Guidelines for European Rules of Evidence in Criminal Proceedings*, in *EXCLUSION OF EVIDENCE WITHIN THE EU AND BEYOND* 28 (F. Höpfel & B. Hüber eds., 1997).

¹⁶⁶*CORPUS JURIS*, *supra* note 164, § 3.

that maintains the sovereignty of “member states” as it recognizes the Federal Government’s right to regulate certain activities affecting the nation, establishing such a system from a trading confederation of independent countries with diverse languages, customs, histories, and legal traditions, is a daunting prospect. The difficulty is increased by realization that creation of EU prosecutors and EU courts to practice EU procedures in the prosecution of EU crimes “against the financial interests” of the EU represents not just a ceding of control in a well-defined and limited sphere of interest, but might easily lead to an expansive, separate criminal justice system dealing with much more than fraud suspects who flee from Spain to France. If the Europeans needed an example of how readily “financial interests” might be affected by virtually any offense, they need look no further than to the scope of Congress’s regulation of “commerce” in the United States and the growing body of federal criminal law.¹⁶⁷

Corpus Juris implicitly recognizes both the political difficulty¹⁶⁸ in gaining approval for establishment of a central European criminal justice system, and the inherent advantages in having a unified form of enforcement and prosecution. Speaking of procedure and evidence rules, *Corpus Juris* includes the observation that:

Harmonisation is undoubtedly harder to achieve in this area given the extreme diversity of national systems. However, procedure and evidence, even more than the rules of substantive law, affect the efficiency of the whole of the system. That is why disparities in this area may lead in practice to impunity against some, while others have proceedings brought against them.¹⁶⁹

In the end, the experts observed that, “harmonisation, aimed at strengthening justice and efficiency, contributes to the complexity of the whole.”¹⁷⁰ Adopting an interesting compromise position, they concluded:

For this reason, we propose a radically new response to the absurdity, widely condemned but still tolerated, which consists in opening up borders to criminals whilst closing them to law enforcement agencies, at the risk of transforming our countries into havens for crime. This is not a criminal code, nor a unified

¹⁶⁷See, e.g., *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005) (holding that the Commerce Clause authorizes federal prohibition of intrastate growing of marijuana).

¹⁶⁸See THE IMPLEMENTATION OF THE CORPUS JURIS IN THE MEMBER STATES at vi (M. Delmas-Marty & J.A.E. Vervaele eds. 2000) (noting that the harmonisation of criminal law and of its procedure remains a politically sensitive topic).

¹⁶⁹CORPUS JURIS, *supra* note 164, §3.2.

¹⁷⁰*Id.* §3 (emphasis omitted).

code of European criminal procedure made directly applicable everywhere by European courts set up for the purpose. What we propose is a set of penal rules, which constitute a kind of *corpus juris*, limited to the penal protection of the financial interests of the European Union, designed to ensure, in a largely unified European legal area, a fairer, simpler and more efficient system of repression. While there are sometimes areas of convergence between one national system and another, allowing the definition of a common law “of confluence”, there remain in many cases divergences which only a common law “of synthesis” can overcome. And finally the gaps, which are common in this relatively new area dealing with the protection of supranational interests, also make it necessary to draw up what could be termed a *common law of supplement*.¹⁷¹

Protests to the contrary notwithstanding, *Corpus Juris* does contemplate a “criminal code” and a “unified code of European criminal procedure made directly applicable everywhere by European courts set up for the purpose.”¹⁷² This point has not been lost on critics in, and outside of, the member states.¹⁷³ Their criticism focuses on the establishment of a European public prosecutor, the possible loss of trial rights (e.g., an independent jury), creation of an investigating magistrate procedure, and—more generally—the relinquishment of judicial authority to persons not of the critic’s country.¹⁷⁴ These concerns are unlikely to

¹⁷¹*Id.* (emphasis added).

¹⁷²“Rather than permit national courts to try to accommodate different legal practices, *Corpus Juris* would establish one set of laws to govern a select group of crimes, all of which bring financial harm to the European Union.” Amann, *supra* note 157, at 836-37.

¹⁷³See, e.g., CAMPAIGN AGAINST EURO-FEDERALISM, EUROPEAN UNION WANTS TO INTRODUCE A NEW LEGAL SYSTEM: CORPUS JURIS, <http://www.poptel.org.uk/against-eurofederalism/cj44.htm> (arguing against establishment of a European public prosecutor and centralized investigating magistrate); *The European Union Criminal Code That Will Overthrow Habeas Corpus and Trial by Jury in UK*, HAZNAKERT ONLINE, Jan. 1, 1999, <http://www.hazankert.com/corpusjuris3.html> [hereinafter *Overthrow*] (noting that “the EU would become the . . . [single] prosecuting authority in cases of suspected budget fraud,” acting under its own rules of investigation and trial); Ralph Maddocks, *Corpus Juris*, LE QUÉBÉCOIS LIBRE, June 12, 1999, <http://www.quebecoislibre.org/990612-6.htm> (stating that the European prosecutor would be independent of national authorities and institutions; trial by jury would disappear; arrests without evidence would be allowed; and, the accused would be assumed to be guilty).

¹⁷⁴See Maddocks, *supra* note 173; Nile Gardiner & Sally McNamara, *The EU Lisbon Treaty: Gordon Brown Surrenders Britain’s Sovereignty*, THE HERITAGE FOUNDATION, at 2 (Mar. 7, 2008), available at <http://www.heritage.org/Research/Reports/2008/03/The-EU-Lisbon-Treaty-Gordon-Brown-Surrenders-Britains-Sovereignty> (stating that the Treaty of Lisbon would “further erode the legal sovereignty of European nation-states . . . [by] entrenching a pan-European magistracy, . . . a European Public Prosecutor, a federal EU

be satisfied, and may actually be exacerbated, by the notion that a “common law”¹⁷⁵ would grow with the implementation of the proposals embodied in *Corpus Juris*, or by the overt attempts within the proposed rules to protect the individual interests of the member states.¹⁷⁶

