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Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe†

This Article is a critique of the widely held idea that European criminal procedures have been "Americanized." During the last few decades, European continental criminal procedures underwent extensive reforms and the American adversary system often became the reference model for this overhaul. Nevertheless, this Article demonstrates that the transfer, rather than producing an actual diffusion of American legal institutions in Europe and making the European criminal procedure systems more adversarial, has resulted instead in its opposite—i.e., in the fortification of the non-adversary civilian structure and its tenets. It is my speculation that this occasioned what I propose to call an "inoculation effect," which, in a Gramscian sense, is theoretically explainable as a "counterhegemonic" move.

To prove my argument, I discuss the impact of some transferred features of American criminal procedure on the receiving European context. Such features, which students of legal transplants have claimed make the civilian procedures more "adversarial," are pretrial investigations conducted by (the police and) the public prosecutor (in lieu of the investigating judge that is classical of the civilian tradition), exclusionary rules, cross-examination, and jury trial.

My critique of the commonly held view shows that the imported adversarial legal arrangements were not simply "lost in translation," i.e., reinterpreted according to the non-adversarial style of the recipient systems. To the contrary, they effectively strengthened the

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most essential feature of a liberal non-adversary procedure, the impartiality of a third-party official search for the truth. This is why the injection of a small portion of American adversarial procedure into the body of Continental European procedure resembles an inoculation. Indeed, just as an inoculation would do, it seems to have generated the "antibodies" able to make the latter more resistant against any future genuine Americanization, that is, against any future transplantation of an adversarial, party-controlled contest system.

INTRODUCTION

A. The Claim

It is the claim of the present Article that the injection of some American adversarial legal features into Continental European criminal procedures is neither a simple example of legal "translation,"[1] nor can it be explained as a full-fledged transplant. In this Article, I envision such an injection as an immunization against any future genuine adversarial turn by the Continental European systems.

Pursuing a path of analysis that I began earlier,[2] I show that the imported American adversarial features did not simply adapt to the non-adversarial style of the receiving systems, correspondingly modifying their original adversarial character. Rather than undergoing a simple "translation" into a non-adversarial style and thereby ending up "lost in translation," the adversarial legal features instead fortified the tenets of the non-adversarial structure of the receiving countries by making the impartiality of their third-party official search for the truth more robust. Therefore, by reinforcing the foundations of their officially controlled inquiry procedure, the transfer seems to have generated an inoculation effect.

Inoculation is the injection of a small portion of an organism into a body, stimulating the production of antibodies that—by immunizing the body against the injected organism—prevent greater diffusion of that same organism in the future. By the same token, I will argue, the injection of a small dose of adversarial legal features into Continental European criminal procedure systems has fortified their non-adversarial structure, and thus seems to have produced "antibodies" able to make them resistant against any future diffusion of an adversarial procedure into their legal bodies. Thus,

1. *See* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

2. *See* Elisabetta Grande, *Rumba Justice and the Spanish Jury Trial*, *in* COMPARATIVE CRIMINAL PROCEDURE 365 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

my explanation carries forward the line of legal scholarship that, within the broad Gramscian notion of counterhegemony, focuses on receiving countries as resisting legal transfers, whether consciously or unconsciously. The inoculation effect is not just a pattern of resistance, but develops into full-fledged counterhegemony, thus claiming predictive potential.

B. Legal Transplants in Focus

Soon after Alan Watson expressly studied legal transplants in 1974 for the first time,[3] the issue became a classical *topos* in comparative legal scholarship. Since then comparativists have never stopped considering the diffusion of legal norms, legal movements, legal ideas, normative constructions, and conceptual categories from one legal system into another, trying to describe the phenomenon they were observing and to understand how and why legal transplants occur. They noticed that different sources of law are involved in different transplants. Sometimes transplants occur at the legislative level, sometimes at the level of the courts, and at other times they mainly or exclusively operate on the doctrinal level. Sometimes the law travels across sources, "formants" in comparative law parlance, such as when the courts of one country adopt—or, conversely, influence—the doctrine or the legislation of another.[4]

Over time, the term "legal transplant" has been complemented by other locutions such as "legal flux,"[5] "legal circulation,"[6] "import/export of law," "legal graft,"[7] "legal migration,"[8] and even "legal translation" or "legal irritants"[9] to signal how rarely a legal transplant coincides with the pure and straight incorporation of the foreign legal solution into the receiving system. Most of the time, at its arrival in

3. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

4. *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pts. 1 & 2), 39 AM. J. COMP. L. 1, 343 (1991).

5. MAURIZIO LUPOI, SISTEMI GIURIDICI COMPARATI: TRACCIA DI UN CORSO 60ff. (2001). In a wider sense, see also MIREILLE DELMAS-MARTY, LE FLOU DU DROIT: DU CODE PÉNAL AUX DROITS DE L'HOMME (2004).

6. ELISABETTA GRANDE, IMITAZIONE E DIRITTO: IPOTESI SULLA CIRCOLAZIONE DEI MODELLI (2001).

7. Roberto Garganella, *Constitutional Grafts and Social Rights in Latin America*, *in* ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE 322 (Günter Frankenberg ed., 2013); Maria Rosaria Ferrarese, *Il diritto comparato e le sfide della globalizzazione. Oltre la forbice differenze/somiglianze*, 31 RIVISTA CRITICA DEL DIRITTO PRIVATO, no. 3, 2013, at 369, 381, 388; John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 530 (2002). For an effective horticultural metaphor referring to legal transfers with the goal of discovering patterns of success or failure, see Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT'L L.J. 95 (2004).

8. *See, e.g.*, THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed., 2006).

9. For a stimulating interpretation of a double irritation effect produced by the transfer of the continental principle of *bona fides* into the body of British contract law, see Günther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

the "context of reception" the imported legal arrangement ends up being de facto nullified, modified, distorted, or remodeled, often giving rise to something new from the original model[10] that may in turn circulate back, in a reverse flow, to the context of original production.[11] Thus, some literature has introduced the idea of "contamination" among legal systems—instead of "imitation" of one system by another—as a result of the circulation of legal norms and solutions.[12]

Comparative legal scholars, in their attempt to identify the reasons explaining the occurrence of legal transplants, have over time pointed to notions like imposition, efficiency, chance, prestige, and hegemony, often providing explanations going beyond the mere political or economic power of the exporting system.[13] They have noticed that legal diffusion is rarely a simple reflection of the military and economic power of a country; on the contrary, from a Gramscian perspective, it is often associated with broader cultural hegemony.[14]

In line with the vast literature on legal transplants, this Article provides a tentative description of, and explanation for, the Americanization of criminal procedure alleged to be currently taking place around the world, with special attention paid to European

10. On legal transplants and the need to take into consideration the different institutional context of the system of production from that of destination, see Mirjan R. Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839 (1997). *See also* John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on "Legal Processes and National Culture"*, 5 CARDOZO J. INT'L & COMP. L. 51 (1997). For an idea of decontextualization and recontextualization—according to the host cultural setting—of transferred legal "items" as though they were purchased from the shelves of an "Ikea"-type global market of legal items, see Günter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT'L J. CONST. L. 563 (2010).

11. Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994).

12. *See* Pier Giuseppe Monateri, *The Weak Law: Contaminations and Legal Cultures*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 575 (2003); Gianmaria Ajani, *Legal Borrowing and Reception as Transplants*, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 1509 (David S. Clark ed., 2007).

13. Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994); Daniel Berkowitz, Katharina Pistor & Jean François Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 16 (2003); Markovits, *supra* note 7; William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995); Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003); Esin Örücü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205 (2002).

14. On legal globalization and hegemony, see JAMES A. GARDNER, LEGAL IMPERIALISM, AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980); Duncan Kennedy, *Two Globalizations of Law and Legal Thought, 1850–1968*, 36 SUFFOLK U. L. REV. 631 (2003); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003); William Twining, *Diffusion and Globalization Discourse*, 47 HARV. INT'L L.J. 507 (2006); YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002); Yves Dezalay & Bryant G. Garth, *Corporate Law Firms, NGOs, and Issues of Legitimacy for a Global Legal Order*, 80 FORDHAM L. REV. 2309 (2012).

Continental systems.[15] During the last few decades, European criminal procedures underwent extensive reforms and the American adversary system often became the reference model for this overhaul.[16] Legal institutions such as pretrial investigations conducted by the public prosecutor (and the police) (as opposed to the judicial pretrial investigation conducted by the investigating magistrate that is typical of the civil law tradition), exclusionary rules, cross examination, and the jury trial traveled from the American criminal procedure system to the European ones, making the latter—it has often been contended—look more "adversarial."[17]

Did this diffusion of legal institutions from the American system really end up making European systems more adversarial?[18] Is it plausible that, on the contrary, embedded in the new context, American legal features lost their resemblance to the original model? In this second case, can we suggest that their import did not alter the non-adversary structure of the recipient European criminal

15. *See* Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409, 436 (2013). For what is by now a classic analysis pointing to a broad Americanization of European legal systems in general, see Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

16. For the 1988 Italian reform, see William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 430 (2004); Louis F. Del Duca, *An Historical Convergence of Civil and Common Law Systems—Italy's New "Adversarial" Criminal Procedure System*, 10 DICK. J. INT'L L. 73, 74 (1991). For the Spanish jury trial reform, see, e.g., Fernando Gascón Inchausti & María Luisa Villamarín López, *Criminal Procedure in Spain*, *in* CRIMINAL PROCEDURE IN EUROPE 541, 628 (Richard Vogler & Barbara Huber eds., 2008); Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 242 (1998).

17. Almost twenty years ago, Craig Bradley observed that Continental European systems were becoming more adversarial. *See* Craig M. Bradley, *Overview*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, at xv, xix*ff*. (Craig M. Bradley ed., 1st ed. 1999) [hereinafter CRIMINAL PROCEDURE: A WORLDWIDE STUDY (1st ed.)]. For a renewed emphasis on the matter, see Bradley's comments in the second edition: Craig M. Bradley, *Overview*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, at xvii, xxvii (Craig M. Bradley ed., 2d ed. 2007) [hereinafter CRIMINAL PROCEDURE: A WORLDWIDE STUDY (2d ed.)]. However, on the harmonizing effect of the European Court of Human Rights' decisions upon European criminal procedure systems and on the meaning assigned by this Court to the notion of "adversarial" proceedings in connection with Article 6 of the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5—which does not necessarily correspond to the one assigned to it in common law countries—see John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 747ff. (2005).

18. Is "Inquisitorial Process on the Retreat?" is the question raised by Thomas Weigend, *Should We Search for the Truth, and Who Should Do It?,* 36 N.C. J. INT'L L. & COM. REG. 389, 404 (2011). Indeed, Professor Weigend notes, "[T]here exists a clear trend toward an expansion of adversarial elements at the expense of 'pure' inquisitorial systems. . . . One might be led to assume that this switchover movement finally proves the inherent superiority of the adversarial system, but there may well be alternative explanations available." *Id.* at 404–05. The alternative explanation Professor Weigend provides is that a hybrid, cooperative, or compromise procedural model is under construction in Europe, which "may reflect the work of an invisible hand guiding the criminal process toward optimal conditions." *Id.* at 408; *see also id.* at 407ff. In my understanding, however, as I will try to make clear in the present Article, this model is nothing other than the old non-adversary model, which has been constantly evolving since the nineteenth century.

procedure, but worked instead in tune with it, strengthening the non-adversarial Continental way of searching for the truth? In this scenario, what is the outcome of the American legal institutions' circulation in European criminal procedure systems? I try to answer these questions, while avoiding altogether the debate about what term—transplant, flux, circulation, borrowing, import, transfer, or migration—better covers the wide and complex phenomenon of legal elements' dynamism from one system to another. Using all the mentioned concepts in an interchangeable way, I detect what happened in the case of the supposed "Americanization" of Continental European criminal procedure.

