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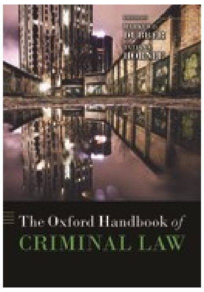

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CHAPTER

39 The Long Shadow of the Adversarial and Inquisitorial Categories

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Abstract

This chapter maintains that the adversarial and inquisitorial categories have been more central to comparative criminal procedure than has been previously acknowledged because they have contributed to constitute it as a transnational field by reflecting and restricting its main theoretical trends and thematic interests. The chapter identifies the main theoretical traditions of this field by mapping commentators' and courts' uses of the adversarial–inquisitorial distinction, and shows that even the main alternative comparative criminal procedure approaches are operating within these same theoretical traditions. The chapter suggests that the adversarial–inquisitorial dichotomy has also contributed to limit the type of themes that the field has covered. Finally, the chapter sketches a number of ways in which this field may transcend the long theoretical and thematic shadow of the adversarial and inquisitorial categories and thus expand the type of positive and normative insights it can bring to our understanding of the criminal process.

Keywords: adversarial, inquisitorial, adversary system, inquisitorial system, criminal procedure, comparative criminal procedure, comparative law, comparative models, judicial reform

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I. Introduction: the Centrality and Influence of the Adversarial and Inquisitorial Categories on Comparative Criminal Procedure

IT is commonplace to say that "adversarial" and "inquisitorial" have been central categories in the comparative study of the criminal process. This chapter argues that the influence and centrality of these categories run even deeper than has been acknowledged because these categories have contributed to constitute ↳ p. 888 and shape comparative criminal procedure by reflecting and restricting the main theoretical trends and the main thematic interests of this field.

The chapter maintains that it is possible to identify the main theoretical traditions with which comparative criminal procedure has engaged by mapping commentators' and courts' uses of the adversarial versus inquisitorial distinction. This mapping reveals five main uses of these categories as: (a) descriptive ideal-types; (b) historical or sociological systems present in actual criminal procedures; (c) opposing interests or values that coexist in any criminal process; (d) functions of the criminal process; and (e) normative models. After carrying out this mapping, the chapter argues that even the main alternative approaches to the adversarial–inquisitorial opposition in comparative criminal procedure operate within these same theoretical traditions.

It will also be suggested that the adversarial–inquisitorial dichotomy has played a role in limiting the type of themes or issues that comparative criminal procedure studies have covered. These studies have tended to focus on the features of the criminal process that are highlighted by juxtaposing adversarial and inquisitorial systems, to the detriment of other topics. The centrality of this juxtaposition may help to explain why comparative criminal procedure has mostly focused on the criminal process of the developed West, has been interested in the domestic but not in the transnational prosecution of crime, has had a doctrinal, institutional and role approach to the criminal process, and has mostly shown interest in only a subset of criminal justice rules, institutions and actors.

The chapter then states that broadening and deepening the knowledge and insights that comparative criminal procedure may produce requires transcending the long theoretical and thematic shadow of the adversarial and inquisitorial categories. The chapter sketches a number of ways in which comparative criminal procedure may do so and thus may expand the type of positive and normative insights that can inform our understanding of the criminal process.

Before we proceed, three clarifications over this chapter's arguments are in order. This chapter includes within comparative criminal procedure the academic discipline that studies the criminal process from a comparative angle and that have representatives at many law schools and other university departments around the world. Participants in this academic discipline are legal academics who teach or write about the criminal process and that explicitly or implicitly include a comparative analysis of two or more jurisdictions in their analysis. These academic participants see themselves or are perceived by others as comparative criminal procedure scholars. However, comparative criminal procedure as a way of thinking and as ↳ p. 889 a transnational field goes beyond legal academia and encompasses legal reformers, judges, lawyers, and policymakers who implicitly or explicitly compare two or more jurisdictions while they are thinking, analyzing, adjudicating over, or trying to reform the criminal process.

