Criminal Procedure

Criminal Procedure

A Worldwide Study

Second Edition

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Carolina Academic Press
Durham, North Carolina

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ISBN-10: 1-59460-244-1, ISBN-13: 978-1-59460-244-3
LCCN: 2007922461

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

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Overview

Craig M. Bradley[1]

There have long been two main approaches to criminal procedure in most of the world: the inquisitorial (civil law) system which originated and prevails on the European continent and the accusatorial (common law) system, which prevails in Great Britain and its former colonies. Countries as diverse as Argentina, South Africa, Egypt, Russia, Japan and China have criminal procedure systems derived from one of, and increasingly, a combination of, these models. In the traditional inquisitorial model, a theoretically neutral judicial officer conducts the criminal investigation and a judge or panel of judges who have full access to the investigation file (dossier), determines guilt or innocence. The trial is a relatively brief and informal affair conducted by a presiding judge without a jury; the accused does not necessarily have a right to avoid testifying and neither counsel has much of a role, if the defendant even has counsel. The trial is not necessarily continuous, may not require the attendance of all witnesses, and can last in excess of a year. Both the behavior of the police and the conduct of judicial proceedings are governed by a more or less detailed code of criminal procedure.

The accusatorial model, by contrast, starts with a police investigation that is openly non-neutral but rather, at least after it has focused on a suspect, is aimed at collecting evidence that will prove his guilt. An adversarial trial is held before a neutral decision maker, either a judge or a jury, with no prior knowledge of the case, and no dossier. The defendant has a right to a jury. The attorneys conduct the trial, with each side attempting to convince the decision maker of the rectitude of her position. The trial is continuous and subject to the principle of orality (i.e., evidence against the defendant must be presented by live witnesses in court, subject to cross-examination). This common law system prevails in Britain and its former colonies, including Australia, Canada, and the United States. Traditionally, the common law system, as the name implies, was governed not by a code, but by court-made law that developed incrementally over time.

Each system has certain advantages and disadvantages. The continental model has the distinct advantage of being much more efficient than the common law approach. The pretrial investigation is, at least in theory, more neutral, with the examining magistrate using the resources of the State to uncover all the evidence, wherever it may lead, in his search for truth. A jury need not be selected, and the trial is conducted expeditiously by one or more judges, rather than by the opposing parties. The trial need not be continuous and may proceed sporadically over a year or more. Since

1. I would like to thank Profs. Damaska and Frase as well as Judge Lensing for their comments on earlier drafts of this chapter.

the State is theoretically neutral, as it acts in the best interests of both parties, there is no need for a defense attorney (though defense attorneys are now required in most countries). Nor is live testimony necessarily required—witness' statements are contained in the dossier. Because the system works so efficiently, plea bargaining is not necessary to reduce the caseload, and is circumscribed.[2] That is, in the usual case, the prosecution must establish the defendant's guilt through the presentation of evidence, most of which is already in the dossier, even though, following that presentation, the defendant may choose to confess. Similarly, witnesses at trial, including experts, are witnesses of the court, not of the parties, and are questioned by the presiding judge in a way that is designed to produce balanced, rather than biased, testimony.

But these very advantages contain inherent weaknesses. If a defendant does not have a vigorous advocate who is prepared to examine the evidence solely from the defendant's point of view, there is a greater chance that an innocent person may be convicted simply because, on the most obvious view of the evidence, he appeared to be the most likely suspect. There is something too cozy, to one raised in the adversarial tradition, about an examining magistrate passing along a file, which sets forth a detailed case for the defendant's guilt, to her judicial colleague at the trial court.[3] The lack of a principle of orality and, possibly, even of a defense attorney, is further troubling. We are not comfortable, especially in the United States, where distrust of government is mother's milk, with a system in which government officials determine guilt with little input from the defendant's advocate, and none from ordinary citizens on a jury.[4]

The adversarial approach, with its "trial by combat" aura, seems more fair to us. According to adversarial theory, each side is represented by a committed advocate, fighting to the rhetorical death for his cause, with the final decision rendered not by "faceless bureaucrats," but by a common sense consensus of the defendant's peers. Every piece of the government's case, which is vigorously presented by the prosecuting attorney, is with equal vigor contested by the defendant's lawyer, with only the fittest evidence surviving. The inherent hostility that every government official feels toward those accused of crime is displayed openly and challenged, rather than operating *sub silente* against the defendant. Since this system mistrusts the government, the defendant is endowed with an entire quiver of rights that he may launch against the government at various stages of the proceeding, including rights against unreasonable searches, to silence, to counsel, and to confront witnesses against him. Breaches of these rights may cause a conviction to be reversed.