In Part I, I will briefly recapitulate how, in my view, adversarial and non-adversarial legal institutions differ. Indeed, in trying to understand the alleged Americanization of Continental European criminal procedure, I will build on a distinction between "tango justice" and "rumba justice" that I discussed elsewhere at greater length.[19] Those readers who are familiar with this aspect of my work may resume reading at Part II, which considers in turn the various classical American features that traveled to Europe, in order to show that they did not transform Continental European criminal procedure along adversarial lines, but instead strengthened its basic non-adversarial tenets. In this endeavor, I will only briefly address trial by jury in the Spanish legal system, since I tackled this theme more extensively in another piece.[20] Finally, I will draw some conclusions based on the idea of inoculation as a possible paradoxical outcome of the "transplant."

I. TANGO JUSTICE VS. RUMBA JUSTICE: TWO MODELS OF CRIMINAL PROCEDURE

A. Anglo-American and Continental Criminal Procedure: The Great Divide

In order to assess the impact of some classical American features on Continental European systems, one needs to bring the difference between adversarial and non-adversarial models into sharper focus.[21]

19. *See* Elisabetta Grande, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth, in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA 145 (John Jackson, Máximo Langer & Peter Tillers eds., 2008). Also, for an outline of my understanding of the difference between adversary and non-adversary systems, see Grande, *supra* note 2.

20. *See* Grande, *supra* note 2.

21. Analysis of the non-adversary/adversary or inquisitorial/accusatorial dichotomy has been at the core of comparative criminal procedure studies and has therefore been extensively and deeply explored in a vast literature. For quick reference to it, see Elisabetta Grande, *Comparative Criminal Justice*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 191, 199ff. (Mauro Bussani & Ugo Mattei eds., 2012). For one of the most recent investigations on the subject, see Máximo Langer, *The Long Shadow of the Adversarial and Inquisitorial Categories*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW (Markus D. Dubber & Tatjana Hörnle eds., 2014).

This preliminary juxtaposition should allow us to intelligently interrogate institutions such as the abolition of the investigating magistrate, the expansion of exclusionary rules, the introduction of cross-examination, and the jury trial on the question of the Americanization of European criminal procedure.

Following Professor Damaška's application of Weberian ideal-typical models to the comparative study of criminal procedure more than forty years ago, the two rival procedural models can be fruitfully organized around the contrast between features distinguishing a party-controlled contest on the one hand from an officially-controlled inquiry on the other.[22] The key difference between adversary and non-adversary models, in his view, resides in the distinct roles that parties and judges play in the fact-finding process. In the adversary model, two contestants shape the expression of their dispute and manage the presentation of the evidence. In the non-adversary one, fact-finding responsibilities are assigned to court officials.

These differences between the respective roles of parties and judges reflect contrasting approaches to the search for truth. Starting from the idea that a third party's search for the truth can be neutrally pursued, the non-adversary model maintains that the pursuit of justice requires judges to seek as closely as possible the *objective* truth in adjudicating criminal liability. By contrast, the adversary system rests on the assumption that any third-party reconstruction of the facts is biased and non-objective and a truly non-partisan search for the truth is viewed as unachievable. The search for the truth in a legal process therefore needs to depart from ordinary cognitive practices and be pursued through a fair confrontation of two parties, each one promoting her side of the story in front of a passive adjudicator. What results is a different notion of truth that, instead of being *objective*, is indeed the product of a contest between two interpretations of reality: in my view, it can be described as an *interpretive* truth to point to its skepticism towards an objective reconstruction of reality. [23]

The "relational" nature of the truth-discovering enterprise in an adversary system produces what I have elsewhere called a "tango" idea of justice.[24] As in tango, where it takes two—and only two—to dance, in an adversarial conception it takes two to produce a reconstruction

22. Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) [hereinafter Damaška, *Evidentiary Barriers*]. *See also* Mirjan R. Damaška, *Models of Criminal Procedure*, 51 ZBORNIK PFZ 477 (2001). I explored the implications of Damaška's move beyond the old accusatorial versus inquisitorial dichotomy in Grande, *supra* note 19.

23. For a more nuanced view on the search for the truth in the two systems, see Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157 (2003).

24. Grande, *supra* note 19.

of reality that can be equated with truth.[25] By contrast (and I address this point in greater depth later), the alternative notion of justice in the non-adversary system can be associated with the metaphor of the rumba dance (in its Cuban version). As in the dance, in "rumba justice" a variety of dancers—the defendant, her lawyer, the prosecutor, the victim, sometimes public complainants (i.e., private third parties unconnected to the offense who are allowed to participate, provided they comply with a series of requirements, as occurs in Spain) or civil third-party defendants (i.e., persons who are liable for damages in lieu of the defendant, should the latter be convicted and insolvent, as occurs in Italy or Spain), and lastly the judges and lay assessors or jurors—perform together in a collective search for the *objective* truth.

B. How Did It Happen? Historical Reasons for a Divorce

1. The Emergence of Tango Justice

The divergence between non-adversary and adversary models outlined above, i.e., between non-partisan and dialectical searches for the truth in the criminal process, does not reach far back into the history of legal systems. On the contrary, as with many relevant systemic differences, it is relatively recent. It originates at the end of the eighteenth and beginning of the nineteenth century[26] with the emergence of the classical liberal credo.[27] Until then, Anglo-American proceedings (featuring a judge who examined the witnesses and the accused, deeply influenced the jury's adjudication, and dominated the proceedings) and Continental proceedings shared very much the same non-adversarial commitment to searching for the *objective* truth.

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25. To be sure, the defense does not always need to present an alternative truth to the one offered by the prosecutor in order to win her case. In fact, since the defendant does not bear the burden of proving her innocence and it is rather the prosecutor who bears the burden of proving the defendant's guilt—and therefore of proving all the elements of the crime beyond a reasonable doubt—the defendant can strategically renounce the opportunity to provide her own reconstruction of the reality. She can simply claim that her adversary did not meet the evidentiary or persuasive burden of proof, and still succeed in getting an acquittal. However, in so doing she takes the risk that the opponent's partisan truth—the only one available to the court—will win the mind of the passive adjudicator. Yet in the adversary system, as long as the rules of the contest are fair and the defendant makes choices that are deemed to be free, the result is considered fair and the *interpretive* truth is considered to have been ascertained.

26. "[A]dversary procedure cannot be defended as part of our historic common law bequest." John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 316 (1978) [hereinafter Langbein, *Before the Lawyers*]. Professor Langbein's thoughts on the origins of the adversarial style in criminal matters are to be found in JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003). Even before Professor Langbein's research, conducted on the Old Bailey Sessions Papers, produced strong evidence of this claim, Professor Damaška pointed out that common law criminal proceedings before the nineteenth century were fundamentally non-adversary. *See* Mirjan R. Damaška, *Structure of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 542 n.156 (1975).

27. On the impact of *laissez-faire* Lockean values on English institutional arrangements, see Damaška, *Evidentiary Barriers*, *supra* note 22, at 532ff. *et passim*; MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

Yet at the turn of the nineteenth century in England, as well as in the United States,[28] the general classical liberal attitude of skepticism toward objectivity,[29] combined with its urge to keep the state at "arm's length,"[30] required the restructuring of the criminal process as a dispute between two sides—the prosecution and the defense (very much conceived of as private parties)—pursuing their opposing interests before a passive state official who was given virtually no involvement in the investigation of the underlying facts. The new order replaced the previous reliance upon a third-party factual inquiry with a faith in the truth-detecting efficacy of a fair contest between two parties. According to classical liberal ideology, neutrality and objectivity, viewed as unattainable in the human world, were even more suspect if vested in highly distrusted government officials. An *interpretive* truth, stemming from an equitably balanced confrontation between two one-sided accounts of reality (neither of them possessing the complete truth), took the place of the *objective* truth as ascertained through neutral inquiry. In light of this transformation, fairness became the proxy for justice, replacing the "impossible" discovery of the *objective* truth.

2. Rumba Justice as a Response to Liberal Ideology Criticism

To be sure, the attack launched by the classic liberal credo against the very idea of a "neutral" inquiry in the search for the truth did not spare the Continent either. Yet, Continental lawyers refused to renounce the idea of searching for an *objective* (or "substantive" or "ontological") truth in the criminal process; they responded to the same criticism by different means.

Since the beginning of the nineteenth century, the secret, unilateral, and official inquiry that had dominated previous Continental criminal proceedings for more than half a millennium has been increasingly transformed. Over the course of 200 years, Continental systems have relentlessly modified their criminal procedures in order to cope with the problem of the possible lack of neutrality of the official truth seeker. It became clear that the more the inquiry was unilateral, the higher the risk of undermining the truth seeker's impartiality. From this perspective, the introduction in the French *Code d'instruction criminelle* of 1808 of two additional figures—the prosecutor and the defense counsel—within the new, so-called "mixed" system of criminal

28. Damaška, *Evidentiary Barriers*, *supra* note 22, at 542.

29. "Since no belief or idea regarding human affairs" was considered "exclusively or demonstrably true." *Id.* at 532.

30. As is very well known, this expression was used by Karl Llewellyn with regard to the adversary model, as opposed to a "parental" model, Llewellyn's term for the inquisitorial model. *See* Karl N. Llewellyn, *The Anthropology of Criminal Guilt*, *in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 439, 444–50 (1962). For a further exploration of these models, labeled the "battle" and "family" models by the author, see John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970).

procedure was the first step in the move towards making the official inquiry more collective, pluralistic, and unbiased.[31]

After World War II, many changes that aimed at increasing the official truth seeker's neutrality were introduced in the various Continental criminal procedure regimes. They were also prompted by the intense work of the then-newborn European Court of Human Rights, whose case law gave rise over time to a European criminal procedure model characterized at once by judicial activism and the enhancement of the procedural rights of the participants.[32] Continental systems everywhere in Europe abandoned the traditional investigative monopoly of state officials in favor of a multilateral approach. In this spirit, defense attorneys were granted a role in the pretrial investigative phase of the proceeding, acquiring the right not only to inspect the dossier freely but often also to be present during many procedural activities and sometimes even to offer counterevidence and counterarguments.[33] Moreover, in many countries, the defense, and in some countries—including Spain, France, and Italy—victims, too, were allowed to ask for pretrial investigative steps to be taken and, in case of refusal, were entitled to a formal reply subject to appellate review.[34] By granting the defense and the victim greater input into officially conducted investigations, European systems transformed the search for the truth from a unilateral inquiry into a sort of collective enterprise. The active participation of multiple actors provided for a plurality of *external* perspectives on the pretrial investigation, increasing the impartiality of the official in charge of the inquiry. In Germany, the lawyer for the defense is nowadays entitled to undertake

31. On the *Code d'instruction criminelle* and the so-called "mixed model," see Jimeno-Bulnes, *supra* note 15, at 423ff. and literature quoted therein.

32. For the increasing role of the European Court of Human Rights in influencing domestic Continental European courts to enhance defense participation as well as victim participation in the development, presentation, and testing of live testimony—thereby challenging the judicial monopoly over the official inquiry at all phases of the criminal process, including the pretrial investigation, trial, and appeal—see JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS (2012).

33. In Italy, that was also the outcome of a vast array of Constitutional Court decisions delivered when the 1930 code of criminal procedure was still in effect. *See* FRANCO CORDERO, PROCEDURA PENALE 584–88 (1982). For an analysis of the changes that these "participatory principles" produced in French pretrial procedure, see Jacqueline Hodgson, *Constructing the Pre-trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process?*, 6 INT'L J. EVIDENCE & PROOF 1 (2002).