Corpus Juris proposes to create a single criminal justice system to deal with European financial crimes. To accomplish this, it tries to blend existing legal traditions into a procedural regime that reflects the cultures that would be subjected to its jurisdiction.¹⁷⁷ For instance, rather than urge creation of a central EU court in the fashion of the European Court of Human Rights, *Corpus Juris* contemplates national courts following EU law.¹⁷⁸ In its Commentary, the *Corpus Juris* experts reconcile the procedural rules¹⁷⁹ by noting, “the differences between the accusatorial and the inquisitorial traditions are smaller than at the preparatory stage as it is considered everywhere that oral and adversarial proceedings are paramount during trial.”¹⁸⁰ This observation undoubtedly would be startling to many European jurists who consider adversarial proceedings to be quite foreign, and even inconsistent with their “inquisitorial” practices. On the most obvious trial issue, the use of an independent jury, the proposed rules initially made clear that “professional judges” must decide cases, and “not simple jurors or lay magistrates.”¹⁸¹ This choice, which may have satisfied many within the EU, but which drew sharp criticism from the English-speaking countries,¹⁸² was grounded on a distrust of “inexperienced people” making important decisions about guilt

police force, . . . and an EU criminal code”); Spencer, *supra* note 45, at 63 (noting that the public discussion of the proposal “has been distorted by the violently hostile reaction of the right-wing press” which characterized it as a “federalist plot, hatched in Brussels”).

¹⁷⁵*Corpus Juris* establishes the “common law” regime explicitly in Art. 26, § 3:

On application of the general rule on the subsidiary of national law (Article 35), national courts must refer to the rules in the European *corpus* and, if there is a lacuna, apply the national law. They are bound in all cases to give grounds for the penalty by reference to circumstances pertaining to the particular case, applying the rules set out above.

CORPUS JURIS, *supra* note 164, art. 26, § 3 (emphasis added).

¹⁷⁶For example, the investigating magistrate is referred to as the “judge of freedoms” who is responsible for safeguarding the rights of the person being investigated and is a judge of the member state’s judiciary. Amann, *supra* note 157, at 837.

¹⁷⁷*Id.* at 837 (report proposes a system of investigation and adjudication that would combine aspects of accusatorial and inquisitorial methods).

¹⁷⁸CORPUS JURIS, *supra* note 164, art. 26, § 1.

¹⁷⁹*Id.* at art. 26, cmt.

¹⁸⁰*Id.*

¹⁸¹*Id.*

¹⁸²See, e.g., CAMPAIGN AGAINST EURO-FEDERALISM, *supra* note 173; *Overthrow*, *supra* note 173; Maddocks, *supra* note 173.

and innocence.¹⁸³ Because of the controversy it caused in Britain, the proposal was dropped during a subsequent feasibility review.¹⁸⁴

However beneficial it would be to establish a regional legal regime with uniform procedure, it will be difficult, if not impossible, to persuade diverse, sovereign peoples to abandon long-held and cherished notions of what constitutes due process in favor of a system cobbled together by compromise. Harmonization, rather than unification, of processes seems somewhat less difficult, but it faces many of the same obstacles. German Judge Wolfgang Schomburg opined on this point that:

An overall—i.e. over and above EU interests—harmonised body of common European substantive criminal law seems neither feasible nor desirable given the need to maintain national and regional particularities. Nor is it possible to forcibly impose harmonisation of procedural law. Approximation will to some extent occur of its own accord as a result of competition between the systems and increased cooperation.¹⁸⁵

If Judge Schomburg is correct, a degree of harmonization is possible—and even

¹⁸³CORPUS JURIS, *supra* note 164, at 116-17.

¹⁸⁴See Spencer, *supra* note 45, at 64 (noting that “*Corpus IP*” eliminated the “professional judge only” rule for fraud offenses).

¹⁸⁵Wolfgang Schomburg, *Are We on the Road to a European Law-Enforcement Area? International Cooperation in Criminal Matters. What Place for Justice?*, 8 EUR. J. OF CRIME, CRIMINAL L. & CRIMINAL JUSTICE 51, 57 (2000). J. R. Spencer explains this harmonizing effect in this way:

[A] number of . . . developments . . . oblige the Member States to change their rules of criminal procedure to conform to some common European norm. Of those that do not, furthermore, a number are likely to have an indirectly harmonising effect. An example is the proposed system for mutual recognition of criminal judgments. This was in fact proposed with a view to enabling diverse criminal justice systems to work together, and not in order to force them to harmonise their rules. However, a system under which the criminal courts of one Member State are obliged to give effect to the decisions of another is unlikely to work unless each court has faith in the quality of those decisions—and to ensure this faith, a degree of harmonisation between the procedures of the different countries may eventually prove necessary. But even those developments that do not require the Member States to change their laws will obviously lead to greater contact between lawyers, policemen, prosecutors and judges from different countries, and, with it, greater openness to other systems’ institutions and ideas.

Spencer, *supra* note 45, at 60.

likely because of cooperation in other areas of law and commerce—but immediate adoption of a supranational procedural regime is unlikely.¹⁸⁶

More than a decade after the unveiling of *Corpus Juris*, only some of its proposals have been adopted and instituted. There is now a “European arrest warrant”¹⁸⁷ applicable throughout the EU, and efforts have been made to extend this initiative to a similar “European evidence warrant” (search warrant).¹⁸⁸ Discussions regarding uniform standards for protecting the rights of the accused also have continued,¹⁸⁹ but wholesale adoption of the rules proposed in *Corpus Juris* has not yet occurred. In public remarks, Franco Frattini, the European Commissioner for Justice, Freedom and Security, spoke of the “pressing need for language and especially legal language which is as far as possible uniform” while making “allowance for the differences that exist between common law systems, civil law systems and the other legal systems, sometimes quite distinctive, that exist in the Far East.”¹⁹⁰ In further remarks reminiscent of the Full Faith and Credit Clause of the United States Constitution, Commissioner Frattini also asserted: “Mutual recognition is as crucial in criminal matters as it is the case in civil matters. . . . Mutual recognition implies that Member States’ police and judicial authorities should recognise judicial decisions taken in another Member State as *equivalent* to their domestic decisions, without any substantial review.”¹⁹¹

While *Corpus Juris* has not yet produced a full-fledged system of substantive and procedural criminal law, its influence remains considerable.¹⁹² The discussions that have surrounded the formulation and implementation of *Corpus Juris*, the study in 2001 of the “future of judicial integration in Europe” that preceded the addition of Eastern European states to the EU,¹⁹³ and even the

¹⁸⁶It must be noted, however, that the same might have been said of the adoption of a common currency within the EU, a feat that largely has been accomplished.

¹⁸⁷Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems*, 9 GERMAN L.J. 1313, 1314 (2008).