The second clarification is that my argument—that I will not be able to develop in detail here due to the chapter's space constraints—is that the centrality of the adversarial and inquisitorial categories and the ways of thinking that they reflect has contributed to limit the scope of comparative criminal procedure as a field in a variety of ways. At times, these categories have contributed to blind legal participants. In other words, they have contributed to make invisible for these participants other alternative theoretical perspectives and themes that could be used to analyze the criminal process from a comparative angle. These categories have also contributed to exclude from or push to the margins of the field the work of a number of scholars, legal practitioners, and policymakers that could be considered within the field or central to the field, if the field were configurated in a different way. At other times, these categories and the ways of thinking that they reflect have contributed to blur the analyses of the participants in the field—that is, they have impoverished their analysis of certain issues. Finally, these categories and ways of thinking have distracted legal participants—that is, they have encouraged legal participants to concentrate on certain types of theoretical perspectives and themes to the detriment of others. These four ways of influencing the field have been present individually or in combination in different contexts depending on the characteristics of specific legal actors and the institutional settings and practices within which these actors operate.

The third clarification is that my argument about the centrality and influence of the adversarial and inquisitorial categories over comparative criminal procedure is not a univariable causal claim. Many factors have influenced the constitution and shaping of comparative criminal procedure as a field of inquiry, adjudication, and policymaking that I cannot analyze here due to space constraints. My claim is that the adversarial and inquisitorial categories have been one of the factors that have played an important role in this respect.

II. Brief Historical Background

The term "inquisitorial" has a long history in the criminal process. During the twelfth and thirteenth centuries, commentators already distinguished between inquisitorial and accusatorial processes. Based on public rumors
p. 890 (*fama*), public officials could initiate the inquisitorial process by their own motion. Accusatorial ↳ process, on the other hand, required an accusation by a private individual. The distinction between these two types of processes was a distinction within, rather than between, legal systems.[1] In other words, the terms were mainly used to refer to two types of processes that coexisted within the same legal system, rather than as tools to compare and distinguish between the legal processes of different legal systems. Relatedly, at this early time, accusatorial process and inquisitorial process did not connote, respectively, English and continental jurisdictions.[2]

The use of the terms "inquisitorial" and "accusatorial" to compare civil and common law jurisdictions came as a later development, occurring between the second half of the eighteenth century and the first half of the nineteenth century. During the eighteenth century, commentators and policymakers in continental Europe became interested in English criminal procedure as a possible model for reform, as they sought alternatives to the criminal process of the *ancien régime*.[3] European commentators and policymakers started to use the category "accusatorial" to refer to the Anglo-American criminal process and the term "inquisitorial" to refer to either the criminal process of the *ancien régime* or of continental Europe at the time.[4] Later on, Anglo-American jurisdictions started to use the term "adversarial" instead of "accusatorial" in a related fashion.[5]

The content that those commentators gave to these categories varied. In some formulations, the accusatorial
p. 891 process relied on private individuals to prosecute ↳ crime, while the inquisitorial process relied on public officials.[6] Other formulations included a wider range of features. For instance, the accusatorial system was defined as a criminal process controlled by the parties, where the court was a passive umpire. The accusatorial process did not try to elicit the defendant's confession to prove the defendant's guilt, and adjudicated criminal cases in an oral and public trial by jury. Adjudicators had to evaluate the evidence freely, according to their impressions of the case, and their verdict could not be appealed. In contrast, the inquisitorial system consisted of a criminal process controlled by the court by its own motion, where the court had the role of investigating and adjudicating the case. The inquisitorial process tried to elicit the defendant's confession as part of its investigation of the case, and adjudicated criminal cases in written and secret proceedings by professional judges. Adjudicators had to evaluate the evidence of the case according to a system of legal proof, and their verdict could be appealed.[7]