34. *See generally* EUROPEAN CRIMINAL PROCEDURE (Mireille Delmas-Marty & J.R. Spencer eds., 2002). Regarding France, see Valérie Dervieux, *The French System*, *in* EUROPEAN CRIMINAL PROCEDURE, *supra*, at 218, 242; Richard Vogler, *Criminal Procedure in France*, *in* CRIMINAL PROCEDURE IN EUROPE, *supra* note 16, at 171, 185–87 [hereinafter Vogler, *Criminal Procedure in France*] (explaining the increased role of victims in criminal proceedings in France over the years since 1981). Regarding Italy, see OTTORINO VANNINI & GIUSEPPE COCCIARDI, MANUALE DI DIRITTO PROCESSUALE PENALE ITALIANO 368 (1986). For Spain, see Richard Vogler, *Spain*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY (1st ed.), *supra* note 17, at 361, 383 [hereinafter Vogler, *Spain*]; Gascón Inchausti & Villamarín López, *supra* note 16, at 608. For the improved legal position of the victim in Germany in the last few decades, see Barbara Huber, *Criminal Procedure in Germany*, *in* CRIMINAL PROCEDURE IN EUROPE, *supra* note 16, at 269, 335.

investigations himself[35] (although in France a defense lawyer who attempts to take an active role in the collection of evidence still risks prosecution for improperly influencing witnesses or suborning perjury).[36] Italy went even further. After December 2000, it legitimated a system of two parallel (but interrelated) pretrial investigations, one official and the other privately conducted by the defense.[37]

Everywhere in Continental systems, moreover, the enhanced right of the defense to be present and to present arguments and evidence at trial has also provided for a more serious pluralistic approach to the overall official search for the truth.[38]

As a kind of *internal* check on the process—in contrast to the *external* constraints provided by the participation of multiple actors in the official investigation into the truth—other reforms took place in an effort to increase the neutrality of the official search. In Spain, as in France, Italy, and Portugal, the exclusion of the investigative judge from the trial court panel (even before this institutional figure was eliminated in some of these countries) helped to fragment government authority over the investigation and led to a plurality of perspectives within the decision-making process.[39]

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35. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 10, 2000, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHST] 46, 1; Huber, *supra* note 34, at 329 n.218.

36. Vogler, *Criminal Procedure in France*, *supra* note 34, at 233 (citing JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE 123–24 (2005)).

37. *See* Legge 7 dicembre 2000, n.397, "Disposizioni in materia di indagini difensive", G.U. Jan. 3, 2001, n.2 (It.) (now Codice di procedura penale [C.p.p.] [Code of Criminal Procedure] art. 391-bis). The defense, conducting its own investigation, is still allowed to be present when most prosecutorial activities are underway. Freely permitted to contact her "own" witnesses in the pretrial phase, the defense attorney may require the prosecutor to interview potentially favorable witnesses on the defendant's behalf (C.p.p. art. 391-bis(10)) or seize materials in the defendant's interest (C.p.p. art. 368), thus obtaining the prosecutor's help in conducting the defense's own investigation. In the same vein, at the end of the prosecutor's investigation, the defense can also ask the prosecutor to gather new exculpatory evidence (C.p.p. art. 415-bis(4)). Both parties, moreover, are allowed to freely inspect each other's dossiers before the trial begins (C.p.p. arts. 391-octies(3), 433, 415-bis(2), 419(2)–(3), 430(2)).

38. As John Jackson observes, noting the great influence the European Court of Human Rights has had on Continental European criminal procedure's reforms,

> [t]he [Human Rights] Commission and Court sought to "translate" the defence rights prescribed in Article 6 into a vision of adversarialism that was as compatible with the continental notion of *une procédure contradictoire* as with the common law adversary trial. Defendants have to be guaranteed rights to legal representation, a right to be informed of all information relevant to the proceedings, a right to be present and to present arguments and evidence at trial. But this does not rule out considerable participation by judges in asking questions or even calling witnesses.

Jackson, *supra* note 17, at 753. *See also* JACKSON & SUMMERS, *supra* note 32, at 86–87 *et passim*.

39. For France, see Dervieux, *supra* note 34, at 232; *see also* article 61 of the previous Italian code of criminal procedure (1930). For the reform that took place in Portugal in 1988, see José de Souto de Moura, *The Criminal Process in Portugal*, *in* THE CRIMINAL PROCESS AND HUMAN RIGHTS: TOWARD A EUROPEAN CONSCIOUSNESS 45, 48 (Mireille Delmas-Marty ed., 1995). For the implementation of the principle of a fresh judge in Spain, see Gascón Inchausti & Villamarín López, *supra* note 16, at 562–63.

The same rationale underlies the establishment in France, in 2000, of a *juge des libertés et de la détention* with decision-making power over detention instead of the examining magistrate,[40] or, in Italy, the bifurcation of the (formerly unified) authorities who are in charge of the pretrial phase. Indeed, in Italy, the judicial authority over the preliminary investigation is nowadays vested in a different judge (namely, the "judge of the investigation," or *gip*) than the one in charge of the preliminary hearing (the "judge of the preliminary hearing," or *gup*), who decides if the defendant has to stand trial.[41] Again, the *internal* pluralistic rationale explains the differing access to the pretrial investigative dossier granted to different members of the trial court. In France, for example, in the assize court only the presiding trial judge has full access to the dossier, unlike the other members of the bench and the lay assessors. [42] In Germany, lay judges—*Schöffen*—have no knowledge of the investigation files.[43]

Other reforms likewise fostered a diversity of perspectives among fact-finders by limiting the use at trial of evidence from the official file of pretrial investigative activities, thereby encouraging the trial court to develop a fresh understanding of the facts, as untainted as possible by the views of any public official involved in the previous stage of the proceeding.[44] In Continental systems, moreover, the old tradition of appellate supervision of criminal trial courts further fragments official authority over the investigation,

40. Vogler, *Criminal Procedure in France*, *supra* note 34, at 209.

41. The differentiation took place (following a vast array of Constitutional Court decisions) on the basis of a pluralistic rationale, ten years after the new code of criminal procedure was enacted in 1988, in order to avoid decision making being concentrated upon a single judge for issues related to both investigation supervision and the sufficiency of evidence for committal to trial. *See* Decreto Legislativo 19 febbraio 1998, n.51, G.U. Mar. 3, 1998, n.66 (It.).

42. Vogler, *Criminal Procedure in France*, *supra* note 34, at 251.

43. Sabine Gless, *Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial—Germany*, *in* GERMAN NATIONAL REPORTS TO THE 18TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 675, 681 n.26 (Jürgen Basedow, Uwe Kischel & Ulrich Sieber eds., 2010).

44. For the general rule in Spain that only evidence called at the oral hearing is considered probative, see Gascón Inchausti & Villamarín López, *supra* note 16, at 615; Vogler, *Spain*, *supra* note 34, at 388. In 1988, the Italian system accomplished the strongest severance between pretrial investigation and adjudication in order to safeguard the truth seeker's impartiality. The then brand-new Italian code eliminated all of the trial court's contact with the pretrial investigation file, instituting a "double file" system which gives the trial court access only to the trial dossier. For operational aspects of the double file system, see Michele Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 30 N.C. J. INT'L L. & COM. REG. 577, 586 (2005). In so doing, it insulated the trial judge completely from the activities conducted by public officials (the public prosecutor, judge of the preliminary investigation, and judge of the preliminary hearing) during the pretrial phase, preventing the results of the pretrial investigation from prejudicing the trial court before the trial even starts. The Italian trial judge today approaches the case as a *tabula rasa*. For a very similar solution in the Spanish jury trial, see Trial by Jury Organic Law pmbl. pt. III, art. 34(1) (B.O.E. 1995, 122); *see also* Thaman, *supra* note 16, at 271ff., 281ff.

multiplying the number of decision makers to enhance the *internal* plurality of perspectives.[45]

Multiplying the *external* and *internal* perspectives in criminal cases effectively transformed Continental procedure from an officially unilateral inquiry into a pluralistic investigation, making Continental justice—in a dancing metaphor—resemble the rumba dance in its Cuban version. In Continental criminal procedure, indeed, a variable number of dancers dance together in the common enterprise of discovering the truth[46] and perform, occasionally alone and occasionally in groups, with many shifts and continuous substitutions of dancers and roles.[47] That was the reply to the "neutrality problem" of a third-party search raised since the end of the seventeenth century by classic English liberalism. Therefore, the Continental world still considers neutrality attainable in the criminal process. It never replaced the search for an *objective* truth with a search for an *interpretive* truth.[48] Officials, made as impartial as possible, are still in charge of searching for the truth, as carefully as they can.

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45. Contrast the strong Continental tradition of appellate supervision of criminal trial courts with the one-level adjudication typical of the English common law process until "well into the nineteenth century," to quote John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1770–1900, at 13, 37 (Antonio Padoa Schioppa ed., 1987). It is a contrast whose legacy has carried into present times. *See* Damaška, *supra* note 26, at 514–15.

46. Jackson offers arguments for the rise of a unique European "participatory model" that transcends the contest/inquest divide and is rooted in a philosophical and political tradition common to both sides of the English Channel. He ascribes this development to a realignment of European criminal procedures along the lines indicated by the European Court of Human Rights. *See* Jackson, *supra* note 17; SARAH J. SUMMERS, FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURAL TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS (2007); JACKSON & SUMMERS, *supra* note 32. *See also* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 818–20, 870 (2000); Mireille Delmas-Marty, *Toward a European Model of the Criminal Trial*, *in* THE CRIMINAL PROCESS AND HUMAN RIGHTS: TOWARD A EUROPEAN CONSCIOUSNESS, *supra* note 39, at 191.

47. In the pretrial phase, for example, the victim can take the place of the prosecutor; in Spain, she functions as a truly private prosecutor, and can maintain the indictment despite the public prosecutor's desire to dismiss the case, thereby giving the judge in the intermediate stage the chance to set the case for trial. In Portugal, a similar role is performed by the *assistente* in front of the *juiz de instrução*, while in Italy, with or without the victim's opposition to the prosecutor's decision to dismiss, the judge of the investigation can compel the prosecutor to charge the defendant. Therefore, the prosecutor, the victim, and the judge bring different points of view and interests to the proceedings, sometimes moving in the same direction and sometimes not. The victim in many systems, including Spain, Portugal, and Germany, can appeal against an acquittal even when the prosecutor decides not to do so. And at trial, of course, in searching for the truth, the court can adduce evidence for or against the defendant, sometimes dovetailing with the prosecutor's evidence and sometimes contradicting it, and the prosecutor at trial can even request acquittal or appeal the defendant's conviction, which may put the prosecutor at odds with the victim's own legal motions. For some interesting Spanish cases of public and private prosecutors' contrasting strategies, see Thaman, *supra* note 16, at 397–400.

48. For some of the upshots of this fundamental difference, see Grande, *supra* note 19, at 155ff.

Has this remained true even after some very typical legal features of the adversary system, like a police/public prosecutor's investigation replacing the examining magistrate's inquest, exclusionary rules, cross-examination of witnesses, and the jury system, have found their way into the Continental systems? Or on the contrary, as is often contended, has the transfer of these classical American legal arrangements onto European soil made Continental systems more adversarial? In case the answer to the first question is yes, can we claim that the introduction of adversarial arrangements even fortified the non-adversary procedural structure of the recipient countries, in line with the previously mentioned reforms aimed at increasing the official inquiry's neutrality? Finally, if this is the case, can we predict an "immunization effect" of the transfer against any future adversarial overhaul? Can we claim, in other words, that the injection of a small amount of adversarial legal features into a non-adversary context has made the latter more resistant to any future adversarial turn?

In trying to answer these questions in order to prove my claims, in the next Part I will address in turn the transfer of each American adversarial legal feature to Continental European criminal procedure.

II. Tango and Rumba Justice in the Face of Legal Transfers

A. *The Abolishing of the Investigative Judge in Continental Europe*

1. The Anglo-American Prosecutor: An Informal Private Actor?

Consistent with the idea of tango justice, the prosecutor in the U.S. system acts as a party, i.e., as an adversary of the defendant, and of course her partisan investigation (together with the police) is necessarily completely separated from any judicial activity. To be sure, despite addressing her as "the Government" or "the State," the system constructs the prosecutor as a private actor as much as possible. The strong, centuries-long resistance to a public prosecution in England—which lasted until the Crown Prosecution Service was created at the end of the twentieth century—is emblematic of this phenomenon. Indeed, as Hay and Snyder summarize, "the consequences of prosecution were too important for the political liberties of the nation to entrust it to the executive."[49] In fact, very rarely in early English legal history did law officers of the Crown, associated with the central state, prosecute.[50] Moreover, notwithstanding the investigating and forensic role acquired from the sixteenth century onwards

49. Douglas Hay & Francis Snyder, *Using the Criminal Law, 1750–1850: Policing, Private Prosecution, and the State*, *in* Policing and Prosecution in Britain 1750–1850, at 3, 43 (Douglas Hay & Francis Snyder eds., 1989).

50. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 Am. J. Legal Hist. 313, 315ff. (1973).

by the justice of the peace (a figure loosely connected with the central authority),[51] "[f]or a very long time, really into the nineteenth century," the prosecutorial role was, in fact, mainly left—at least formally—to the victim.[52] Then, in the nineteenth century, when a corps of professional officers paid by the central state—that is, the English police force—was created, they acted as prosecutors, though not in their official capacity. To the contrary, they acted as private parties who proceeded on behalf of the Crown.[53] "Although prosecutions were suits in the name of the Crown, they were viewed, in political ideology as well as in law, as adversarial proceedings between private individuals," observe Hay and Snyder.[54] To vest the police in a private role meant in fact to dissociate the government from the police and the state from the pretrial investigation; it meant, therefore, the granting of an image of neutrality and disengagement to the state in the pretrial investigation phase. At trial, moreover, the state could be associated only with the court, which, starting from the nineteenth century, held a passive role.[55] In the colonies, by contrast, "many other influences, in the revolutionary and Jacksonian periods particularly, converged in the development of the powerful American office."[56] Yet, the emergence of the public prosecutor in the United States and its monopoly over prosecution is better explained as a democratic innovation against the class inequality of private prosecution rather than as a move towards the office's strong association with the state.[57] The American district attorney, in fact, compared with her Continental European counterpart, maintains a robust private posture. She is not a state career figure, part of a bureaucratic and highly hierarchical structure, in the manner of her Continental counterpart, who

51. "They were for the most part leading local gentry, appointed by royal commission for each county and certain cities" and "rewarded with honor and authority rather than money," rather than a "centrally organized and paid prosecutorial corps." *Id.* at 318, 335. On the history and the activities deployed by the justices of the peace as *de facto* partisan "public" prosecutors, see *id. passim*; John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1060 (1994).

52. Langbein, *supra* note 50, at 317. *See also* John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 444 (1974).

53. In 1972—more than ten years before the Crown Prosecution Service was instituted in England and Wales—R.M. Jackson wrote: "When 'the police' prosecute, the correct analysis is that some individual has instituted proceedings, and the fact that this individual is a police officer does not alter the nature of the prosecution." RICHARD M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 155 (6th ed. 1972), *quoted in* Langbein, *supra* note 52, at 440–41.

54. Hay & Snyder, *supra* note 49, at 35. For an analogous observation, see MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 118 (1997).

55. On the transformation of the judge's role from active to passive, see John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996); Langbein, *supra* note 51; Langbein, *Before the Lawyers*, *supra* note 26.

56. Hay & Snyder, *supra* note 49, at 29–30.

57. *See* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY ch. 1 (1980).

identifies herself with the office.[58] The American prosecutor is instead a private lawyer and a politician, only temporarily landed in an official role. She represents the people—by whom she is elected at the state level—rather than the government of a centralized state. As the people's representative—in the Kantian sense of the interests of the community at large being the aggregate of the individual interests—the prosecutor in the common understanding is the victim's lawyer: she pursues the interests of the aggrieved private party rather than the interests of the state administration.[59] Of course, the lack of a *partie civile* in the American criminal trial strongly encourages this understanding,[60] whereas the victim's autonomous participation in the Continental criminal trial leaves no doubts as to the immediate connection between the prosecutor and the state. Moreover, the latent association between the American prosecutor and the victim's lawyer seems to explain the former's broad and unchallenged discretionary power to decide not to institute criminal proceedings, grounded as it is in the inherently private nature of her activity. As the victim's representative at trial, indeed, the American prosecutor "stands in her shoes," becoming heir to the aggrieved citizen's ancient, unregulated prosecutorial monopoly.[61] To be sure, no counterpart to the American prosecutor's unchallenged discretion in deciding whether or not to prosecute exists in any Continental system. In Continental Europe in fact, it is precisely the victim, as a separate and autonomous actor (unlike in the United States), who can challenge the prosecutor's decision not to press charges in various ways.[62]

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58. For comparative considerations regarding the prosecutor's power and functions, see Langbein, *supra* note 52. Even if outdated in some respects, it is an article that can still be considered a landmark study on this point.

59. This common understanding seems to hold true even if, as argued by Abraham Goldstein among others, the real victim may feel alienated from "her" case by the prosecutor's unregulated discretion to charge the alleged perpetrator and involve the victim in the proceedings. *See* Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 518ff. (1982).

60. For a comparative perspective, see William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996).

61. *See* Langbein, *supra* note 52, at 446. On the historical reasons for the public prosecutor's unregulated monopoly, see also Goldstein, *supra* note 59, at 548ff. On the exclusive and unconstrained discretionary power not to prosecute that is granted to the American prosecutor, see WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE §13.2 at 710ff., especially § 13.2(g) at 714ff. (5th ed. 2009).

62. Of course, in Continental systems as well, the prosecutor does in fact enjoy a good amount of discretion in deciding whether or not to prosecute, even when the principle of mandatory prosecution formally applies. Regarding this point in the Italian system, see Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 240ff. (2000). Yet, no matter whether it is the principle of mandatory prosecution (or *Legalitätsprinzip*, as is the case, at least in part, in Italy, Spain, Portugal, and Germany) or the principle of expediency (or *Opportunitätsprinzip*, as in France, Belgium, and the Netherlands) that applies, in Continental systems this prosecutorial discretion finds a serious constraint in the various means available to the victim to check and limit the prosecutor's refusal to press charges. In France, for example,

2. The European Prosecutor as a Non-partisan Official

In the quite recent past, Germany (1975),[63] Portugal (1987),[64] and Italy (1988)[65] abolished the examining magistrate (or investigative judge) as the central figure in charge of the pretrial investigation. This move can easily be interpreted as a step towards the "Americanization" and "adversarialization" of their inquisitorial criminal procedure, since the investigating judge has always been considered a distinctive feature of the inquisitorial system.[66] Yet, the prosecutor, although now lacking any judicial authority in her investigative activity, has never become a party to the proceedings, but has solidly maintained her non-partisan stance. This is obviously the case in Germany and Portugal, where the prosecutor, as an impartial and objective investigator, collects the evidence for and against the defendant and participates in the proceedings with the aim of discovering the truth and obtaining a just outcome.[67] It is also the case in Italy, which since 1988 has had the most "Americanized" of the Continental procedural regimes. To define the Italian prosecutor as a party to the process would be highly misleading, since the most one could say is that she has an ambiguous role, working as a helper for the defense in multiple respects.[68]

> where either there has been no prosecution at all or the prosecutor has simply declined to proceed . . . it is always open to the victim to force a prosecution by intervening by means either of a direct summons (*citation directe*) before the trial court itself or, for more weighty offences or where the offender is unknown, by a complaint outlining the facts with an application for civil party status (*plainte avec constitution de partie civile*) directed to the examining magistrate.

Vogler, *Criminal Procedure in France*, *supra* note 34, at 240–41. In Germany, "if a victim reported the offence, he must be informed of the decision not to proceed. He can appeal against it by way of review." Huber, *supra* note 34, at 313. In Italy, under article 410 of the Code of Criminal Procedure, the victim can oppose a prosecutor's request for dismissal and ask for further investigation; this can lead to a mandatory formal charge against the suspect imposed by the judge (*gip*) upon the prosecutor. In Spain, private prosecutors can ask for the case to go to trial against the prosecutor's request for dismissal. *See* Gascón Inchausti & Villamarín López, *supra* note 16, at 591–92. In Portugal, according to article 287 of the Code of Criminal Procedure, the *assistente* can request an "instruction" from the judge of the investigation (*juiz de instrução*) in order to challenge the public prosecutor's decision to drop the charge. *See* Jorge de Figueiredo Dias & Maria João Antunes, *Portugal*, *in* CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 317, 328 (Christine Van Den Wyngaert ed., C. Gane, H.H. Kühne & F. McAuley co-eds., 1993). And so on.

63. Erstes Gesetz zur Reform der Strafverfahrensrechts [1. StVRG] [First Criminal Procedure Reform Act], Dec. 9, 1974, BUNDESGESETZBLATT [BGBL] I (Ger.). *See* Thomas Weigend, *Germany*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY (2d ed.), *supra* note 17, at 243, 262.

64. Código de processo penal [C.p.p.] [Code of Criminal Procedure] art. 262 (Port.). *See* de Figueiredo Dias & João Antunes, *supra* note 62, at 318ff.

65. Codice di procedura penale [C.p.p.] [Code of Criminal Procedure] arts. 126ff. (It.). *See* Giulio Illuminati, *The Accusatorial Process from the Italian Point of View*, 35 N.C. J. INT'L & COM. REG. 297, 308 (2010); Grande, *supra* note 62, at 232ff.

66. For a quick outline of the historical roots of this figure, see Jimeno-Bulnes, *supra* note 15, at 424ff.

67. On the German system, see Huber, *supra* note 34, at 326. On the Portuguese system, see de Figueiredo Dias & João Antunes, *supra* note 62, at 319.

68. For the situations in which the Italian prosecutor can assist the defense, see *supra* note 37 and, to some extent, C.p.p. arts. 358, 421-bis (It.).

Moreover, just as much as the German and the Portuguese prosecutor, the Italian prosecutor can move at trial for the defendant's acquittal or afterwards lodge an appeal in her favor. Nor has the prosecutor in Italy, Germany, and Portugal loosened her solid association with the state, embedded as she is in a bureaucratic structure that gives her a strong character of being an organ of the state.

3. To Summarize

In sum, neither an "adversarialization" of procedure (i.e., the emergence of a procedure of the parties), nor the subliminal message of individual freedom from state prosecution typical of the American system ensued following the abolition of the investigative judge in several Continental jurisdictions. The tenets of "tango justice" did not flow into Continental European criminal procedure, but rather a strengthening of the "rumba" way of impartially discovering the truth arose from it. The sharp severance of the investigative and judicial functions achieved by abolishing the investigating judge altogether served the goal of improving the *internal* plurality of perspectives that can form the basis of solid and impartial judgments. It limited the prosecutor's role to the activity of gathering the evidence to be produced at trial, as opposed to the activity of taking the evidence that was previously performed by the investigating judge. Therefore, by eliminating the authoritative pretrial judicial evaluation of the evidence, the reform begot stronger autonomy for the trial judge in her own appraisal of the evidence. In sum, by multiplying the *internal* perspectives in criminal cases, it fortified the rumba justice approach, arguably transforming the injection of the adversarial style in a non-adversarial structure into an agent of resistance against the adoption of any further adversarial posture.

B. Exclusionary Rules à l'Américaine *in Continental Europe?*

Almost twenty years ago, Professor Langbein noted how the attitude towards the law of evidence differed between American and Continental lawyers:

> Sit in one of our trial courtrooms, civil or criminal, and you hear counsel interrupting incessantly to raise objections founded upon the rules of evidence. These incantations are so familiar that they have passed into the popular culture. Close your eyes and you can hear Perry Mason or the protagonists of "L.A. Law" or similar television fare bound to their feet, objecting fiercely: "Immaterial!" "Hearsay!" "Opinion!" "Leading question!"
>
> Cross the Channel, enter a French or an Italian or a Swedish courtroom, and you hear none of this.[69]

69. Langbein, *supra* note 55, at 1169.

Twenty years later, Professor Langbein's observation doesn't hold completely true any longer.