But this combative approach also contains inherent weaknesses. For one thing, the prosecution typically has greater resources than the defense, including a professional police force to carry out investigations and a legal department of well-paid prosecutors who are generally skilled and enthusiastic. The defendant, by contrast, is likely to be represented by a court-appointed attorney or public defender, who will have few inves-

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2. However, plea bargaining, as the chapters on Germany and Italy illustrate, has sprung up as a direct response to the more elaborate and time consuming rights structure that has developed in most countries.

3. "Americans tend to equate inquisitorial systems with coercive interrogation, unbridled search, and unduly efficient crime-control." Abraham Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009,1018 (1974).

4. However, juries are available in Spain, France and in some parts of Russia, and most other civil law countries use "lay" judges—citizens who hear the evidence, have access to the dossier, and vote along with the professional judges. See §III in each chapter.

tigative resources, who may be overworked and underpaid, and who will probably believe that his client is guilty. (Obviously, belief in the defendant's guilt may affect the performance of a privately retained attorney but, one suspects, to a lesser extent.) Thus, despite defense counsel's stance of vigorous resistance to the prosecution's case, he may, for various reasons, not have his heart in it or have inadequate resources to properly defend the case.

Even more troubling, in their efforts to advance only the view of the case most favorable to their side, the attorneys may skew the truth-finding process. The attorney who is most skilled at choosing a favorable jury, arguing to the jury, locating witnesses, and at examining and cross-examining them is more likely to prevail, regardless of the defendant's actual guilt or innocence.

Finally, and most disturbing, this system is extremely cumbersome, because jurors must be laboriously picked, convinced, and instructed, and because the procedural rules are extremely detailed, to ensure fair play. Given the limited resources available to the criminal justice system and the high cost of jury trials,[5] the majority of cases must be resolved *without* a trial.[6] Instead, a plea bargaining system induces defendants to give up their rights and plead guilty, frequently by offering to convict them of lesser crimes than they apparently committed, thus disadvantaging both the defendant and society.

In fact, the plea bargaining system is even worse than it appears on its face, because the weaker the prosecution's case, the more likely it is that a favorable bargain will be offered to the defendant. But "weakness" in the prosecution's case also correlates with innocence of the defendant. Thus, innocent defendants will, on average, be offered more attractive plea bargains than will the guilty. Of course, if the prosecutor believes the defendant to be innocent, he must dismiss the case. But there is undoubtedly a group of defendants whom the prosecutor believes to be guilty but are not. They may be offered a highly-favorable plea bargain.

For example, in my experience as a prosecutor, it seemed that the most common non-drug felony in Washington, D.C. was armed robbery of a convenience store or of a person walking alone on the street. Frequently the only witness was the victim. If the victim made a positive identification of the defendant, either after the crime or from a photo spread and lineup, the prosecutor would, absent any reason to mistrust the identification, prosecute the case. However, prosecutors are aware that eyewitness identifications are notoriously unreliable and that juries may mistrust them. Accordingly, favorable plea bargains in single-witness armed robberies are almost always offered. A typical bargain in a case where the victim was not harmed was a plea to unarmed robbery with no recommendation as to sentence. The judge would give such a defendant a much lighter sentence than if he had been convicted of armed robbery after a trial. Defense attorneys, who knew from experience that their clients were likely to lie to them, would generally urge their client to accept a bargain even if the client denied the crime, unless

5. *But see* Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931 (1983) (arguing that for about $850 million more than was then being spent on the criminal justice system, every defendant could be given a three-day jury trial).