Commentators in continental Europe conceived the accusatorial and inquisitorial processes as systems. One or more epistemological, social, or political principles underpinned and connected the respective features of each of these processes. Thus, a number of commentators considered that each system assumed a different way of gathering, producing, and evaluating evidence, and determining the truth about the case. For instance, according to one account, the accusatorial system had a "synthetic conception" of investigating the truth since each of the parties had to present evidence that supported their assertions. The accusatorial system also assumed that proper evaluation of evidence only required the common sense, education, and experience of any citizen. In contrast, the inquisitorial system had an "analytical conception" of truth determination, since each incriminating procedural step required that there were clear indications that the defendant was guilty. In addition, the inquisitorial process required that the professional adjudicators appointed by the government used a system of legal proof that was assumed to be the product of scientific knowledge.[8]

Continental European commentators also assumed that there was a relationship between the type of society and the type of criminal process. For instance, reflecting nineteenth-century notions, some commentators assumed that the accusatorial process could flourish in primitive or simpler societies, as suggested by the use of accusatorial trials by ordeals and by oath in the Middle Ages, but not in advanced or complex p. 892 ↳ ones.[9] Commentators also associated the accusatorial system with a democratic or people's conception of the state, aimed at protecting individual rights and liberties, and the inquisitorial system with an authoritarian or monarchical conception of the state, aimed at efficiently enforcing criminal law.[10] Commentators defended the inquisitorial system by arguing that it was based on reason and that it punished crime solemnly and equally.[11] Elaborating on this distinction between the accusatorial and inquisitorial systems, a group of commentators characterized Napoleon's *Code d'instruction criminelle*, which prevailed in continental Europe in the nineteenth century, as "the mixed system" that struck the right balance between individual liberties and efficiency.[12]

III. Contemporary Theoretical Conceptions of the Adversarial and Inquisitorial Categories

The centrality of the adversarial–inquisitorial distinction for comparative criminal procedure continues to the modern day. While the nineteenth-century conceptions of these terms may have set the grounds for the current configuration of the field, comparative criminal procedure has grown and expanded its theoretical bases in the last few decades.[13] In terms of their theoretical conception, we can distinguish at least five contemporary uses of the terms "adversarial" or "accusatorial," on the one hand, and "inquisitorial," on the other.[14] Those who use these five theoretical conceptions have not always articulated them as such. At times, the same author has used the expressions in more than one of these theoretical senses and, in fact, these theoretical senses can be soundly integrated in a single analysis. In addition, these five uses have not been equally present in the comparative criminal procedure literature and practice. Nevertheless, the articulation and mapping of these five conceptions is useful because doing so will enable us to identify the main theoretical traditions within contemporary comparative criminal procedure. p. 893 ↳

In a first theoretical use, "adversarial" and "inquisitorial" have been conceived as *descriptive ideal-types*. In reality, no existing criminal process fully presents the features of either type. Rather, in the same way that buildings may be more or less true to defined architectural styles, criminal processes may be more or less similar to procedural models.[15] The designer of ideal-types would determine their content based on one or more features that she considers important to highlight or study. Commentators have considered that the contraposition between criminal process as a contest between two parties versus criminal process as a unitary impartial investigation is one of the central, if not the core, content of, respectively the adversarial and inquisitorial ideal-types.[16] However, some commentators have also included features such as oral versus written proceedings, concentrated versus sequenced proceedings, lay versus professional adjudicators, among others, in, respectively, the adversarial and inquisitorial types.[17]

This ideal-type approach has been fruitful for classificatory purposes because any criminal process could be located along the spectrum between the adversarial and inquisitorial ideal-types.[18] In addition, as Weberian categories, ideal-types can be used to describe predominant features of the rules or practices of a given criminal process, enabling the comparative analysis of specific topics, such as which criminal proceedings present more evidentiary barriers to conviction[19] or better protect vulnerable witnesses.[20] The main criticism of ideal-types has been that, even if they can capture the degrees of gray between two procedural opposites, they cannot make sense of the multiple procedural phenomena not included in the ideal-types.[21]

In a second theoretical conception, "adversarial" and "inquisitorial" have been conceived as *historical* or *sociological systems* that exist in actual past or contemporary criminal processes, typically in common and civil law jurisdictions or a subgroup within them. In one of this conception's strands, the content of the adversarial and inquisitorial systems would be determined by the lowest common denominator that civil and common law jurisdictions respectively possess at any given time.[22] For instance, if at any point all common law jurisdictions use a jury, while all civil law jurisdictions use professional adjudicators, these features respectively become part of the content of the adversarial and inquisitorial systems. This lowest-common-denominator approach has been criticized for its instability because the content of the categories has to be altered with any change in any single civil or common law jurisdiction.[23] This approach also lacks sound criteria to determine the meaning of the adversarial and inquisitorial systems because the content of the categories depends on random changes in individual civil and common law jurisdictions, rather than on the principles or rationales that may underlie the categories.