In the recent past, several Continental European countries have imported exclusionary rules modeled upon the American system.[70] For example, Portugal, Italy, and also Spain adopted the hearsay prohibition rule.[71] Italy and Germany introduced the so-called *Miranda* rule, excluding the statements of an accused who was not informed of her right to remain silent in pretrial questioning.[72] Italy, Germany, and Spain—in different ways and in different terms—have enacted inadmissibility rules against evidence obtained illegally, such as by unlawful tapping.[73] In Spain and sometimes also in Germany, the fruits of illegal searches are held inadmissible.[74]

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70. *See* Craig M. Bradley, Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375 (2001). The American influence on the Spanish reforms relating to the inadmissibility of illegally obtained evidence is, for example, underlined by Vogler, *Spain*, *supra* note 34, at 381. *See also* CARLOS FIDALGO GALLARDO, LAS "PRUEBAS ILEGALES": DE LA EXCLUSIONARY RULE ESTADOUNIDENSE AL ARTÍCULO 11.1 LOPJ (2003).

71. The hearsay prohibition is banned in Portugal by article 129 of the Code of Criminal Procedure and in Italy by article 195 of the Code of Criminal Procedure. In Spain, hearsay testimony is allowed only formally since it is very much restricted in the substance, producing the same results as in Italy, where in principle it is prohibited:

> Case law has imposed stringent conditions on the probative value of hearsay evidence, given that, in order for a guilty verdict to be based on such evidence, the following conditions must be met: 1) the hearsay witness must identify precisely the first-hand witness, and 2) it must be impossible for the first-hand witness to be present at trial (because he is dead, his whereabouts are unknown, or he lives abroad), so that the statement of the first-hand witness is not replaced by that of the hearsay witness.

Gascón Inchausti & Villamarín López, *supra* note 16, at 617–18.

72. *See* C.p.p. art. 64(3)–(3-bis), *as modified by* Legge 1 marzo 2001, n.63, art. 2, G.U. Mar. 22, 2001, n.68 (It.); GILBERTO LOZZI, LEZIONI DI PROCEDURA PENALE 125–26 (2012). On the *Miranda*-type exclusionary rule in Germany, its history, and its content, see Gless, *supra* note 43, at 700ff. For a wider comparative perspective, but updated only to 2000, see Stephen C. Thaman, Miranda *in Comparative Law*, 45 ST. LOUIS U. L.J. 581.

73. For Italy, see C.p.p. art. 271; LOZZI, *supra* note 72, at 285ff. (discussing the mentioned article). For Spain, see Organic Law on the Judiciary art. 11(1) (B.O.E. 1985, 6). The Spanish article, which relates not only to criminal procedure but to all procedure, states that "evidence obtained either directly or indirectly in contravention of fundamentals rights and liberties will be with no effect" (translated by author). This is connected with the fundamental right of privacy of communication guaranteed by article 18(3) of the Spanish Constitution. On this issue, see Gascón Inchausti & Villamarín López, *supra* note 16, at 578ff. and literature quoted therein. Regarding Germany, Huber, *supra* note 34, at 347, points out that "evidence obtained by surveillance of telecommunication is inadmissible if the substantive preconditions for surveillance (§ 100a) are not met . . . . The lack of formal preconditions does not necessarily result in inadmissibility."

74. *See* Organic Law on the Judiciary art. 11(1) (Spain), in connection with the constitutional principle that the "home is inviolable," CONSTITUTION ESPAÑOLA art.18.2, B.O.E. n.311, Dec. 29, 1978. For these provisions as applied by Spanish courts, see Gascón Inchausti & Villamarín López, *supra* note 16, at 577ff.; Vogler, *Spain*, *supra* note 34, at 379ff. In Italy, despite the general provision of article 191 of the Code of Criminal Procedure, which prescribes that any evidence acquired in violation of the law is inadmissible, the courts and academic commentators have given a restrictive interpretation to the provision, and therefore the fruits of unlawful searches and seizures are not excluded in practice. For a discussion, see LOZZI, *supra* note 72, at 228ff. In Germany, courts regard evidence that was illegally seized as admissible. However, on the "growing tendency toward rejecting evidence that was acquired in clear, conscious violation of a person's constitutional rights," see Weigend, *supra* note 18, at 401 & n.57. *See also* Weigend, *supra* note 63, at 251ff.

Moreover, in exceptional cases of serious infringement of an individual's constitutional rights, even some form of the "fruits of the poisonous tree" doctrine of evidence (according to which evidence that derives from illegal evidence is also illegal) has traveled to Germany.[75]

Did this import modify the basic tenets of the law of evidence of the recipient systems, thereby making them more adversarial? Alternatively, can we suggest that the Continental non-adversary context has modified the structure of the American exclusionary rules according to its different needs? And, if this is so, did the import even strengthen the non-adversary, rumba approach to searching for the truth, thereby possibly working as an antibody against any future "adversarialization"?

1. Exclusionary Rules in the United States: The Adversarial Rationale

In the common law world, the law of evidence seems to be a child of adversarial criminal procedure, more than a "child of the jury" in Thayer's words.[76] If we accept Langbein's reconstruction of the rise of the modern common law of evidence as being contemporary with the advent of the adversary procedure in England, we cannot but agree with him that, since the jury system originated in the twelfth century, exclusionary rules are the consequence of the novel passive posture of the common law trial judge that originated at the end of the eighteenth century. It is the new need to take *ex ante* control over the rationality of an oracular and by-then autonomous trier of fact that explains the shielding of jurors from evidence that could "infect" adjudication.[77] In the previous criminal procedure, in which the judge deeply influenced the adjudication of the jury and led the proceedings,[78] "the judges did not need anything as clumsy as the rules of admissibility to keep juries to heel,"[79] since "[t]he tradition that the jury would lightly disclose the reasoning for a verdict . . . enabled the court to probe the basis of the proffered verdict, [and] hence to identify the jury's mistake and to correct it."[80] Therefore, "[h]earsay and

75. *See* Huber, *supra* note 34, at 348. It is worth pointing it out that this has occurred in a context in which, generally, "courts still regard evidence as admissible, on principle, even if a procedural fault occurred when the piece of evidence was obtained." Weigend, *supra* note 18, at 400f. Indeed, in trying "to serve both the establishment of truth and the commitment to due process," Gless, *supra* note 43, at 676, the general theory of the admissibility of illegally gathered evidence in German law envisions the need to search for the objective truth as an acceptable justification for the restriction of the due process principle, whenever the violation of the latter is not excessive. For further discussion on this point, see generally Gless, *id.*

76. James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 249 (1892).

77. Or, in Damaška's words, it is the need "to shore up ex ante the legitimacy of inscrutable verdicts." DAMAŠKA, *supra* note 54, at 46.

78. *See* Langbein, *Before the Lawyers*, *supra* note 26, at 315.

79. *Id*. at 306.

80. *Id.* at 294–95.

prior conviction evidence were received about as freely as in the modern Continental systems," explains Langbein, referring to Continental systems as they looked in 1978.[81]

The eighteenth-century emancipation of the "inexperienced and taciturn"[82] jury from the trial judge, who was pressured by the adversary procedure towards passivity, provides an explanation for the way in which the exclusionary rules work in practice. Yet the adversarial style of procedure seems also to be the reason that underlies the very existence of most of these rules.

In the adversary system, the law of evidence plays the key role of establishing the rules that provide for a fair contest, allowing the tango to be successful in its production of the *interpretive* truth. American evidence law levels the playing field of the dispute by ensuring the balancing of advantages between litigants at the evidence-taking stage, thereby giving the parties equal opportunities to present their view of reality. In the context of a two-party battle, it would be unfair for the stronger party to take advantage of a confession imposed upon the weaker adversary. It would be equally unfair, and hence intolerable for the sake of the *interpretive* truth, for the former to abuse her power against the latter, gaining undue advantages from an illegal search or seizure or an illegal interception. Not giving one of the parties the opportunity to directly and vigorously examine the other side's witness (who was possibly intensively coached and briefed) would likewise unfairly prevent her from challenging the opponent. It would also be considered unfair to allow hearsay testimony, since the person whose utterance the hearsay witness reproduces cannot be tested by the opponent, "who is often justified in envisaging the out-of-court speaker as a hidden ally of his adversary—an ally who avoids courtroom challenge."[83] And so on. In all the above-mentioned instances, the contest would be as prejudicially biased as an appeal of felony in medieval times, in which only one of the two combatants was provided with a horse and a sword. Therefore, adversarial fairness underlies the truth-discovery process in the American perspective and many exclusionary rules such as hearsay prohibition, the privilege against self-incrimination (along with corroboration rules, compulsory process, and cross examination), or even the illegally obtained-evidence rules seem to (also) be designed to that end.

The foregoing does not, of course, ignore the fact that respecting adversarial fairness can bring about other desirable collateral effects too. Sometimes deference to adversarial fairness results in a more accurate reconstruction of reality. This is, for example, the case when excluding a coerced confession also happens to exclude a false

81. *Id.* at 315–16.
82. *Id.* at 306.
83. DAMAŠKA, *supra* note 54, at 80.

confession (which of course is not always the case).[84] It is also the case when veracity is promoted by testing, through cross-examination, the accuracy and reliability of an adverse witness's testimony or by requiring first-hand witness declarations instead of hearsay. However, this goal, too, is not always realized, since cross-examination conducted by a skillful counsel can shake false testimony as well as true; on the other hand, if the original declarant is dead, conditionally allowing hearsay testimony promotes fact-finding accuracy more than prohibiting it would.[85] At other times, exclusionary rules that (in my view) are primarily designed to achieve adversarial fairness have a different collateral outcome: a disciplinary effect on law enforcement authorities, who hopefully will be deterred from abusing of their power against the rights of each and every citizen in the future.

Consistent with the tenets of the adversarial approach, exclusionary rules in the U.S. system are in general only conditionally applicable: they come to life only if the parties invoke them.[86] Because the *assumption* is that litigants know what is best for them, and since no one else can establish better knowledge, no one, and especially not the distrusted state official, can impose his view on the parties.[87] This is why, even if the judge has the theoretical power to suppress evidence on his own motion, he rarely does so and, anyway, he never has

84. Consider, for example, the *Gäfgen* case in Germany, in which police officers' threats of very painful treatment convinced the defendant to confess the truth and to reveal the place where he had abandoned the corpse of the boy he had abducted and killed. The case launched a discussion in Germany about the legitimacy of torture for the purpose of enabling a rescue and went before the European Court of Human Rights. *See* Gäfgen v. Germany, 2010-IV Eur. Ct. H.R. 247 (2010); Gless, *supra* note 43, at 696.

85. Think here about a case like *Giles v. California*, 128 S. Ct. 2678, 2682 (2008), in which evidence of a murder victim's complaints to the police before she was killed was disallowed; on this case, see David A. Sklanski, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1693ff. (2009). For a similar case decided instead according to a "non-adversarial" approach, see the European Court of Human Rights' decision in *Al-Khawaja and Tahery v. the United Kingdom*, 2011-VI Eur. Ct. H.R. 191.

86. *See* FED. R. EVID. 103(a). The rule can be summarized as follows:

> As a general rule, no action by the trial judge is error in the absence of an offer, request or objection. Thus, improper admittance of evidence will be waived without timely objection, improper exclusion will be waived without an offer of proof that places the substance of the proposed evidence on the record, and the right to a limiting instruction will be waived without a request.

PAUL F. ROTHSTEIN, MYRNA S. READER & DAVID CRUMP, EVIDENCE IN A NUTSHELL 10 (6th ed. 2012). Yet, "[n]otwithstanding the above black letter rule, it is usually not error for the trial judge to issue a correct ruling or instruction when it is not requested, *if she chooses to do so*." *Id.* However, this very rarely happens:

> If by careless omission or deliberate inaction, a party fails to object to inadmissible evidence, the judge will normally admit it. Once admitted, the evidence stands on the same footing as other admitted evidence. *Only in extreme cases, and usually on behalf of a criminal defendant, will the court intervene and exclude inadmissible evidence on its own motion (sua sponte)*.