6. The National Center for State Courts found that in 13 jurisdictions surveyed, the percentage of felony cases resolved by jury trial ranged from a low of 2.1 in Texas to a high of 6.9 in Alaska. Jeffrey Abramson, *We, The Jury* 298 (1994).

the client could offer a convincing defense.[7] No doubt, some defendants who were innocent ended up pleading guilty.

To a large extent, the differences in criminal procedure reflect the different fundamental assumptions underlying the inquisitorial and the common law systems, as discussed in the book *Criminal Justice in Europe.*[8] In the inquisitorial system, "the state is the benevolent and most powerful protector and guarantor of public interest and can, moreover, be trusted to 'police' itself as long as its authority is organized in a way that will allow it to do so."[9] In the accusatorial system, by contrast, there is "a negative image of the state and a minimalist view of its functions."[10] Thus, the accusatorial approach to criminal justice emphasizes separation of powers and the resolution of a conflict between equal parties.[11] These traditions mean that, in the Netherlands, for example, which adheres to the inquisitorial approach, the most salient feature of pretrial process is the degree to which all parties co-operate in arriving at a pre-prepared version of [the truth] that is subsequently recorded in a case file or dossier as the basis for the coming trial. Professional investigators employed by the state—police, forensic psychiatrists, and scientists—are expected not only to do most of the work, but also to do it in a detached and impartial way, an assumption that allows the defense to leave most matters of investigation to [state officials][12].... Prosecutors see themselves as "magistrates ... engaged in an impartial weighing of the different interests involved."[13]

Although it is not spelled out as explicitly, a similar philosophy underlies the approach to criminal justice in the countries presented in this book, such as Israel and France, and particularly Mexico, that are the closest to the pure inquisitorial model.

In England and the other common law states, by contrast,

> Each party is responsible for developing evidence to support its arguments. Investigation is motivated by self-interest rather than public interest. There is no investigating judge to seek out "truth" and, despite official rhetoric about impartiality in prosecution, the concrete legal duties of police and prosecution lawyers do not extend to seeking out exculpatory evidence.[14] Indeed, what constitutes truth is subject to negotiation by the parties. Extensive plea bargaining simply produces an agreed approximation of events.... It is rare for any judicial authority to challenge these agreed assertions.[15]

Karl Llewellyn aptly described these two approaches as "parental" and "arm's length" systems of criminal procedure.[16]

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7. In the United States, the defendant does not necessarily have to admit his guilt in order to plead guilty, though the prosecutor must satisfy the court that there is an adequate factual basis for the plea. *North Carolina v. Alford*, 400 U.S. 25 (1970).

8. Christopher Harding, *et al.*, editors (1995).

9. Nico Jörg et al., *Are Inquisitorial and Adversarial Systems Converging? in Criminal Justice in Europe*, supra, n. 8 at pp. 41, 44.

10. *Id.* at 45.

11. *Id.*

12. *Id.* at 47.

13. Stewart Field, et al., *Prosecutors, Examining Judges, and Control of Police Investigations* in *Criminal Justice in Europe*, supra n. 8 at p. 236.

14. They do extend to turning over exculpatory evidence if it is found, however. *United States v. Bagley*, 473 U.S. 667 (1985).

15. Jörg, supra n. 9 at p. 48.

16. K. Llewellyn, Jurisprudence at p. 444–450 (1962).

Of course, in the laws of different countries, these differing approaches have never been as clear as the presentation of these archetypes would suggest—a point emphasized by Prof. Damaska many years ago.[17] In recent years, however, it would seem that the closure of the gap between the two models has been accelerating.[18] Defense lawyers now play a more prominent role in civil law trials, and suspects have more rights for those lawyers to protect.[19] Though jury trials remain in disfavor on the continent, they are available in Spain, France and parts of Russia.[20] A right against self-incrimination at trial, and against involuntary confessions, is now generally enforced, and the use of an exclusionary rule to force police to obey rules governing searches (sometimes)and interrogations (usually) is increasingly being used in most of the countries discussed in this book.[21] *Miranda*-type warnings[22] are also widely required.[23] In short, defendants are entitled to more "rights" than they used to be, including the right to an advocate whose job it is to vindicate those rights.