¹⁸⁸See Press Release, Franco Frattini, Eur. Comm’r Responsible for Justice, Freedom and Sec., Remarks at 4th European Jurists Forum: Helping EU Citizens Seize Opportunities: EU’s Policies and Legislation in the Area of Freedom, Security & Justice 4 (May 3, 2007), *a v a i l a b l e a t* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/270&format=HTML&aged=0&language=EN&guiLanguage=en> [hereinafter Frattini Remarks] (last visited Sept. 19, 2010).

¹⁸⁹See *id.*

¹⁹⁰See *id.* at 2.

¹⁹¹*Id.* at 4 (emphasis in original).

¹⁹²See VOGLER, *supra* note 61, at 277 (noting that the creation of universal procedure code, as in *Corpus Juris*, “is still exercising its powerful fascination”); SPENCER, *supra* note 45, at 50-51 (explaining that the pressure to converge runs “both ways,” from EU to member states and from members to the Community).

¹⁹³See Christine van den Wyngaert, *The Protection of the Financial Interests of the EU in the Candidate States: Perspectives on the Future of Judicial Integration in Europe*, 2 ERA

heated rhetoric in opposition to the creation of a single European legal area,¹⁹⁴ all have contributed to the conception of a workable integration of diverse legal traditions.¹⁹⁵ It may be impossible to determine whether this on-going debate has prompted reform efforts in Europe and elsewhere; whether it stands as an example to others; or whether it is in part the product or beneficiary of such efforts, but *Corpus Juris* clearly is a part of a movement to re-think how criminal justice systems function.

C. The International Criminal Tribunals

Following the work of the Nuremberg and Tokyo tribunals at the end of World War II, no international body for the prosecution and trial of “war crimes” or other international criminal conduct existed until the creation in 1993 of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’).¹⁹⁶ A year later, the International Criminal Tribunal for Rwanda (‘ICTR’) joined the ICTY as a special tribunal to address the genocide in Rwanda.¹⁹⁷ Other *ad hoc* tribunals have been established more recently to deal with special situations of violation of international norms.¹⁹⁸

The procedural lineage of these courts can be traced to the World War II tribunals in their employment of a “mixed” or “hybrid” process, borrowing liberally from the two main legal traditions, but with certain features tailored to meet the peculiar needs created by the cases they try. Rather than catalog and

F O R U M 2 (Sep. 2001), *available at* <http://www.springerlink.com/content/m44104p2j6725627/fulltext.pdf>.

¹⁹⁴See, e.g., CAMPAIGN AGAINST EURO-FEDERALISM, *supra* note 173; *Overthrow*, *supra* note 173; Maddocks, *supra* note 173; Gardiner & McNamara, *supra* note 174.

¹⁹⁵J. R. Spencer summed up the impact of *Corpus Juris* in this way:

If nothing ever come of it, the *Corpus Juris* project is still of interest. It demonstrates that the different traditions of criminal procedure in Europe are close enough for a synthesis to be attempted: and this is so whether (as some believe) the broad future of law of Europe in all fields is to coalesce in a new *ius commune*, or whether (as others believe) the underlying cultural differences are really so strong that this will never happen.

Spencer, *supra* note 45, at 64-65.

¹⁹⁶See LINDA CARTER ET AL., *supra* note 156, at 111; ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 205 (2d ed. 2008). The full name of the tribunal, used by almost no one, is the “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.”

¹⁹⁷PODGOR, *supra* note 196, at 205.

¹⁹⁸See *id.* at 205-28.

compare those procedures, it suffices to consider one example from the *ad hoc* tribunals—the ICTY—as well as the first permanent international criminal tribunal, the International Criminal Court (‘ICC’).

i. The ICTY

An observer¹⁹⁹ at a trial before the ICTY would notice immediately the combination of disparate elements that a traditionalist might consider incompatible. Typically, three judges sit collegially.²⁰⁰ The panel is selected from the “permanent” judges²⁰¹ and temporary *ad litem* judges appointed for a term of years; all are professionals nominated by their countries and approved by the General Assembly of the United Nations.²⁰² There is no lay participation in the judging, either by an independent jury or by use of lay judges.

The judges are free to ask witnesses questions, but the production of witness evidence ordinarily takes the form of direct and cross-examination by the prosecuting and defending counsel.²⁰³ Rule 85 of the ICTY’s Rules of Procedure and Evidence specifies that “each party is entitled to call witnesses and present evidence.”²⁰⁴ Defendants choose whether to testify, and opening statements and closing arguments are permitted.²⁰⁵ Witnesses are placed under oath, and their testimony is given in open court unless the interests of justice, security, or “public order or morality” dictate otherwise.²⁰⁶

Rules of evidence not unfamiliar to an American trial lawyer are in place, although hearsay evidence and other forms of evidence considered insufficiently reliable for a jury may be considered and given an appropriate weight.²⁰⁷ Even an exclusionary rule exists; albeit one that is cast in the vague generalities typical of

¹⁹⁹Observing the trial work of the ICTY is very easy, due to the video feeds of the courtrooms available on-line at the tribunal’s excellent website. See UNITED NATIONS: INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY), <http://www.icty.org/sid/10150> (last visited Aug. 24, 2010). Within the past year, a virtual tour of the courtroom has been added to the site, displaying the arrangement of the room.

²⁰⁰See *Election Process*, UNITED NATIONS: INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY), at <http://www.icty.org/sid/143> (last visited Aug. 24, 2010).

²⁰¹“Permanent” judges are elected for four-year terms, but may be re-elected. See *id.*

²⁰²See *id.*

²⁰³See INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA R. OF PROC. & EVID. R. 85(B), IT/32/Rev.43 (“Examination-in-chief, cross-examination, and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.”); see also SAFFERLING, *supra* note 18, at 218-19 (judges are not exclusively responsible for presentation of evidence but have an ancillary responsibility to question).

²⁰⁴INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA R. OF PROC. & EVID. R 85(A), IT/32/Rev.43 [hereinafter ICTY R. OF PROC. & EVID.].

²⁰⁵See *id.* R. 84, 84 *bis*, 85(B), IT/32/Rev.43.

²⁰⁶See *id.* R. 79.

²⁰⁷See *id.* R. 3.