GRAHAM C. LILLY, DANIEL J. CAPRA & STEPHEN A. SALTZBURG, PRINCIPLES OF EVIDENCE 5–6 (5th ed. 2009) (emphasis added).

87. *See* Damaška, *supra* note 26, at 535.

the duty to remedy a failure by the party to object to inadmissible evidence.[88] The dancers by and large draft their own script and, in so doing, the accused is perceived as acting as a free individual, able to freely make strategic choices in shaping the evidentiary arrangements and thus her own case.

2. Exclusionary Rules in Continental Europe: The Protective Rationale

On their side, Continental European systems design evidentiary regulations to govern and limit the conduct of the official search for the *substantive* truth. In civil law systems, therefore, exclusionary rules seem primarily concerned with protecting the accuracy of official fact finding: they ban evidence that is deemed to prevent the pursuit of the *objective* truth. Yet, since "it is not a principle of criminal procedure to seek the truth at any cost" as the German Federal Court of Justice once stated,[89] in Continental systems officials today have to pursue their search for the truth more and more within the limits imposed by the respect for human dignity. They have to guard against the infringement of the accused's fundamental human rights, even when that causes a deviation from the unveiling of the substantive truth. A different rationale than the one at play in the United States seems therefore to explain the very existence of exclusionary rules on the Continent. Here it is not the adversarial fairness rationale that gives life to them. It is rather the old goal of safeguarding official fact-finding accuracy, detectable in many inadmissibility rules meant to exclude evidence deemed to be unreliable. Examples include rules that exclude anonymous documents or testimony based on word of mouth shared by the community;[90] the rule excluding hearsay testimony;[91] or even the rule that excludes an accused's statement

88. Occasionally a trial judge will be required to act on her own motion. This is the case of the plain error doctrine, incorporated into rule 103 (e) of the Federal Rules of Evidence, according to which, even when a proper objection was not made, an appellate court *may at its discretion* take notice of a forfeited error and reject the trial result if the committed error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993). However, not only does the rule reflect an appellate court's discretional power, but since "[t]he adversary system, based on party responsibility, is deeply engrained in our jurisprudence, particularly in the field of evidence" (as noted by MICHAEL H. GRAHAM, EVIDENCE: A PROBLEM, LECTURE AND DISCUSSION APPROACH 695 (3d ed. 2011)), the plain error doctrine is very rarely applied. Indeed, "[t]he infrequency with which the doctrine is generally applied precludes deliberate reliance upon it during the trial of a case." GRAHAM, *id.*, at 696.

89. Bundesgerichtshof [BGH] [Federal Court of Justice] June 14, 1960, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHST] 14, 361, 364–65. *See also* Gless, *supra* note 43, at 681 n.22.

90. *See* Codice di procedura penale [C.p.p.] [Code of Criminal Procedure] art. 234(3) (It.); Código de Processo Penal [C.p.p.] [Code of Criminal Procedure] art. 130 (Port.).

91. On the "intrinsic" rationale for excluding evidence that has long been embedded in the Continental hearsay prohibition (i.e., "[t]he insight that firsthand information is more reliable than information filtered through intermediary sources"), see DAMAŠKA, *supra* note 54, at 15 n.22 (quoting Mirjan Damaška, *Hearsay in Cinquecento Italy*, *in* 1 STUDI IN ONORE DI VITTORIO DENTI 59 (Michele Taruffo ed., 1994)).

obtained in a way likely to affect the declarant's self-determination via lie detectors, narcoanalysis, and so forth (although in this case—for reasons mentioned above—this rationale holds true only to some extent, mixed with the rationale of the protection of the defendant's dignity, as discussed below),[92] which one finds in a variety of civil law jurisdictions. It is, furthermore, the more novel desire to protect the defendant from an otherwise too "dirty," and therefore unacceptable, search for the substantive truth that motivates other exclusionary rules. This is particularly the case of exclusionary rules of recent adoption, such as the *Miranda*-type rule or the rules excluding illegally seized items or illegally obtained interceptions.

The "protective" rationale, as opposed to the adversarial one, that seems to trigger the exclusionary rules in Continental systems explains why evidentiary regulation in Europe—in contrast to what happens in the United States—is by and large the province of the judge in charge of searching for the *objective* truth as well as of protecting the defendant, and why it cannot in principle be displaced by unilateral waiver. In Continental criminal procedure, the "imported" exclusionary rules lose their original adversarial rationale and acquire a different rationale consistent with the non-adversary context in which they now have to operate. In line with the different protective rationale, their observance remains mainly the responsibility of the court, since the parties, who can always raise the question of their inadmissibility, cannot in principle modify the evidence rules by not making a relevant objection.[93] In those systems, the judge, in the name of the search for an *objective* truth but also in the name of official protection of the defendant, retains the power and *the duty* to raise statutory exclusionary rules ex officio. Such rules, rather than working as the expression of the parties' freedom to draft their own script, act irrespectively of the parties' will. Even when, as is the case with the hearsay ban in Italy, the litigants can allow the production at trial of the hearsay witness by not vetoing it, the judge—in a rumba search for the truth—can act ex officio in their place by asking that the original declarant take the stand.[94]

92. *See, e.g.,* STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] § 136a (Ger.); C.p.p. arts. 64(2), 188 (It.).

93. In Italy, in fact, their violation can (and must) always be officially raised at any stage or level of the proceedings. *See* C.p.p. art 191(2) (It.). For a more extensive treatment, see Grande, *supra* note 62, at 248f. For the Spanish system, see Gascón Inchausti & Villamarín López, *supra* note 16, at 614, and literature quoted therein. Germany, however, seems to have recently deviated from this common attitude, at least in relation to some of its exclusionary rules (and without prejudice to StPO §136a, which is always mandatorily applied by the court even if the accused consents to admission of the evidence in question). Regarding a veto against the admission of illegally gathered evidence by the person whose rights have been violated, which has recently been advanced by German courts as a condition for some exclusionary rules to be enforced (the so-called *Wiederspruchslösung*), see Gless, *supra* note 43, at 686. Sabine Gless also points to the severe criticism with which this development has met in Germany. The basis of the German jurisprudence in that regard can be found in Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27, 1992, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHSt] 38, 214, 225 and those decisions following it. *See* Gless, *supra* note 43, at 686.

94. C.p.p. art. 195(2) (It.).

In a non-adversary context, furthermore, where justice is associated with a neutral third-party search for an *objective* truth rather than being equated with "adversary fairness," it is essential to ensure that the evidentiary framework is as complete as possible. The ensuing desire to meet the adjudicator's investigative needs is therefore paramount. Accordingly, European civil law systems generally still permit the admission of hearsay evidence (and secretly gathered, out-of-court declarations by witnesses), whenever the original declarant or the witnesses are not available in court because of intervening death, mental illness, or some other reason that makes their previous declaration impossible to repeat.[95]

3. Exclusion from Cognitive Framework vs. Exclusion from Argumentative Basis for Decision Making

In the Continental context, moreover—in which the judge has not converted to passivity, a bifurcated adjudicating body is generally absent, and the decision of guilt or innocence (even when the adjudicator is wholly or partly represented by lay people) is not given in an oracular form but instead is always openly reasoned[96]—the "imported" exclusionary rules perform differently than in the original (U.S.) context. In the United States, inadmissible evidence is excluded from the adjudicator's (i.e., the jury's) knowledge. The "recipient" countries, by contrast, exclude the inadmissible evidence from the court's argumentative basis for its decision making. That is, exclusionary rules in Continental European systems do not insulate the trier of fact from the impact of the inadmissible evidence; instead, they prevent the adjudicator, who is generally aware of the excluded evidence, from considering that evidence in determining the defendant's guilt or innocence.[97]

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95. *See* C.p.p. arts. 195(2), 512 (It.); StPO § 251(1)–(2) (Ger.); LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] [CRIMINAL PROCEDURE LAW] art. 730. *See also* Al-Khawaja and Tahery v. the United Kingdom, 2011-VI Eur. Ct. H.R. 191. In this case, which reversed *Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A) (1989), and subsequent decisions (*see* JACKSON & SUMMERS, *supra* note 32, at 86ff.), the European Court of Human Rights held the use at trial of untested hearsay testimony not to be a violation of Article 6(3)(d) of the European Convention on Human Rights (when there is a good reason for the non-attendance of the witness). And this is so even in cases where the absent witness testimony is the sole or decisive basis for the conviction, provided that there are sufficient counterbalancing factors in place to ensure that the proceedings, when judged in their entirety, are fair. *See Al-Khawaja*, 2011-VI Eur. Ct. H.R. at 253 (¶ 147).

96. The major exception is the French *cour d'assises*, where mixed panels deliver unreasoned verdicts.

97. This is true even when the trier of fact includes semi-autonomous lay assessors, as in the German *Schöffen*, or is a fully autonomous body, as in the case of the jury trial in Spain. "If 'inadmissible' evidence has been introduced or mentioned at the trial, the presiding judge will inform the lay judges that they have to disregard that piece of evidence." Weigend, *supra* note 63, at 254 n.60. In Spain, article 54(3) of the Trial by Jury Organic Law (B.O.E. 1995, 122) provides that the judge must instruct the jurors to disregard any evidence that was wrongfully admitted and then declared illegal at trial. Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233, 253 (1999).

Since the Continental judge (and even the Spanish jury, which I will soon address briefly), unlike the American jury, must give written reasons for a finding of guilt or innocence, the violation of an exclusionary rule is supposed to be redressed at the appellate level. Yet, of course, as Thomas Weigend notes,

> [e]xclusion thus requires [triers of fact] to delete the relevant information from their minds and to base their judgment on a fiction rather than on the facts known to them. Even if a judge is willing to obey the command of the law and disregard excluded information, it is psychologically difficult for him to make a decision he knows to be unrelated to the "real" facts of the case. . . . Exclusion of evidence thus just makes it more difficult for the court to *justify* a decision which may well have been influenced by the "excluded" evidence.[98]

Genuinely excluding evidence from the adjudicator's access seems, indeed, a very different solution.[99] Therefore, the Continental exclusionary rules system cannot provide, in the words of a master of comparative evidence law, "the institutional black velvet on which the jewels of the common law's exclusionary doctrine can display their full potential and allure."[100] This crucial functional difference in the actual operation of exclusionary rules in the Continental versus the American system supports the claim that labeling them with the same name represents a case of misleading homonymy.

4. To Summarize

To summarize, in the Continental institutional context, the "imported" exclusionary rules seem to have lost their original adversarial fairness rationale, as much as their connection to the idea of parties' individual freedom to shape evidentiary arrangements to suit their own tactical interests. Moreover, although maintaining the same name as their American counterparts, exclusionary rules operate in the European continental systems in a very different manner. The inadmissible evidence is not excluded from the trier of fact's cognitive framework, but is instead eliminated from the trier of fact's written reasoning. It seems, therefore, that the context of reception has ended up highly modifying the original structure of the "imported" American exclusionary rules, according to its different needs.

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98. Weigend, *supra* note 63, at 254.

99. "[I]t is legitimate to question whether judges can really be expected to ignore evidence which they have already seen. It is also debatable whether the duty to provide a reasoned verdict can really be said to restrict a judge's decision." JACKSON & SUMMERS, *supra* note 32, at 73.

100. DAMAŠKA, *supra* note 54, at 52; *see also* Roger Park's review of Damaška's book, *An Outsider's View of Common Law Evidence*, 96 MICH. L. REV. 1486, 1489 (1998).

Yet, the emergence of a preliminary trial stage devoted to the admission of evidence in the presence of all the participants in the criminal process, as has occurred in Italy and Spain (and which is often connected with the introduction of an evidence law modeled upon the U.S. system), did not remain without repercussions in Continental systems.[101] In fact, formal preliminary proceedings that are dedicated to motions to suppress evidence and separated from the evidence-taking phase have today increased the participation of the many "dancers" in the continental criminal process in the decision as to the evidentiary material to be admitted at trial—an activity that previously was mainly performed by the judge alone.