By contrast, while inquisitorial systems have become more adversarial, many examples in the English and U.S. systems of movement toward the continental model are more in the realm of proposal than of fact.[24] However, with the exception of the United States, all of the countries presented in the book, and most other countries, use a nationally applicable code of criminal procedure rather than relying on judicial precedents as the means of governing the criminal process.[25] The use of a code is in the civil law tradition. However, the exposition of defendant's rights and the limitation of police powers found in those codes reflect the common law's mistrust of government.

Until recently, the narrow attitude in the United States, encouraged by the Supreme Court, was that the inquisitorial system depended upon the use of terror and torture as suggested by its namesake, the Spanish Inquisition. In a famous passage from *Murphy v.*

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17. See, Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. of Pa. L.R. 506, 569 (1973).

18. On convergence between the United States and Germany, see Richard Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. Int'l & Comp. L. Rev. 317 (1995); *see also* Craig Bradley, *The Failure of the Criminal Procedure Revolution* 95–143 (1993) (discussing how various common law and civil law countries are moving toward a U.S.-style, rights-oriented approach to rules governing criminal investigation).

19. See, e.g. the sections on Interrogations (§II C 1) and the role of defense lawyers (§III B 3) for each country discussed in this book. See also, Stewart Field & Andrew West, *A Tale of Two Reforms: French Defense Rights and Police Powers in Transition*, 6 Crim. L.F. 473 (1995).

20. Jury trials were used in Germany between 1890 and 1920 and in the Netherlands from 1811 to 1813. Stewart Field, et al., *Prosecutors, Examining Judges, and Control of Police Investigations, in Criminal Justice in Europe* 227, 229 (Phil Fennell et al. eds., 1995). Jury trials have also been abandoned in Japan and India, and are used increasingly rarely in England. Stephen J. Adler, *The Jury* at xv–xvi (1994). France has nine "jurors" in Assize Court whose function is similar to that of lay judges in Germany. France §III B. Germany, *Id.*

21. Nico Jörg et al., *Are Inquisitorial and Adversarial Systems Converging?*, in *Criminal Justice in Europe*, supra note 8, at 48, 54. See §II A 5 of each chapter.

22. A practice imported from England. *Miranda v. Arizona*, 384 U.S. 436, 486–88 (1966).

23. See §II C 1 of each chapter.

24. "Worries about the partisan nature of policing have led to calls for the introduction of a pretrial truth-finder such as the investigating judge (in England)." Jörg et al., *supra* note 8, at 49. Other "proposals include greater judicial involvement in indicating sentences and regulating deals." *Id.* at 52.

25. Another exception is Australia, where police are governed primarily by state, rather than federal, codes. Craig Bradley, *The Emerging International Consensus in Criminal Procedure*, 14 Mich. Jour. of Int'l Law 171, 191–95 (1993).

Waterfront Commission of New York Harbor,[26] the Supreme Court described the Anglo-American privilege against self-incrimination as follows:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses....[27]

The notion that an "inquisitorial" system of justice was inextricably linked to torture and unreliable results, combined with Americans' traditional ignorance of other languages and culture, and the elimination of states as "laboratories" due to the national uniformity of criminal procedure rules enforced by the U.S. Supreme Court, meant that Americans really had no sense of alternatives to the classic common law system. The U.S. adversarial/jury system, while often criticized, is nevertheless generally thought by American lawyers to be the only fair way to proceed.

For example, I and, I'm sure, most of my contemporaries managed to pass through three years of law school without ever finding out that jury trials do not generally occur in criminal cases on the European continent. One's attitude toward such Supreme Court cases as *Williams v. Florida*[28] and *Apodaca v. Oregon,*[29] in which the Court held that twelve-person juries and unanimous verdicts were not constitutionally required, (each of which might be considered a move in the inquisitorial direction) might well be influenced by the knowledge that perfectly civilized countries dispense with juries altogether.

In the 1970s, however, this insular attitude began to change, as scholars like Abraham Goldstein, John Langbein, Lloyd Weinreb, and Mirjan Damaska began to publish comparative articles in leading U.S. law journals.[30] Still, as noted, there was little in the case law to indicate that U.S. judges, particularly the Supreme Court justices, had been influenced by the comparative material found in the legal literature. *Williams* and *Apodaca,* for example, while containing extensive discussions of the English roots of the American jury system, make no mention of continental procedure.[31] Other developments in the United States, such as the requirement that exculpatory evidence be

26. 378 U.S. 52 (1964).