European “exclusionary rules.”²⁰⁸ The burden is on the prosecution to prove guilt beyond a reasonable doubt, but a simple majority of the trial judges may convict.²⁰⁹

Apart from the absence of a jury and the somewhat more active participation of the trial judges, an ICTY proceeding is not jarringly dissimilar to the adversarial trial of an American or British court. It does have, however, a distinctively non-adversarial, continental flavor that is even more evident in practice than in the rules of form. For example, the panels of judges (“trial chambers”) may include judges from English-speaking, adversarial traditions, sitting alongside colleagues from civil law, non-adversarial countries. Although each judge on these mixed panels will follow the letter of the procedural rules, each one is likely to approach judging in a noticeably different way. A German judge, for instance, would be more likely to question witnesses actively and exercise more control over the proceedings, while a Scottish judge might be content to sit quietly and let the lawyers direct the flow of evidence. Panels in which judges of one tradition dominate may handle the proceedings very differently than those of another tradition, even though the evidence and the lawyers are the same. A strong presiding judge can influence the tone of the trial, and even rule on evidentiary and procedural matters in ways that reflect his or her own legal background.

While trial proceedings are mostly open and oral, the nature of the crimes being tried often requires that they be closed to the public. This might be done to protect a witness from coercion or retaliation, or because testimony is considered especially sensitive or embarrassing or revealing of confidential matters. Closing parts of the trials to the public serves important interests, but it runs counter to the legal training and experience of judges from countries with strong free-speech/open-trial cultures.²¹⁰ An English judge could view other interests as prevailing over the need for transparency and public discussion of the trial,²¹¹ while an American judge would defer more readily and expansively to the need for justice done publicly. These differences threaten the goal of consistency within a multinational tribunal. Consequently, trials conducted in the same “legal language” will nevertheless have distinctive “accents” depending on the composition of the chamber.

Another danger of multinational (or multi-traditional) judging is the tendency to somewhat haphazard rule interpretation at the trial level. No

²⁰⁸*See id.* R. 95 (stating that “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings”).

²⁰⁹*See* ICTY R. OF PROC. & EVID. R. 87(A).

²¹⁰For a general discussion of open trials and the relationship between the media and the justice process in Europe, *see generally* Marcel Lemonde, *Justice and the Media*, in EUROPEAN CRIMINAL PROCEDURES 688-715 (Mireille Delmas-Marty & J. R. Spencer eds., 2002).

²¹¹*See id.* at 692-97.

procedure code is watertight; all have gaps that must be filled by interpretive rule-making in the court of first instance. This “law in the interstices” is even more likely to reflect the learned biases of the judges. At the extreme, this can produce sufficiently disparate results that lawyers, defendants, and observers of the court sense the tribunal is “making it up as it goes along.”²¹² These inconsistencies can be corrected roughly and for the most part at the appeals level, but the appearance of courts within the same tribunal handling trial issues in different ways potentially undermines the confidence of the litigants and the public.

Setting aside the advantages and challenges of combining judges, the ICTY demonstrates the first significant combination of procedural rules from different traditions. The three-judge trial bench, functioning without the possibility of lay participation, starkly contrasts, not only with the independent jury model of the United States and Great Britain, but also with the mixed-bench model of many western European countries. To the extent that the judges question witnesses and exercise controls, the trial differs further from a strong adversarial model.

On the other hand, there is considerable adversariness in the ICTY’s trial procedures. Lawyers bear the primary responsibility for calling witnesses and examining them under rules of evidence that are more extensive than necessary in most non-adversarial systems. Motions are made by the lawyers; they argue their cases and control the order of evidence; and the burden of proof falls on the prosecution and is identical to that used in England and the United States.

Notwithstanding the hybridization of procedural rules by the ICTY, it seems quite successful in its role as a neutral, fair arbiter of conduct in a regional conflict.²¹³ The use of video streaming via its website, simultaneous translation into the official languages of the tribunal, published rules of procedure and evidence, and professional, competent prosecution and judging—complete with detailed “European-style” judgments—contribute to the claim that the ICTY has achieved important goals that extend beyond accountability for crimes against humanity.²¹⁴

²¹²In fact, the permanent judges of the ICTY create the procedural rules and evidence rules. See PODGOR, *supra* note 196, at 212-13. So, in a sense, the judges of the tribunal *do* “make up” the law of the court.

²¹³This view, obviously, will never be shared by all. See Eric A. Posner, *Political Trials In Domestic and International Law*, 55 DUKE L.J. 75, 149 (2005) (“In the international setting, international criminal tribunals will similarly look like efforts by the governments that influence the prosecutor and judges-- whether the Security Council (in ad hoc cases) or the members of the ICC--to harass or embarrass states with contrary foreign policy objectives. The states whose nationals are being tried will always make this charge, however faithfully the prosecutor and judges try to carry out their duties.”).

²¹⁴See PODGOR, *supra* note 196, at 214; THE INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, BRINGING JUSTICE TO THE FORMER YUGOSLAVIA, THE TRIBUNAL’S FIVE CORE ACHIEVEMENTS, *a v a i l a b l e* *a t* http://ulm.katholikentag.de/data/kt_aktuell/manuskripte/3732.doc [hereinafter ICTY CORE

ii. The ICC²¹⁵

In important respects, the ICTY has laid the groundwork for the ICC, the first permanent international criminal court.²¹⁶ The ICTY experience includes many of the same issues and complications that can be expected as the ICC begins its work: political wrangling;²¹⁷ cooperation—or lack thereof—among the affected states and with the court;²¹⁸ development of a body of “common law” and interpretation from very general international standards;²¹⁹ and, of course, creation of procedural rules that seek to accommodate a variety of differing notions of due process.

Because the ICC was created through a treaty process, substantive rules of law and rules of procedure and evidence were part of the founding document (the “Rome Statute”).²²⁰ To supplement the provisions of the Rome Statute, separate rules of procedure and evidence have been adopted by the parties to the treaty.²²¹ These rules augment and expand upon the more general articles of the Rome Statute.²²²

As with the ICTY, the ICC’s composition and processes reflect the

ACHIEVEMENTS].

²¹⁵Because this article considers the procedural trends at work in the world today, I do not describe the creation of the ICC, its purpose—except in the most general terms—or the substantive crimes subject to prosecution by the court. I also have focused for purpose of comparison on the procedures involved in the trial of cases, rather than in their investigation and appeal. The history of the negotiation of the Rome Statute and the continuing efforts to shape this tribunal in its formative stages are most interesting, but are outside the scope of this article.