Ultimately, therefore, far from relegating the judge to the role of a mere umpire, evidentiary regulations in some European contexts have allowed more room for the many dancers of rumba justice in the crucial preliminary activity of questioning the admissibility of evidence. Once again, in sum, by increasing the pluralistic character of the official investigation, the "imported" feature did not merely adapt to the non-adversarial style of the receiving systems. Rather, in line with many past reforms aimed at coping with the "neutrality" problem of a third-party search for the truth, it reinforced the impartiality of a non-adversarial, official-controlled inquiry procedure. And this, in turn, gives plausibility to the transplant's predicted inoculation effect against any future Americanization of Continental criminal procedure.

C. Cross-Examination-Based System Meets Continental European Criminal Procedure

In 1956, Edmund Morgan described the right to cross-examine as "a right unknown to systems of trial other than the common-law system."[102] Yet recently, Continental criminal procedure has quite extensively introduced a cross-examination-based system to question witnesses and sometimes also experts and parties.[103] In Spain, Portugal, and Italy, for example, direct and cross-examination by the

101. *See* C.p.p. arts. 493ff. (It.); L.E. CRIM. art. 659 (Spain).

102. EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 113 (1956).

103. Or at least, as in France, it now provides the opportunity for the parties' representatives to bypass the previously mandatory judge intermediation in their questioning of witnesses and parties after they have been questioned by the court. *See infra* note 104. Italy is an example of a country where (since 1988) a full-fledged cross-examination-based system has been introduced as the only questioning technique available for addressing witnesses, as well as experts and parties. C.p.p. arts. 498–499, 503 (It.). Direct and cross-examination of witnesses was introduced in Portugal as well, in 1987. Código de processo penal [C.p.p.] [Code of Criminal Procedure] art. 348(4) (Port.). For the direct and cross-examination of witnesses in Spain, see L.E. CRIM. arts. 708 ff. Moreover, in Germany, StPO § 239(1) provides for direct and cross-examination of witnesses by the parties, but only upon a joint request by the prosecution and the defense. In this case, they question the witness while the judge is permitted only to pose additional questions.

representatives of the parties is now the unique method of questioning witnesses. Elsewhere, such as Germany, it is only a subsidiary method of interrogation, since in principle the questioning of witnesses and defendants is still conducted by the (presiding) judge.

Has this "revolutionary change of procedure," as one scholar has defined it,[104] brought about an "adversarialization" of the European systems that adopted it? Or can it be listed instead as yet another device that ended up giving more momentum to the strengthening of a non-adversary search for truth, in keeping with the rumba justice approach?

1. Cross-Examination in the American Two-Sided Fact-Finding Structure

Direct and cross-examination as a style of questioning witnesses and defendants is the most dramatic and symbolic expression of the passivity of the judge in the fact-finding process in the American adversary procedure. It is the emblem of a criminal process structured as a dispute between two sides—the prosecution and the defense (very much conceived as private parties)[105]—pursuing their opposing interests in front of an official who, as a mere umpire, has virtually no involvement in the actual investigation of the facts.[106] It is therefore the best expression of adversary criminal procedure as an arms-length model, assuring the individual of maximum freedom from the state. It is also the quintessence of tango justice, where two sides—and two sides only—participate in the fact-finding discovery process, opposing each other as in the old appeal of felony, yet now substituting modern argumentative techniques for the old physical armed force.

In a party-controlled contest system like the American one, cross-examination represents the only effective questioning technique to test the reliability of a witness, who cannot but be strongly associated with one party or the other as her ally. Witnesses and expert witnesses are routinely coached in advance of the trial, and are therefore

104. Vogler, *Criminal Procedure in France*, *supra* note 34, at 217 (commenting on the French reform, which dates back to 2000 and—as mentioned *supra* note 103—simply enables the representatives of the parties to put questions directly to the witnesses, defendants, and *parties civiles* with the permission of the President after the court has questioned them). *See* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] arts. 312, 442.1., 536.

105. *See supra* Part II.A.1.

106. On the self-imposed passivity of American judges, even when by statute they are permitted to question witnesses, see DAMAŠKA, *supra* note 54, at 90. Commenting on rule 614 of the Federal Rules of Evidence, according to which a judge at trial may call witnesses *sua sponte* and may also question witnesses at trial, Pizzi and Montagna remark:

> Rule 614 is not problematic in the United States because judges sparingly use the power to call a witness and because appellate courts have always strongly cautioned trial judges about asking too many questions at trial lest they appear to the jury to have abandoned their neutral role and to have endorsed one side of the case.

Pizzi & Montagna, *supra* note 16, at 447.

suspected of false or distorted testimony until they successfully survive a skillful cross-examination.

In a system where truth arises out of the opposing views of the parties, to prevent one of them from putting forward her own perspective through the highly effective means of cross-examination not only would be unfair, but would also preclude the very discovery of the *interpretive* truth. This is why American law resists out-of-court written testimony and will exclude direct testimony or even declare a mistrial if cross-examination cannot be completed.[107] Yet, of course, in an adversary system where parties shape their own case according to their own tactical needs, adversarial fairness can always be unilaterally renounced, with the result that partisan testimony can go totally unchallenged if the opponent so desires.

2. Cross-Examination in the Continental European Participatory Fact-Finding Structure

In traditional Continental European procedure, the (presiding) judge as leader of the proceeding, and not the parties, carries out the questioning of defendants, witnesses, and experts. This is coherent with the court having to perform the fact-finding role and with its duty to seek the substantive truth. It is therefore a style of questioning that is emblematic of the court's responsibility to ensure the production at trial of all information needed to discover the truth. Did the direct and cross-examination technique, whether mandatory or at party request[108] or even as a default technique for the questioning of witnesses,[109] alter the non-adversarial judicial fact-finding responsibility in the Continental European systems that adopted it? Did it restrict the judge, as in the American system, to the role of a passive arbiter? Did it transform the questioning of witnesses into a two-sided duel?

To be sure, when the cross-examination-based technique landed on the European continent, it was plunged into a procedure where the court holds a central position at the evidence-taking phase. Although there are different limits in the various European countries, the burden (and power) of producing evidence, for instance, is still the province

107. DAMAŠKA, *supra* note 54, at 79.

108. On direct and cross-examination as a witness-questioning technique available upon request in Germany, see the aforementioned StPO § 239(1) and the discussion by Huber, *supra* note 34, at 318. It is worth pointing out that StPO § 239 is never used in practice in Germany. But the parties have always had the right to ask questions of witnesses and experts after the court has concluded its part of the interrogation, under StPO § 240(2), and defense lawyers in particular make extensive use of that right. On the possibility in France for parties' representatives to directly question witnesses, defendants, and *parties civiles* upon request—which, as noted earlier, is perceived as revolutionary despite being a mere possibility—see *supra* note 104. In this case too, however, it is an opportunity only rarely seized by the parties. *See* Richard S. Frase, *France*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY (2d ed.), *supra* note 17, at 201, 233–34.

109. In Italy, in monocratic proceedings, the parties can waive their right to direct and cross-examination of parties and witnesses. *See* C.p.p. art. 567(4).

of the court—which, however, shares it with all the other active actors of the process.[110] Coherent with the central role played by the court at the evidence-taking phase, the cross-examination-based technique in Continental systems does not relegate the judge to the role of a mere umpire in the witness examination process. Nor does it convert witness questioning into a two-sided duel—as occurs in the United States. It simply increases the role played by the different "rumba dancers" in the crucial activity of questioning the witnesses. The travel to Continental Europe has therefore profoundly modified the cross-examination-based technique, transforming it into a sort of collective performance in which the rumba dancers question the witnesses in search of an *objective* truth. The court, including lay judges or jurors (as is the case in Spain), most often intervenes on its own initiative in the questioning of witnesses. Besides, more than two participants are involved in direct and cross-examination, consistent with the idea that there are more than two dancers in rumba justice. Indeed, any of the following can participate in witness cross-examination:

- the prosecution
- the defense
- depending on the Continental system:
  - the *partie civile* (which can encompass the person damaged by the crime as well as the victim)
  - the private prosecutor (a victim with different powers in the proceedings than the simple *partie civile*)
  - the public complainant (also called the popular prosecutor—i.e., as already mentioned, private third parties unconnected to the offense who are allowed to participate provided they comply with a series of requirements, such as in Spain)
  - any civil third-party defendants (i.e., persons who are liable for damages in lieu of the defendant, should the latter be convicted and insolvent; they are allowed to participate in the proceedings in Italy or Spain)

110. The stringent limits upon the Spanish trial court's power to produce evidence of its own initiative have mostly been imposed by interpretations in the case law of article 729(2) of the Code of Criminal Procedure, which—as an exception to the principle of exclusive party presentation of evidence at trial—allows the court to order evidence to be heard ex officio. *See* Gascón Inchausti & Villamarín López, *supra* note 16, at 561 n.13 (referring to the case law on this point), 607, 613. On the Italian trial court's reappropriation of considerable power to introduce evidence ex officio, after the enactment of the new code of 1988 highly restricted it, see Grande, *supra* note 62, at 245–46, 250. In Germany, the court is in charge of discovering the truth and therefore must examine all evidence relevant to the decision, irrespective of whether or not one of the participants has asked for it. StPO § 244(2). Yet the parties may proffer their own evidence and may request the court to hear additional evidence they suggest. StPO §§ 214(3), 220, 244–245. The same is true for France. *Cf.* C. PR. PÉN. art. 310. For further discussion on the latter, see STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 184 (2d ed. 2008).

Thus, the possible intervention of one "dancer's" questioning in substitution for another nullifies any individual strategic choice to renounce the opportunity to cross-examine the opposing witness.

Cross-examination in Continental European systems, moreover, does not seem to be as indispensable an instrument for challenging the credibility of a prima facie unreliable witness due to her association with one of the combating parties as it is in the United States. Indeed, the great involvement of impartial officials in evidence gathering and in the fact-finding process, combined with the absence of pretrial coaching practice (or at least a much less intense form of it than in the United States), reduces adversary tensions. Concern for the risk of a one-sided distortion of information is lower and, consequently, the need for an aggressive and destructive cross-examination *à l'americaine* to test the accuracy of the testimony is less compelling.[111]

Furthermore, the lack of a strong partisan association between the witness and the litigant, especially the litigant who is often the most powerful (i.e., the prosecutor), explains the usual (even if not uncontroversial) taking into consideration of a direct examination when cross-examination cannot be completed due to the sudden unavailability of the witness. It also explains, as mentioned above, the fact that written out-of-court testimony may be exceptionally permitted by Continental systems in order to satisfy the cognitive needs of the court in its search for the substantive truth.[112] In non-adversary systems, the fact finder has to provide a fully reasoned judgment in writing, which is always subject to supervision by an appellate court. This prevents the fact finder from overvaluing evidence with which the parties have not been confronted. Thus, from a Continental perspective, the sacrifice of fairness brought about by the use of testimony with which the parties have not been confronted does not necessarily preclude a just decision by the trial-level fact finder.

3. To Summarize

In sum, when a cross-examination-based system landed in Europe, it did not find the two-sided fact-finding structure typical of U.S. criminal procedure, where it functions as an adversarial technique for eliciting the *interpretive* truth from a supposedly biased witness. Introduced into Continental Europe, the cross-examination technique still works as an instrument to discredit opposing witnesses, yet the participation of multiple actors substantially modifies its strong adversarial character. As a means to achieve a more

111. For a deep analysis of these themes, see DAMAŠKA, *supra* note 54, at 79ff.; Mirjan R. Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088ff. (1974–1975).

112. *See supra* note 95 and accompanying text.

autonomous and direct involvement of a plurality of subjects in witness questioning, it improves the participatory fact-finding scheme. In Continental Europe, therefore, in keeping with the tenets of rumba justice, (direct and) cross-examination as a style of questioning witnesses serves the purpose of enhancing the pluralism of the inquiry and thus the impartiality of the official third-party search for the *objective* truth—not the purpose of searching for the *interpretive* truth by battle, as in the tango idea of justice.