27. *Id.* at 55; *accord Culombe v. Connecticut*, 367 U.S. 568, 581 (1961) (emphasis added): "This principle [against self-incrimination], branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, *which were borrowed briefly from the continent*, during the era of the Star Chamber, was well known to those who established the American governments."

28. 399 U.S. 78 (1970).

29. 406 U.S. 404 (1972).

30. Abraham Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 Yale L.J. 240 (1977); John Langbein & Lloyd Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549 (1977); John Langbein, *Comparative Criminal Procedure* (1977); Mirjan Damaska, *supra*, n. 15. However, nearly four decades ago, Jerome Hall discussed the importance of the comparative approach in *The Fundamental Aspects of Criminal Law*, in *Essays in Criminal Science* 159 (Gerhard O.W. Mueller ed., 1961). *See also*, Karl Llewellyn, *supra* n. 14.

31. *Williams,* 399 U.S. at 87–98; *Apodaca*, 406 U.S. at 407–10. Even in the 1980's Chief Justice Warren Burger, Judge Malcolm Wilkey of the U.S. Court of Appeals for the D.C. Circuit, and others thought that "no other civilized nation in the world" had an exclusionary rule. Craig Bradley, *The Exclusionary Rule in Germany* 96 Harv. L. R. 1032 (1983).

handed over to the defense[32] and, in some states, extensive mutual discovery obligations, have a decidedly continental tone, but do not appear to have been based on knowledge of the continental system.[33] However, the 2003 case striking down the juvenile death penalty, *Lawrence v. Texas*,[34] did bolster its conclusion by referring to the fact that most other countries barred the death penalty for juveniles and generated a controversy over whether foreign law was an appropriate tool for interpreting the American Constitution.

Still, because of developments in the civil law world, it seems that movement toward, though not full adoption of, the adversarial model, characterized by conviction-oriented police and prosecutors and checked by aggressive assertion of rights by suspects and their attorneys, is the wave of the future. As societies become more diverse, the notion that government can be trusted to do right by minority groups is being considered increasingly anachronistic by reformers in civil law countries.[35] The more informal approach of the continental system may be well suited to a society in which everyone is of the same or similar background. But it is not suitable where minority groups are mistrusted by, and mistrust, the majority and its police forces.

In the absence of shared norms, formal delineation of rights by courts or legislatures, and their enforcement by counsel, are essential. It is impossible to claim, at this remove, that such concerns *actually* motivated reformers in these countries to move toward the adversarial approach. The availability of information about certain rights in other countries may also have led the ordinary citizen to demand similar consideration from his government. But, whatever the motivations of the decision-makers, the development of the law of most of the countries in this book,[36] including to some extent, English law governing police procedures in recent years, has been in an adversarial, rights-oriented direction.[37] At the same time, the trend in most societies has been toward greater ethnic diversity. The movement of Europe toward political unity has also contributed, through the actions of the European Courts of Human Rights and of Justice, to increasing similarity among European systems. This alone does not explain the trend toward the adversarial approach. However, when it is recognized that, in an increasingly

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32. *United States v. Bagley*, *supra*, n. 14. In the United States, at least, this obligation extends to impeachment evidence. *Id.* at 678. However, in neither the United States nor the Netherlands are police expected to search out all possibly exculpatory material nor, do they have to hand over such material absent a request by the defense attorney. *Id.* at 681–82; *see also* Jörg et al., *supra* note 9, at 49.

33. Older features of the Anglo-American system such as "an organized police force and overt acceptance of police power to detain and interrogate in order to generate evidence against the suspect" originated with inquisitorial systems. Jörg et al., *supra* note 9, at 48; *see also* Goldstein, *supra* note 3, at 1018.

34. 539 U.S. 558.