²¹⁶See ICTY CORE ACHIEVEMENTS, *supra* note 214, at 8 (noting that the expertise developed by ICTY has been shared with those involved with the ICC and Special Court for Sierra Leone).

²¹⁷Professor Broomhall notes that, “The experience of the *ad hoc* tribunals has only underscored the interplay between law and politics in the enforcement of international criminal law.” BRUCE BROOMHALL, INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT 154 (Ian Brownlie eds. 2003).

²¹⁸*Id.* at 152-55 (explaining that the ICTY foreshadows experience that awaits ICC, states’ cooperation with ICTY has been uneven).

²¹⁹See *id.* at 162 (noting that the ICC undoubtedly will contribute to formal rule of law in international criminal law).

²²⁰The Rome Statute, creating the International Criminal Court, was adopted in 1998 and entered into force on July 1, 2002 after being ratified by 60 countries. See INT’L CRIM. CT., ABOUT THE COURT, <http://www.icc-cpi.int/Menu/ICC/About%20the%20Court/> (last visited Sept. 19, 2010).

²²¹See INT’L CRIM. CT. R. PROC. & EVID., ICC-ASP/1/3 (2002), available at <http://www.icc-cpi.int/Menu/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm>.

²²²See *id.*

influences of its members.²²³ While in some respects the ICC differs procedurally from the ICTY, there are many similarities. Here again, three judges of the “Trial Division” of the ICC sit as the “Trial Chamber” to hear cases.²²⁴ They conduct the proceedings in such a way as to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”²²⁵ The court’s role in simultaneously conducting a criminal trial, and protecting, and sometimes compensating, crime victims²²⁶ is one more often seen in European legal systems than in that of the United States. Given the nature of the offenses prosecuted in the ICC (genocide, crimes against humanity, war crimes, and crimes of aggression), it perhaps is not surprising that special provision was made for victims.

Ordinarily, trials are held at The Hague, the seat of the ICC.²²⁷ The trial is public unless necessity dictates closing it,²²⁸ and a record of the proceedings is made.²²⁹ Provision is made for a voluntary admission of guilt by the accused,²³⁰ raising the possibility of plea bargaining. The Statute makes clear, however, that “any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.”²³¹ While this language establishes that the court, and not the parties, bears responsibility for determining guilt and setting the punishment, it does not preclude plea negotiation.²³²

Proof beyond a reasonable doubt is required for a conviction, and the presumption of innocence is expressly established.²³³ A list of rights enjoyed by the accused is enumerated in Article 67. These include the right to be informed of the nature of the charge;²³⁴ to obtain the advice of counsel and prepare a

²²³ Although the United States is not a party to the treaty, its role in forming the court through negotiations leading to the Rome Statute, and following its adoption, is a considerable one. For more information on the troubled relationship between the United States and its negotiating partners, and the influence these debates had on policy, see BROOMHALL, *supra* note 217, at 163-83 (2003).

²²⁴ See Rome Statute of the International Criminal Court, art. 39(2)(b)(ii), July 17, 1998, 2187 U.N.T.S. 90 available at <http://untreaty.un.org/cod/icc/statute/rome.htm> (last visited Sept. 19, 2010) [hereinafter Rome Statute].

²²⁵ See *id.* art. 64(2).

²²⁶ Restitution, compensation, and rehabilitation of victims may be ordered by the trial chamber, even if the victims have not requested the remedy. See *id.* art. 75.

²²⁷ *Id.* art. 62.

²²⁸ *Id.* art. 64(7).

²²⁹ *Id.* art. 64(10).

²³⁰ Rome Statute, *supra* note 224, art. 65.

²³¹ *Id.* art. 65(5).

²³² The same limitation exists in the United States, a country in which most cases are “settled” by plea bargaining.

²³³ Rome Statute, *supra* note 224, art. 66.

²³⁴ *Id.* art. 67(1)(a).

defense;²³⁵ to a speedy trial;²³⁶ to be present and have counsel appointed if the defendant is indigent;²³⁷ to examine and cross-examine witnesses and compel attendance;²³⁸ and to have an appointed interpreter, if needed.²³⁹ The accused also has the right not to testify, and not to have an inference of guilt drawn from the invocation of the right to silence;²⁴⁰ and to make an unsworn statement in his or her defense.²⁴¹ Mitigating or exculpatory evidence in the possession of the prosecutor must be disclosed to the defendant.²⁴²

Witnesses must “give an undertaking as to the truthfulness” of their testimony,²⁴³ and generally are required to testify in person.²⁴⁴ It is the parties who submit evidence,²⁴⁵ and the judges who rule on its admissibility.²⁴⁶ Rules of privilege and judicial notice exist,²⁴⁷ and a kind of exclusionary rule forbids admission of evidence obtained in violation of the Rome Statute or “internationally recognized human rights,” but only if the violation makes the evidence less reliable or “the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”²⁴⁸

This elaboration of rights bears marked similarity to the guarantees found in an American or British adversarial trial, but would also be familiar to practitioners in a Continental non-adversarial system. Inclusion of the parties’ rights to examine and cross-examine witnesses, and to present relevant evidence and make closing statements,²⁴⁹ invests the process with an adversarial flavor. As with the ICTY, however, control of the proceedings by a three-judge panel, and without the participation of lay jurors or judges, provides a bit of comfort for those who find the prospect of judging by “regular” people to be reckless. ICC judges also have the right to examine witnesses,²⁵⁰ and an active trial chamber could change the feel of the process considerably in the direction of an

²³⁵*Id.* art. 67(1)(b).

²³⁶*Id.* art. 67(1)(c).

²³⁷*Id.* art. 67(1)(d).

²³⁸Rome Statute, *supra* note 224, art. 67(1)(e).

²³⁹*Id.* art. 67(1)(f).

²⁴⁰*Id.* art. 67(1)(g).

²⁴¹*Id.* art. (1)(h).

²⁴²*Id.* art. 67(2).

²⁴³Rome Statute, *supra* note 224, art. 69(1).

²⁴⁴*Id.* art. 69(2).

²⁴⁵*Id.* art. 69(3).

²⁴⁶*Id.* art. 69(4).

²⁴⁷*Id.* art. 69(5), (6).

²⁴⁸Rome Statute, *supra* note 224, art. 69(7).

²⁴⁹INT’L. CRIM. CT. R. PROC. & EVID., ICC-ASP/1/3, R.142 (2002), available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm>.