Other strands of this second theoretical conception of the adversarial and inquisitorial systems as historical or sociological categories do not present such problems. Researchers define the categories on the basis of the criminal procedure features they want to study, and investigate whether there are principles or rationales that connect these procedural features together. One strand includes a series of historical studies about the criminal process. In one important version of this conception, commentators have used the term "inquisitorial" to refer to a criminal process that was born in continental Europe between the twelfth and thirteenth centuries and prevailed until the beginning of the nineteenth century. Features of this process have included public officials' initiation of criminal proceedings by their own motion, the system of legal proof, limited defendants' rights, and the use of torture.[24] Recent historiography locates in the eighteenth century the origins of the adversarial system, which is understood as a contest between two lawyers before a passive judge and jury, regulated by contemporary common law rules of evidence and where the defendant has a panoply of trial rights.[25] In these historical studies, contemporary continental criminal proceedings are sometimes characterized not as "inquisitorial," but rather as "mixed" or "non-adversarial."[26] These historical analyses have provided insight into not only the history of the criminal process in different jurisdictions, but also into how the criminal process has interacted with diverse phenomena, such as the formation of the nation-state, the expansion of the power of the church in the Middle Ages and early modern era, and the professionalization of criminal litigation between the eighteenth and nineteenth centuries, to name just a few.[27]

Another use of the terms as historical or sociological systems refers not to criminal proceedings of the past, but to contemporary criminal proceedings of (at least some of) today's common and civil law jurisdictions.[28] "Adversarial" has, for instance, referred to a criminal process conceived of as a dispute between two parties before a bifurcated court composed of a judge and a jury, while "inquisitorial" has referred to a criminal process conceived of as a unitary impartial investigation run by professional public officials. Recent scholarship has characterized these two conceptions of the criminal process as a set of cultural or social norms that institutions and actors internalize through socialization processes.[29] These two conceptions have also been characterized as two ways to distribute powers and responsibilities among the main institutions and actors of the criminal justice system, such as prosecutors, judges, defendants, defense attorneys, victims, and the citizenry.[30] And, to the extent that legal actors use the "adversarial" or "common law" label and the "inquisitorial" or "civil law" label to define themselves as jurists, these categories can also be understood as legal identities.[31]

This conceptualization of the adversarial and inquisitorial systems in terms of social norms and power dynamics has helped to understand how these historical or sociological systems reproduce themselves and change over time.[32] It has also enabled researchers to analyze why civil and common law jurisdictions have regulated and discussed specific legal topics in a different fashion, such as the defendant's right to disclosure.[33] This conceptualization has also helped to explain how reforms from adversarial to inquisitorial systems may be rejected or transformed by the receiving jurisdiction due to differing cultural norms or to power dynamics, and to analyze whether and how U.S. criminal procedure has spread to other jurisdictions.[34] p. 896 This conceptualization has also helped to explain a set of procedural practices and outcomes within international criminal tribunals where lawyers educated and trained in domestic systems with differing procedural norms have prosecuted, defended, and adjudicated cases together.[35]