35. Kelk, in *Criminal Justice in Europe, supra* n. 8, at p. 6–7, points to "diminishing tolerance" in the Netherlands, which can "be seen in our attitude toward ethnic minorities," and concludes that this trend has contributed to "juridification" (the establishment of formal rules) "not because of any deep-seated interest in the classical values of liberty, equality and fraternity" but to establish "social control in the sense of supervision and one person watching another." Kelk makes it clear that he is opposed to this trend and objects to "lawyers who are guilty of unacceptable practice in attempting to use the rules of criminal procedure(for example, with regard to procedural mistakes) for the benefit of their clients." *Id.* at 15. To an American lawyer, this is a very strange declaration.

36. As the authors of the Chapters on Spain, Italy and Russia all point out, recent reforms have moved toward the adversarial approach. This is also true in the Netherlands. Jorg et al., *supra* n. 8 at p. 53.

37. Bradley, *supra* note 18, at pp. 96–108.

unified Europe, *every* ethnic and linguistic group—Germans, French and Belgians alike—will be a minority, it is not surprising that the trend is toward more formal and detailed declarations of rights.

By contrast, in still-insular China, relatively non-diverse Japan,[38] and in Mexico, we continue to see more abbreviated and frequently discontinuous trials conducted by courts without juries or lay assessors, where the rights of defendants are not a major focus of the proceedings.[39] Argentina, by contrast, a country with a deplorable history of civil rights abuses, now has an absolute right to counsel,[40] and adopted the principles of concentrated and oral trials in 1993,[41] though in other respects, (no juries or lay assessors, trial conducted by presiding judge) it resembles the more traditional inquisitorial model. Likewise, South African law has been strongly influenced by the need to provide uniform rights to all citizens.

In the end, the reader of this book will realize that the two-model system has broken down. Most of the civil law countries discussed have moved away from the traditional inquisitorial model and toward the adversarial, though to different degrees and in different respects. A trend can be found, however, in three of the most significant and controversial aspects of the Warren Court criminal procedure "revolution" in the United States. First, an exclusionary rule is increasingly employed to bar the prosecution's use of evidence obtained through police misconduct.[42] Second, police are generally required to give warnings as to rights to suspects prior to interrogation.[43] Third, defendants in criminal cases, at least where imprisonment is possible, are entitled to be represented by counsel and to have counsel appointed if they cannot afford to hire one.[44]

There are also two important trends which have not yet been adopted by the United States, in addition to the lack of a national code discussed above. The first is that, although exclusionary remedies are increasingly available in other countries, they are not mandatory, except as to coerced confessions. Rather, they are in the discretion of the trial court,[45] based on various criteria such as whether use of the evidence would "bring

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38. Japan does have a small indigenous minority, the Ainu, plus a small number of ethnic Koreans, neither of whom have any political power.

39. In Israel, there is not an absolute right to appointed counsel except in capital cases and in cases "punishable by a prison sentence of no less than ten years," no principle of orality, and discontinuous trials. Israel, § III B 3. In Japan, though counsel is generally provided, there is no jury or lay assessors, there is no principle of orality, the trials are discontinuous and may last for years. The conduct of the trial itself, however, is deemed "adversarial" by authors in both countries, in the sense that the lawyers, assuming the defendant has one, conduct direct and cross-examination themselves rather than the presiding judge assuming primary responsibility. For a discussion of Japanese criminal procedure, see, Hiroshi Oda, *Japanese Law* (1992) p. 398–403.

40. *Argentina*, §III B 3.

41. *Argentina*, § III B 1.

42. See §§ II A 5 and II B 3 of each chapter. The precise rationale for evidentiary exclusion differs from country to country, however, and only the United States has a rule that is usually mandatory.

43. See §§ II B 1 and 2 of each chapter. As to this requirement, the United States Supreme Court was influenced by the British "Judges Rules" which have long required warnings as to the right to silence and that statements may be used against the declarant.