²⁵⁰*See id.* R. 140(2)(c).

“inquisitorial” one.²⁵¹

While the application of these rules may trend in either direction, it seems likely that the ICC trial experience will be a kind of hybridized process reminiscent of the ICTY. Even if this occurs, though, the ICC occupies a unique position within worldwide criminal procedure. It is a permanent body, and therefore unlike the ICTY, ICTR, Nuremberg tribunal, or any of the other *ad hoc* courts. While it shares its supranational character with the United Nations, it stands separate and apart from the U.N. Within the bounds of the express authority conferred on it by the Rome Statute and the indulgence of its member states, the ICC enjoys a rare freedom to develop its own procedural jurisprudence and custom. As the most visible institution of its kind, independent from the dictates of any particular nation, legal tradition or culture, the ICC constitutes an ongoing experiment. As such, it may prompt nations considering procedural reforms to follow its example. The more fundamental question, however, is whether the ICC is itself merely a reflection of a much broader reform movement.

VI. WHY IS THIS HAPPENING?

All of these modifications of criminal procedure might be entirely unconnected and coincidental, but if they are, it is surprising that such different legal traditions have adopted so many common features. Instead, this movement may reflect a growing consensus about the desirability of certain procedural processes, or disenchantment with others, or both. Or, it may be prompted by the examples of the *ad hoc* tribunals²⁵² and those nations that engaged in reform efforts relatively early. If the convergence is deliberate, is it motivated by a new unified view of what criminal procedure should be? If so, where did that unified view originate, and what is it? Is this convergent trend likely to continue, to change direction, or to end?

Given the connectedness of the economies, peoples, and political leadership of developed nations, it is impossible to believe that procedural changes begin and grow in a vacuum. As the strong walls of legal sovereignty, which had been left relatively intact by the world community, crumbled with the creation of the World War II tribunals and the United Nations, invading notions of “international norms” gained stronger footing in countries that previously had paid little heed outside of diplomatic circles to what other nations were doing. Whether the exchange of social and popular culture through television, instant news, increased travel, or trade prompted the spread of legal culture or merely

²⁵¹See SAFFERLING, *supra* note 18, at 220 (stating that judges are more than passive “umpires” and closer to those of Continental systems).

²⁵²See LUBAN ET AL., *supra* note 1, at 137 (noting that decisions of supranational criminal courts “provide a growing source of analysis and guidance from which a universal code of criminal procedure may one day emerge”).

expedited it, the impact of globalization must have played a significant part in propagating reform.²⁵³

Some have argued against the establishment of a universal system of criminal procedure,²⁵⁴ while others have promoted the idea.²⁵⁵ Richard Vogler describes his opposition:

The first principle I would like to propose is the abandonment of the impractical dream of discovering the universal laws of motion of criminal procedure through the application of scientific method. This project, still very much alive in the conferences of the *Association Internationale de Droit Pénale (AIDP)*, is linked to a Positivist agenda which has long been discredited in most disciplines. It represents a yearning for the creation of a universal code of criminal procedure which could be applicable across the globe and which would enable us all to coordinate our efforts in the collective defence against crime. This ambition, which was central to the early scientific endeavours of comparative criminal justice, is still exercising its powerful fascination, most notably in the elegant and thoughtful work of Delmas-Marty (2003).

It has encouraged the creation of pan-European projects at the level of criminal justice, such as *Corpus Iuris*, *Eurojust* and the office of the European Prosecutor. It has developed a new impetus from the foundation of the international tribunals which has renewed enthusiasm for the elaboration of a truly universal procedure.²⁵⁶

It may well be that a universal approach to criminal procedure is a Utopian dream we are incapable of achieving, and one that is not, in any case,

²⁵³See *id.* at 136 (stating that “one result of an increasingly interconnected world ... is a clear trend toward harmonization, if not actual convergence, among the various legal systems around the world”); see also Linda S. Mullenix, *American Exceptionalism and Convergence Theory: Are We There Yet?*, PAPERS OF THE INT’L ASS’N OF PROCEDURAL LAW, 2009 TORONTO CONFERENCE 1, 1 (2009), available at http://www.iapl2009.org/documents/2aLindaMullenix_000.pdf (last visited Sept. 19, 2010); Samuel P. Baumgartner, *Civil Procedure Reform in Switzerland and the Role of Legal Transplants*, PAPERS OF THE INT’L ASS’N OF PROCEDURAL LAW, 2009 TORONTO CONFERENCE 1, 1 (2009) available at <http://www.iapl2009.org/documents/2aSamuelBaumgartner.pdf> (last visited Sept. 19 2010) (“[T]here is bound to be some convergence of rules and approaches across legal cultures as various forms of international interaction increase.”).

²⁵⁴See VOGLER, *supra* note 61, at 277.

²⁵⁵See, e.g., SAFFERLING, *supra* note 18.

²⁵⁶VOGLER, *supra* note 61, at 277.

desirable. The mere existence of region-wide efforts like *Corpus Juris*, as Vogler says, reflects the “yearning” for universality, but success or failure in the implementation of these smaller-scale projects will portend the future of broader ambitions. Assuming that historical, cultural, and political obstacles prove too great to overcome in realizing a completely unified procedure, striving for that goal may nevertheless reveal workable combinations previously considered incompatible.²⁵⁷ If one or several hybrid, adversarial/non-adversarial constructs are seen to succeed in practice, that success will encourage further experimentation and foster a greater willingness to consider new procedural schemes. Partial success, as in the Italian reforms, will discourage some, encourage others, and cause still more to proceed cautiously.

The *ad hoc* tribunals, especially the ICTY and ICTR, were brave attempts to fashion a compromise procedure that would be essentially adversarial, but with sufficient vestiges of a non-adversarial approach to allow participation and acceptance by judges, defendants, victims, and attorneys from those traditions. Despite the attractiveness of the adversarial model, or perhaps because the model was championed by advisers and advocates in the English-speaking world, modifications have been necessary to curb the abuses so prominently on display in the trial of Slobodan Milosevic, a spectacle that lasted four years and was incomplete at the time of his death.²⁵⁸ Creation of a procedural regime without lay judging and including the possibility of pleading guilty may have promised increased efficiency, but it was a promise unfulfilled. ICTY trials have been lengthy, due in part to the unfamiliarity of civil law judges with the practical workings of adversarial rules,²⁵⁹ but also due to inherent inefficiencies in such a

²⁵⁷Cf. Mullenix, *supra* note 253, at 1 (stating that the convergence of American common law and civil law systems may occur despite “peculiarly American resistance to theoretical concepts or foreign norms” and because of “the U.S.’s ready embrace of pragmatism and practical solutions”).