These first two conceptualizations of "adversarial" and "inquisitorial" as ideal-types and as historical or sociological systems have also enabled the analysis of what may be at stake in this dichotomy from an epistemological, sociological, or political perspective.[36] A series of studies have considered that the adversarial and inquisitorial models involve not only two different fact-finding and adjudication techniques, but also assume different conceptions of truth, with the inquisitorial model assuming, for instance, a correspondence theory of truth, and the adversarial model assuming a consensus theory of it.[37] This epistemological line of research has enabled comparative criminal procedure scholars to analyze not only theoretical but also practical issues, such as possible relationships between wrongful convictions and adversarial and inquisitorial criminal processes. For instance, scholars have pointed out how adversarial party-driven proceedings may have problems in identifying and challenging common causes of wrongful convictions, such as mistaken eyewitness identification, lying witnesses, false confessions and false guilty pleas, faulty forensic evidence, and tunnel vision or confirmation biases.[38]

Within sociolegal circles, some have linked adversarial process to individualist conceptions of society and Puritanism and inquisitorial process to more p. 897 communitarian conceptions of society and Catholicism.[39] In political theory, adversarial and inquisitorial processes have been linked to different conceptions of the state. In one political theory conceptualization, the passive role of the court in adversarial process has been linked to a reactive conception of the state that remains neutral among different conceptions of the good, while the active role of the court in inquisitorial process has been linked to a state that embraces and advances a conception of the good.[40] In another formulation, adversarial process has been linked to a state that implements its policies through litigation, while inquisitorial process has been linked to a state that implements its policies through a bureaucratic machinery.[41] In yet another formulation, adversarial process has been linked to a capitalist state.[42]

Besides being conceptualized as ideal-types and historical or sociological systems, "adversarial" and "inquisitorial" have been used in a third way: to refer to *opposing interests* or *values* within the criminal process. In this view, "adversarial" refers to the value of due process or defendants' rights and "inquisitorial" refers to the value of law enforcement or efficiency. This third conceptualization of the adversarial–inquisitorial categories does not concentrate on procedural form in fact-finding and adjudication, but rather on whether specific features of the criminal process advance due process or law enforcement. In this sense, "adversarial" and "inquisitorial" would be interests or values that we would find in different degrees in every jurisdiction, rather than labels that would respectively apply to common and civil law. One can place different jurisdictions on different points of the spectrum between these two opposing values or interests on the basis of which particular balance each jurisdiction strikes between law enforcement and due process.

Though this third conceptualization of the adversarial and inquisitorial categories has not typically appeared in pure form, it has been present in comparative criminal procedure for a long time. For instance, in his classic *Theory of Evidence in the German Criminal Process*, published in 1834, Mittermaier said that the two fundamental principles of criminal procedure are: (a) the interest of society and the need that no guilty person goes unpunished, and (b) the protection of individual and public freedoms.[43] Mittermaier also maintained that the adversarial and inquisitorial are the two fundamental ways that one can use to analyze the criminal process.

p. 898 According to Mittermaier, the differences between these two categories are ↳ not merely formal, because the adversarial and the inquisitorial principles are the cardinal maxims that regulate evidence and verdicts.[44] He then linked the adversarial principle to the popular principle under which people see in every indictment against a citizen a dangerous attack against public and individual liberties, while he linked the inquisitorial principle to a monarchical system in which the supreme power must prosecute crime in the interest of protecting general security and maintaining order.[45] Thus, through the adversarial and inquisitorial principles, one could understand the criminal process as a tension between these two conflicting interests or values of law enforcement versus due process.

Similarly, Garraud said in 1907 that every procedural code aims at reconciling two apparently opposing interests: the interest of society that no guilty person escapes a speedy punishment and the interest of the individual of having an impartial and thorough examination of his guilt.[46] Neither adversarial nor inquisitorial processes present sufficient safeguards for the proper administration of justice. While adversarial process would lead to impunity, inquisitorial process would not be respectful of due process. It is thus necessary to combine both types of process to manage such a tension.[47]

This third conceptualization of the adversarial and inquisitorial categories persists to this day. Under some accounts, the adversarial process puts the interests of individuals subjected to criminal prosecution over the interests of society and is inefficient in collecting evidence and ensuring convictions against the guilty.[48] In contrast, inquisitorial process aims at preventing the impunity of the criminally guilty and protects the interests of the collectivity, but risks convicting the innocent and is authoritarian.[49] The procedures of continental Europe would be mixed systems that would strike a balance between law enforcement and the protection of liberty, and even Anglo-American systems would not be purely adversarial.[50]