44. See §§ III B 1 and 3 of each chapter.

45. See §§ II A 5 and II C 3 in each chapter. Italy purports to have a mandatory rule, but, "in practice this provision has limited effect." *Id.* So does Egypt, though the same "in practice"qualification may apply. The United States gets around the seeming harshness of rules excluding evidence whenever the police violate the rules by declaring that certain police conduct, such as searching an open field, does not fall within the Fourth Amendment at all, and consequently is not subject to court regulation. There is also an exception to the exclusionary rule for evidence seized pursuant to a defective judicial warrant. See § II A 4. Still, evidentiary exclusion due to police rule-breaking

the administration of justice into disrepute" (Canada) or "make the proceedings unfair" (England), and are used more sparingly. The second is that detailed rules for the length and conduct of interrogations are spelled out in many countries' codes.[46] In the United States, by contrast, after the *Miranda* requirements have been met, the Supreme Court has not further set rules governing interrogations, such as length and whether certain types of deceit may be employed, beyond the prohibition of coercive methods.(There is, however, a relatively recently-imposed requirement that an accused must, "absent extraordinary circumstances," be brought before a judicial officer for a "probable cause hearing" within 48 hours of his arrest. It remains unclear how much of that 48 hours can be devoted to interrogation.)[47]

As for trials, it is interesting to see that jury trials are considered vehicles for reform in Russia despite their general disfavor elsewhere, including, to some extent, their mother country England, where only about a quarter of contested trials (not counting guilty pleas) were held before juries in 1996.[48] The "mixed" system, as used in Germany, Italy, and other continental jurisdictions, has much to recommend it. In the United States, the process of choosing, instructing, and arguing to a jury is very cumbersome. Moreover, since the search for truth is extensive and time consuming, evidence rules have been developed to decide what juries may and may not hear. Not surprisingly, countries that use juries also tend to step up plea bargaining because the system cannot afford to have too many of these extended proceedings. The more efficient mixed system, with lay people participating as "judges," is much less cumbersome and thus creates less pressure for guilty pleas, while maintaining citizen participation.[49] Moreover, juries are extremely malleable, thus placing too much weight on the skill and resources of lawyers in manipulating them, and too little weight on the actual guilt or innocence of the accused. The United States, most notably in the acquittals of O.J. Simpson, and the Los Angeles police who participated in the Rodney King beatings, is sometimes plagued by what are widely considered unjust and incorrect jury verdicts.

A Note on the Theory and Organization of This Book

This book is designed to serve as both a reference and a teaching tool. It is organized in outline form so that the reader/researcher can readily compare each aspect of one country's system with the same aspect of other countries'. All of the chapters use the same numbering system at least through the first Arabic number. Thus, for example, §II A1, "Stops" will be the same in each chapter, but not all chapters will have a subsection II A1a. This form will make comparison easier. It will also create some awkwardness since the outline is based on the American system and may have terms and concepts that cannot readily be applied to all of the other countries discussed. Even though both terminology and practices will vary from country to country, the basic aspects of bringing a criminal case from investigation through prosecution are the same. That is, to fol-

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seems to be a considerably more common phenomenon in the U.S. than in the other countries discussed in the book.

46. See §§II C 1 and 2.

47. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Since the accused will normally (but not necessarily) receive counsel at this hearing, that will usually put an end to interrogation.

48. See *England*§III.

49. This view has previously been suggested in, Craig Bradley and Joseph Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 So. Cal. L. R. 1267, 1284, 1288–89, 1292 (1996).

low the example, all police have occasion to stop and question suspects, regardless of whether that activity is subject to legal controls or what it is called. It thus seemed worth the price in awkwardness to require each chapter to proceed on the same chronological outline of the criminal process.

As to the countries chosen, the original criteria for including countries in the book were three: to achieve a global representation; to use countries where the law on the books could be thought to reasonably reflect the law in action; and to use authors who had previously published in English. However, as the book developed, it became apparent that there were not major differences in the approaches of all of the countries considered since, in addition to the countries discussed in this book, such diverse countries as Japan, Australia, Egypt and Poland, all had systems that were based on the two European models. The Egyptian system,(now included in the second edition) for example, is based on the French, and the Japanese system represents a combination of the German, American and French approaches.[50]

Accordingly, it seemed desirable to include two major countries—China and Russia—which are of great geo-political importance, but whose systems are not yet well developed, in terms of both exposition and provision of rights to criminal defendants. Those chapters serve as a counterpoint to the other more advanced countries, as well as providing information about two important countries as to which little material concerning criminal justice is available. However, in recent years the Russian system has improved, and is moving closer to that of the countries of western Europe.