²⁵⁸Marlise Simos & Alison Smal, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes, Dies*, N.Y. TIMES, Mar. 12, 2006, at § 1, 34, col. 1, available at http://topics.nytimes.com/topics/reference/timestopics/people/m/slobodan_milosevic/index.html; VOGLER, *supra* note 61, at 282-83.

²⁵⁹See VOGLER, *supra* note 61, at 281 (noting that ICTY trials typically last for a year). No doubt, the nature of the crimes being tried in the ICTY hindered efforts at speedy prosecution. Much of the oral testimony must be translated, and while this is done simultaneously, corrections sometimes must be made and clarifications sought, all of which contributes to delay. Much of the testimony revolves around persons and events considerably removed in time from the actual trial, and that evidence is obscured by the unavailability of records and witnesses, in addition to the loss of detailed memory. Events under discussion occurred in a distant part of Europe, making it time-consuming to obtain any supplementary materials or witnesses. To the extent that witnesses are reluctant, due to fear of retribution or security concerns, the usual flow of testimony may be difficult to achieve or sustain. Lawyers unskilled in direct and cross-examination experience more difficulty eliciting testimony. All of these factors slow the adversarial trial process, a process that is inherently cumbersome and inefficient.

system of adjudication. Political considerations and a certain lack of cooperation by affected states also have contributed to the slowness of the process.²⁶⁰ These influences are unlikely to be present in the reformed systems of individual nations, although other obstacles to efficiency undoubtedly will remain. In the context of the *ad hoc* tribunals, the inefficiencies of the adversarial model gradually resulted in resort to more non-adversarial, inquisitorial modes of practice.²⁶¹ This experience is mirrored in the Italian criminal procedure reforms designed to introduce an adversarial characteristic into a traditionally inquisitorial system. As with the *ad hoc* tribunals, the Italians have struggled to find ways to cope with the inefficiencies of their reformed system.²⁶²

Adversarial trials are essentially an expression of preference for control by the individual rather than the state.²⁶³ Given the history of the founding of the United States, it is hardly surprising that the adversarial model flourished in this country. The central government was not to be trusted; sturdy individualism, at first a practical necessity, became the national ideal. Movement among legal systems toward an adversarial view of adjudication may be a reflection of the growth of individualism in other countries, or a concurrent disillusionment with government-controlled systems regarded as inherently corrupt and suspect. If so, the continuing attractiveness of adversarial procedures²⁶⁴ is assured among countries in which strong government control at the expense of the individual exists, and reform is likely to be accelerated by dissatisfaction with social or economic conditions attributable to the political leadership or form of government.

One may wonder why this impulse for a more active role in the criminal justice system has not been widespread in the past. The answer lies in the vastly

²⁶⁰See VOGLER, *supra* note 61, at 280-81.

²⁶¹See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 387 (2003) (need to speed up proceedings has been the "primary rationale" for change from adversarialness to more inquisitorial features); VOGLER, *supra* note 61, at 281-82 (explaining that various factors led to significant "drift" away from the adversarial).

²⁶²See Van Cleave, *supra* note 87, at 304 (stating democratic reforms made trial "more complicated and time-consuming").

²⁶³Richard Vogler notes, for example, that "the historic shift of European criminal justice towards increased due process has been a natural and continuing tendency in a democratic environment." CRIMINAL PROCEDURE IN EUROPE, *supra* note 160, at 11. This is not to say, of course, that adversarial processes are more likely to produce "due process." To the extent that they vest more control in those they seek to judge, they will present a more attractive alternative to justice dispensed exclusively by legal professionals and representatives of the government.

²⁶⁴The adversarial model continues to dominate the reform movement. CRIMINAL PROCEDURE IN EUROPE, *supra* note 160, at 11 (stating adversarial methodology has dominated ideologically during the last decades of the 20th century and the first years of the present century). According to Richard Vogler, in continental Europe, the "drive towards adversariality" has been "remorseless." *Id.* at 12. He notes that it also has spread through diverse regions of the world. *Id.*

increased access to information that only recently has been available. Not so long ago, the legal doings of other nations were known primarily to the “knowledgeable elite” of societies, and not to the ordinary citizens or even to most lawyers and judges. American popular culture, complete with its images of trials in which juries decide cases presented by lawyers working for their clients instead of collaboratively, has spread ever more widely as Hollywood continues its love affair with the exaggerated drama of the American courtroom. The average American probably has never seen a foreign film or television program—even with the advent of satellite channels—that depicts an inquisitorial criminal trial. If an American does see a foreign trial, it is likely to be in a British film in which wigged and robed advocates with accents play out a trial procedure already familiar to the viewer. People in non-English-speaking countries, however, have no trouble finding depictions of the adversarial trial, or at least a romanticized version of it.²⁶⁵ Precisely because it *is* a romanticized version, neatly concluded in fifty minutes or less and in which justice virtually always is done even against terrible odds, foreign lawmakers may be excused for turning to that model for its attractive features, but without a full appreciation of its shortcomings.

For many of the same reasons, the jury system is well known and widely admired. Would the average citizen prefer to be judged by a professional judge who is a political appointee or government civil servant, or by a panel of like-minded citizens? The allure of a jury system is only enhanced by the opportunity it presents to participate in some significant way in important decision-making. The jury is a democratic institution precisely because it gives Everyman a temporary role in the application of criminal justice; it makes the juror a judge-for-a-day.