Ultimately, the injection of the adversarial cross-examination-based system into the body of the Continental European criminal procedure reinforced the foundations of the recipient countries' non-adversarial structure. In this sense, this transplant too can be interpreted as a sort of inoculation against any future adversarial turn.

D. Jury Trial in Spain

On May 22, 1995, the Spanish Parliament passed legislation, the Trial by Jury Organic Law, effective November 24, 1995, reviving trial by jury in certain criminal cases.[113] The jury court in Spain has jurisdiction over only a select number of crimes.[114] On May 27, 1996, Spanish juries began to try the first cases under the new law.

Did the "Anglo-American jury format"[115] introduced in Spain by the 1995 Trial by Jury Organic Law produce an Americanization of Spanish criminal procedure in such criminal proceedings? Did it transform the Spanish system, at least in part, from a rumba justice into a tango justice regime? Or instead, by adding a new actor to the participatory fact-finding enterprise, did the Spanish jury trial multiply the number of dancers and in so doing enhance the plurality of perspectives over the factual inquiry, in turn fortifying the non-adversarial basis of rumba justice?

1. Collective Search for the Truth, Jury Activism, and the Jury Verdict as a "Collective Product" in the Spanish Jury Trial: A Few Remarks and a Referral

I tried to answer the preceding questions in a recent study of mine, which I only reference here for a deeper analysis on the subject.[116]

113. Trial by Jury Organic Law (B.O.E. 1995, n.122). For a detailed description of the institution of the jury trial in Spain and its history, see Thaman, *supra* note 16. *See also* Carmen Gleadow, *Spain's Return to Trial by Jury: Theoretical Foundations and Practical Results*, 2001–2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 57; CARMEN GLEADOW, HISTORY OF TRIAL BY JURY IN THE SPANISH LEGAL SYSTEM (2000).

114. These include homicide, threats, failure to comply with a legal duty to provide assistance, burglary, arson in forestland, and several kinds of crime against the public administration, such as mishandling official documents, bribery, influence peddling, embezzlement of public funds, fraud and illegal levies demanded by public officials, prohibited negotiations by public officials, and mistreatment of prisoners. *See* Thaman, *supra* note 16, at 259–60.

115. Gascón Inchausti & Villamarín López, *supra* note 16, at 645.

116. Grande, *supra* note 2.

There, I contended that though it has often been portrayed as an Anglo-American import,[117] the jury trial—as opposed to the mixed-panel trial typical of the Continental tradition of the nineteenth century—operates quite differently in Spain than it does in the United States.

In the first place, the new jury system has not transformed the Spanish criminal trial from a third-party search for the truth into a contest between two and only two parties in complete control of the fact-finding enterprise. It has thus not transformed Spanish procedure from a rumba justice to a tango justice system. In fact, unlike in the United States, the jury trial judge in Spain ("the magistrate-president," or *magistrado-presidente*) is not merely an umpire of a forensic contest between the prosecutor and the defendant in a party-controlled process of developing the evidence, nor is the Spanish jury conceived of as a passive adjudicator.

Rather than a contest between two litigants shaping their own dispute according to their own interests in front of a passive adjudicator, the Spanish jury trial more strongly resembles a plural inquest in which many actors participate. These include the prosecutor (who can intervene in favor of the defendant, by asking for an acquittal),[118] the defendant, the victim (i.e., the private prosecutor), the public complainant (or popular prosecutor), any civil third-party defendants, the presiding judge, and the jurors (who also perform as active participants in the collective search for the truth). All assume an active and fluid role and share in the search for the substantive truth, and the roles are so fluid that, in a dancing move that could definitely be considered surprising, even the private prosecutor can ask for the defendant's acquittal.

In the second place, unlike the American jury, the Spanish jury does not symbolize ultimate freedom from the government. The jury in the American trial is genuinely independent because of the exclusion of any judicial involvement in its deliberations (except of course in the case of a directed verdict of acquittal). Moreover, its power to deliver a largely inscrutable general verdict, which is difficult to challenge on appeal from a conviction and impossible to challenge in case of acquittal, conveys the message that the jury is the champion of the individual against the state. Allowing the jury to render a truly final verdict of acquittal gives substance to the aspiration of the defendant to be free from state oppression, since no state official has the power to second-guess the jury finding. The extreme version of this

117. *See, e.g.,* Gascón Inchausti & Villamarín López, *supra* note 16, at 628 ("A jury was introduced on the Anglo-American model."). *See also* Thaman, *supra* note 16, at 242 (discussing whether the reintroduction of trial by jury in Spain based upon an Anglo-American model "can again be a catalyst in a move to a more adversarial criminal procedure on the European continent as it was in the nineteenth century in the wake of the French Revolution").

118. For specific cases of acquittal requests put forward by the prosecutor, see Thaman, *supra* note 16, at 392–97.

rationale is the jury power of nullification, whereby the peers make a final determination of acquittal even in the face of uncontroverted evidence proving the defendant guilty and even in defiance of clear judicial instruction.

By contrast, Spanish jurors do not enjoy the same level of autonomy and independence from state involvement in their decision making. Again, in a participatory scheme largely inconceivable in the American system, the jury verdict is a sort of collaborative product involving, in different roles and capacities, all the dancers of rumba justice. Indeed, Spanish jurors vote on a list of factual propositions or questions on the verdict form (*objeto del veredicto*) that are formulated by the judge with the involvement of every other trial participant. Moreover, unlike the American jury, yet consistent with a third-party quest for *objective* truth, and also in keeping with the rumba justice approach that always requires the logic and rationale of third-party findings to be judicially verified,[119] Spanish jurors must give reasons for their conclusions. If the reasons given by a jury are determined to be inadequate, the verdict is either returned to the jurors by the supervising magistrate-president, pursuant to article 63(1)(d) or (e) of the 1995 Trial by Jury Organic Law, or it may be reversed on appeal by the Regional Supreme Court.[120] This holds true even for verdicts of acquittal, thereby preventing jury nullification.

2. To Summarize

As I have elsewhere shown through a more extensive analysis,[121] as a further example of how the injection of an adversarial feature into a non-adversary procedure makes the non-adversary structure of the recipient system even more robust, the introduction of the jury trial—rather than having made Spanish criminal procedure more adversarial—seems to have fortified the non-adversarial features of the rumba justice regime. It added the jury as a new actor in the participatory fact-finding process enterprise, enlarging the number of dancers. In so doing it enhanced the plurality of perspectives over the factual inquiry, thereby providing for a more dynamic and pluralistic effort to make the third-party search for the truth more impartial. In the end, the stronger rumba justice approach arguably better equips Spanish

119. According to a vertical and *internal* check on the process, providing a plurality of perspectives within the decision-making process. *See* discussion *supra* Part I.B.2. The principle that judgments in criminal cases must always be reasoned and based on a rational evaluation of evidence to ensure an effective right of appeal was established by the European Court of Human Rights in *Taxquet v. Belgium*, 2010-VI Eur. Ct. H.R. 145, 177 ¶ 92. *See* Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in* Taxquet v. Belgium, 86 CHI.-KENT. L. REV. 613, 633f. (2011).

120. LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] [CRIMINAL PROCEDURE LAW] art. 846-bis c)(a). *See* Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI.-KENT L. REV. 585, 601 (2011).

121. *See* Grande, *supra* note 2.

criminal procedure against any future transformation into a tango justice system.

Some Concluding Remarks

In their transfer from the American to the Continental European legal systems, procedural features such as the prosecutor's (and police's) investigation in lieu of investigation by the examining magistrate, exclusionary rules, and cross-examination of witnesses have—as much as the jury trial—ended up being highly modified by their new context, changing their original function and nature. They have lost their adversarial rationale as well as those characteristics that in the U.S. model provide for their strong connection with a liberal idea of criminal procedure in adversarial terms.[122] Their introduction did not produce the rejection by the receiving systems of the very notion of an officially controlled inquiry, and unlike in the original U.S. model, the transferred legal arrangements also did not help shield defendants from government activism by delegating all power and control over the process to the parties. Yet, the transfer of these features did not simply constitute their "translation" into a non-adversarial style. Their introduction into Continental European criminal systems operated instead as a means of fortification of the most essential feature of non-adversary procedure, i.e., its official third-party search for an *objective* truth. Indeed, in line with previous Continental reforms targeting the "neutrality problem" of the third-party search raised by the classical liberal credo, the imported features effectively made that search more pluralistic, participatory, and dynamic, and consequently more impartial. This helped protect the individual against a monopolistic—and therefore authoritarian—official search for the truth, making the context of reception more liberal, though not more adversarial. In this sense, the transfer actually enhanced the implementation of a liberal idea of criminal procedure—not according to an *adversarial*, but rather according to a *non-adversarial* logic.[123]

Thus, instead of creating adversarial tango justice, by strengthening the tenets of non-adversarial rumba justice, the journey of these American features into the European context somehow seems to have unexpectedly resulted in an inoculation effect against a possible future takeover by the adversary model and its underlying liberal ideology of maximum freedom from the state. Just as the inoculation of the human body using a small portion of an organism stimulates the body's production of antibodies that ward off the otherwise invasive whole organism, so too the injection of a small portion of

122. To use Inga Markovits's horticultural metaphor (*see supra* note 7), these legal arrangements did not travel as "potted plants," nor did they find fertile soil in the conflicting cultural values of the recipient systems.

123. Again, in Inga Markovits's words, "[l]ocal gardeners are trimming back the imports from abroad to make them fit into the European landscape." *Id.* at 109.

American adversarial procedure into Continental European systems has reinforced the foundations of their impartial, officially controlled inquiry procedure, and has possibly produced antibodies to effectively combat any future, wholesale "invasion" by the American adversarial, party-controlled contest system.

Moreover, on a narrative level (which is as important as the operational one), by incorporating U.S.-inspired (even if modified) legal characteristics into their criminal procedure, Continental European countries managed to reinforce their worldwide legitimacy as progressive and liberal systems of criminal justice.[124] In fact, in the face of the still-persistent Anglo-American hegemonic rhetoric that assigns to non-adversary procedure the image of an oppressive process reminiscent of the inquisitorial era, [125] the "import" of some classical "American" legal features helped remove the ignominious inquisitorial label from Continental European procedure. In a Gramscian counterhegemonic move, it thereby further reduced the felt need by these systems to adopt a radically new adversary model in the future, in order to be viewed (especially by globally influential common law lawyers) as sufficiently protective of individual liberties and human rights.

In conclusion, the reception of some American procedural features arguably enabled European systems to improve their image as progressive regimes. Yet, Continental European systems did not embrace American adversarial "tango" justice, but rather reinforced their non-adversarial rumba manner of protecting defendants against an authoritarian state. In so doing, they at once refused a genuine adversarial turn and immunized themselves against any future Americanization.

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124. In this sense, borrowing Jonathan Miller's expression, it is possible to speak about a "*legitimacy-generating* transplant." Miller, *supra* note 13, at 854 (emphasis added). Or, following Inga Markovits's observations about the difficulties encountered by the American jury trial transplant in Russia, it is possible to speak about the image-generating or -remaking effect of a transplant:

> How did the Russian jury ever advance so far on the law reformer's drawing boards? In part, I think, because introducing the jury into continental criminal procedure seemed like such a noble and romantic goal, conjuring up images of new world freedom; of self-confident citizens, walking tall; of twelve men good and true; maybe even of "Twelve Angry Men," because I see no reason to exclude film and television from the list of inspirations that drive a nation to remake itself.

Markovits, *supra* note 7, at 110.

125. For the persistent idea of non-adversary procedure as an oppressive process that still "evokes the image of hooded minions of the Spanish Inquisition," see Weigend, *supra* note 18, at 406 & n.82. Consider, moreover, how Gordon van Kessel, in the introduction to one of his essays, cautions his reader: "Contrary to perceptions prevalent in common-law countries, modern Continental systems do not rely on torture or presume defendants guilty until they establish their innocence"!! Gordon van Kessel, *European Trends Toward Adversary Styles in Criminal Procedure and Evidence*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 225, 225 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002).