Highlights of the Second Edition

The second edition includes the addition of Egypt and Mexico, and the omission of Spain. While the Spanish system is not without interesting features, it is essentially similar to the other countries of Western Europe. Mexico resembles the traditional continental inquisitorial system more closely than any other country. Indeed, it is positively Kafkaesque in its use of discontinuous trials in which the judge is frequently absent, and "trial by dossier" with little input from counsel. Egypt, in appearance, if not necessarily in operation, is based on and resembles the French system, but since it is a large and important Muslim country, it is worthwhile to discuss.

While Egypt has recently joined the international trend in expanding the right to counsel in both the pretrial and trial settings and reducing preventive detention, this has been overlaid by a continually re-enacted "state of emergency" provision which allows the authorities to ignore procedural rights in cases designated by the President. Apparently this authority is rather widely used.

Germany continues to exemplify the trends identified earlier. It has steadily expanded the rights of the accused, most recently by expanding judicial control over searches and protecting against official snooping by use of hidden microphones. Predictably however, plea bargaining has become more prevalent. Both trends can also be found in South Africa and Argentina, though the latter has also made it easier for the

50. "Despite the overwhelming influence of American law on the Code, in practice, the influence of German law can still be seen in the implementation of the Code. This is particularly evident in the process of investigation as well as the reliance at the trial on written documents—dossiers prepared by the police and the public prosecutors." Oda, *supra*, n. 38 at p. 398. Indeed, the American influences are few, and the Japanese system also does not embrace recent German developments either. (ed.)

police to conduct consent searches. South Africa has explicitly adopted an exclusionary rule as to interrogation violations.

France, also, has generally moved to a more adversarial "rights oriented" approach, giving suspects the right to consult counsel at the outset of detention rather than after 20 hours and requiring that arrests must be based on individualized suspicion. Plea bargaining has been officially recognized and the parties may now directly question witnesses at trial rather than having their questions posed or approved by the presiding judge. In addition, rights to appeal have been expanded.

Israel has become more rights oriented with the establishment of a discretionary exclusionary rule for unlawfully obtained evidence and the establishment of a duty to visually document the interrogation of suspects in serious felony cases. The right against self-incrimination has been limited, however, by a holding that it does not apply to documents.

Italy continues its official rejection of the inquisitorial in favor of the adversarial model, including strengthening the defendant's right to confront witnesses and providing for defense investigations, rather than requiring the defense to request the prosecutor to conduct further investigation.

Canada and England have both seen increased concern about terrorism leading to laws that restrict the criminal procedural rights of suspects in cases where this concern is raised. On the other hand, Canada now refuses to extradite suspects who might face the death penalty. England has significantly to restricted rights of suspected terrorists, allowing detention without charge for up to 28 days and searches without the traditional "reasonable grounds" being shown. It is also notable that the *Khan* case, in which the European Court of Human Rights refused to adopt a mandatory exclusionary rule for search violations, arose in England.[51]

The United States Supreme Court has, in a number of cases, thwarted the government's attempts to abridge rights, especially of non-citizens, in the "war against terror." Since these developments are outside of ordinary criminal procedure and are not widely employed, they will not be the subject of discussion in the *United States* chapter. The United States Supreme Court has not turned dramatically to the right in criminal procedure despite the predominance of Republican Justices on the Court. The most notable decision of the last seven years was probably *Dickerson v. United States,*[52] in which a 7–2 majority of the Court upheld the *Miranda* warnings as constitutionally required.

Russia has seen the most dramatic changes since the first edition. While it was a model of dysfunctionality and denial of the most fundamental rights of the accused in the first edition, it is in the process of evolving into a modern system, comparable to that found in the rest of Europe. However, it has a long ways to go.

China, which is examined in considerably more detail in this edition than the last, has a unique system that may be less concerned with determining truth than with satisfying the political demands of the Communist Party. It does not appear to have experienced significant changes in the last seven years.

51. *Khan v. United Kingdom*, EurCtHR, App No 35394/97, judgement 12 May 2000.
52. 530 U.S. 428 (2000).