Whatever its genesis, the movement toward increased use of adversarial processes—and perhaps *any* significant movement—faces roadblocks that will be very difficult to overcome in the short term, and may prove insurmountable. As noted, the inefficiencies inherent in the system, the indirect and counter-intuitive method of searching for the truth involved in a cumbersome direct and cross-examination system; the seeming relegation of truth-finding to secondary importance, and the need for complex evidentiary rules to protect juries from undue prejudice and unreliable evidence, all become apparent only after adversarial procedures are adopted. Whether the challenges of operating under an adversarial model outweigh the benefits of giving the affected parties a measure of control remains to be seen, and that cost/benefit analysis undoubtedly will produce variations in systems trying to adjust to a new method of adjudication, including

²⁶⁵When I have taught in Austria, my Austrian students always are familiar with the American style trial through television and movies. Most of them, though, have never seen an Austrian criminal trial and have only a vague idea how it would look. It is ironic that an American law professor would have viewed more Austrian criminal trials than a law student from that country.

total abandonment of the effort in some countries.²⁶⁶

As a result of these experiments shifting toward adversariness, a kind of composite hybrid model has emerged. It bears distinctive inquisitorial aspects: a pre-trial investigative phase conducted by a separate magistrate or prosecutor supervised by an investigating magistrate; an emphasis on truth-finding, including broad disclosure or discovery measures; a significant degree of participation by the trial judge, but with deference to the parties' rights to direct the proceedings; some reliance on written forms of evidence, with more pre-trial disclosure to the judge of evidence to be used at trial; and expansive review powers by appellate courts.²⁶⁷ Exclusionary rules may exist, but are subsidiary to the truth-finding function. The lawyers' primary responsibility is to serve the ends of justice, rather than trying to "win" an adversarial contest on behalf of their clients.

The composite sketch also would contain adversarial elements not previously included in the inquisitorial model. Most visible is the significant control the parties exercise over the trial, including introduction of evidence by direct and cross-examination of witnesses they choose. Increasingly, but not in the international tribunals,²⁶⁸ lay judges are being installed, sometimes even independent, British-style juries, a distinctly democratizing reform measure. In an effort to expedite the movement of cases through courts, various forms of summary disposition, including plea bargaining, are allowed.²⁶⁹

Is it possible, or desirable, to seek to develop from this hybrid composite model a universal method of criminal investigation and adjudication?²⁷⁰ Clearly,

²⁶⁶See VOGLER, *supra* note 61, at 283 (2005) (noting that there was a "radical strengthening" of inquisitorial features of ICTY proposed in wake of Milosevic prosecution). Some adjustments of balance were made by the ICC, based on the experience of the ICTY and ICTR. Essentially an adversarial trial procedure, the ICC model includes compensating inquisitorial features. See CASSESE, *supra* note 261, at 387.

²⁶⁷See, e.g., CASSESE, *supra* note 261, at 386-87; VOGLER, *supra* note 61, at 282-83 (discussing adoption of inquisitorial procedures by ICTY).

²⁶⁸See SAFFERLING, *supra* note 18, at 216 (noting that the use of a jury in an international criminal court is "entirely out of the question").

²⁶⁹This necessary component of adversarial procedures will prove especially unattractive to many. Richard Vogler explains:

One of the most persistent critiques of the introduction of more adversariality is that the emphasis on the trial encourages compensatory moves towards the use of the guilty plea, plea bargaining and an expedited pre-trial, in which outcomes are achieved by negotiation between the parties rather than by hearing in open court.

CRIMINAL PROCEDURE IN EUROPE, *supra* note 160, at 14.

²⁷⁰Christoph Safferling believes such a universal procedure is possible and can be derived from widely accepted human rights norms. See generally SAFFERLING, *supra* note 18. His proposed construct bears a marked resemblance to that adopted by the ICTY and ICC. *Id.*

there are great advantages to be gained in achieving uniformity in crime-control measures. And to a considerable degree, the intertwining of cultures in the Information Age homogenizes popular national understandings and expectations of what a justice system should be. However attractive it may be, the implementation of a uniform system invariably meets the reality that has been experienced in Italy and by the ICTY and ICTR, and can be expected in the ICC.²⁷¹ Imagine how much more pronounced that challenge must be when individual, sovereign states, *e.g.*, China, attempt to align with a world model not of their making, and ill-suited to their national legal ethos.

English is the current *lingua franca*, but there is no widespread movement to replace local languages. The Euro has become a regional currency, but even within the European Union, some members cling to their traditional bills and coins. Most of the world uses metric measurements, but the United States and others stubbornly refuse to cede the foot, yard, pound, and gallon. Adoption of a universal language, currency, and system of measurement also would facilitate trade and travel, but the costs in national pride, tradition, and political capital still outweigh these benefits. In the same way, nations may adopt some reforms in imitation of the Italians²⁷² or the international tribunals, but will not, and should not, insist on a truly uniform, universal method of investigation and adjudication.²⁷³ To the extent that developed countries are reform-minded, they seem to be considering—and often selecting from—the adversarial hybrid menu that currently is in vogue. But their selections vary considerably, as does the success they achieve in integrating the chosen reforms into their own firmly

at 366-79.

²⁷¹That same reality may explain why the United States did not embrace the tenets and processes it created with the Nuremberg tribunals, but other nations did. *See generally* Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151 (2010) (arguing that the French readily accepted the “internationalization” of criminal law due to its compatibility with their legal tradition, while the U.S. did not follow its own example because it was inconsistent with American law, legal philosophy, and politics).

²⁷²The Italian reforms have served as an example for the rest of Europe. *See* CRIMINAL PROCEDURE IN EUROPE, *supra* note 160, at 13 (stating Italian reforms “watched with the greatest interest by the rest of the continent”).

²⁷³*Contra* SAFFERLING, *supra* note 18, at 378-79 (2001):

False adherence to domestic legal cultures that emerged for certain political and historical reasons helps no one. Instead, there must be a profound rethinking of domestic legal systems with a look at the necessities of such a young and sensitive legal order as international criminal law. Certainly a case-to-case development as attempted by the ICTY can be considered inevitable. Nevertheless, in order to avoid embarrassment of states and individuals, this must take place within a solid theoretical consensus.

Id.

entrenched systems.²⁷⁴ If China, Argentina, and Italy prefer adversarial procedures, they certainly will not take the same form, or be embraced with the same enthusiasm in each of those countries.

Reform is not doomed to failure. An increased measure of consensus on principles can be achieved, but as the Italian and ICTY examples have shown, *real* and practical reform requires patience and persistence, and a willingness to adjust the reform measures when time and experience reveal incompatibilities. Important benefits can be realized in the effort to find common ground, but that good must not be sacrificed in the quest for the perfect. Transplantation is a tricky business in law, as in other human organs.



²⁷⁴Richard Vogler noted the same limitations while arguing that universality is a notion based on false positivist premises:

[W]hilst the new international regimes of criminal justice are to be welcomed and whilst the underlying traditions of criminal justice are truly universal, it remains a matter for each nation to develop its own particular regime in accordance with local traditions and bearing in mind the guiding principles of procedure.

VOGLER, *supra* note 61, at 285.