In a fourth theoretical sense, "adversarial" and "inquisitorial" are often used to describe *functions* that criminal proceedings may perform. In this fourth conceptualization, those criminal proceedings that are structured to obtain systematic or coerced admissions of guilt by defendants have been characterized as "inquisitorial," while those that are not structured to elicit these admissions of guilt would be "adversarial."[51] This conceptualization has not concentrated on procedural form, but rather on the actual functions that criminal procedure plays. One can link this fourth conceptualization of the adversarial–inquisitorial categories with the
p. 899 traditional comparative law functionalist school, which does not look at the apparent ↳ differences between legal systems but instead analyzes whether legal systems play similar functions using different forms.[52]

This fourth theoretical conceptualization has an old pedigree in comparative criminal procedure due to the association between the term "inquisitorial" and the practice of torture in the *ancien régime*.[53] The association between coerced confessions and civil law persists today, especially in the common law world.[54] However, despite these simplistic characterizations, comparative criminal procedure scholars have argued that some of the origins of the right against compulsory self-incrimination can be found in civil law, and that contemporary civil law jurisdictions recognize such a right.[55] In addition, turning the classical comparative criminal procedure functionalist argument upside down, recent scholarship has argued that, despite preexisting stereotypes, some contemporary common law jurisdictions may be relying on the systematic or coercive obtainment of admissions of guilt to convict as much as or in more problematic ways than civil law jurisdictions, with these admissions of guilt being managed by prosecutors and occurring at the arraignment stage in the form of guilty pleas rather than before the police or an investigating judge.[56] The association between Anglo-American jurisdictions and the right against compulsory self-incrimination has been weakened further by authorization to the jury in England and Wales to make negative inferences in some situations based on the suspect's silence as well as the authorization in the United States to use techniques such as waterboarding during the Bush administration as part of its anti-terrorism policies.[57]

In a fifth theoretical conceptualization, "adversarial" and "inquisitorial" are used as *normative models*. These
p. 900 models include a set of positive or negative ↳ principles or features that can be used to evaluate actual

criminal proceedings, to make decisions in individual cases, and to advance criminal procedure reform. Arguments in favor of the normative appeal of adversarial and inquisitorial processes have been based on the allegedly superior epistemological capacity, consistency with human rights, higher transparency, democratic character, or efficiency of the adversarial process over the inquisitorial one, or vice versa.[58] As with the previous conceptualizations, commentators have given different content to the adversarial and inquisitorial processes as normative models depending on the issues in which they are interested or for which they advocate.[59] Such content has included classical themes within the adversarial–inquisitorial categories, such as the opposition between party-driven versus court-driven procedure, oral hearings versus written dossier, public versus secret proceedings, strong versus weak defendant's rights, and juries versus mixed courts or professional adjudicators. These arguments have often been followed by proposals to adopt partial or comprehensive adversarial reforms in civil law jurisdictions or inquisitorial reforms in common law ones.[60]

Courts have also made a normative use of these categories. For instance, the European Court of Human Rights has held that Art. 6 of the European Convention on Human Rights requires an adversarial process that includes a right to equality of arms, understood as the right of each party to be afforded a reasonable opportunity to
p. 901 present his case under conditions that do not place him at a substantial disadvantage ↳ vis-à-vis his opponent.[61] The right to an adversarial process means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[62] This right includes that the accused should be given an adequate and proper opportunity to challenge and question witnesses against him, either at the time the witness is making his statement or at some later stage of the proceedings.[63] In order to accommodate both civil and common law jurisdictions, the European Court has not included in the content of adversarial process many features that one finds in common law. This way, the Court has required both common and civil law jurisdictions to amend their proceedings while leaving sufficient room for these jurisdictions to stick to their pre-established norms and regulations.[64]

Even though normative arguments have been made in favor of the inquisitorial system, the adversarial system has had the upper hand in this debate, especially in recent years. The preference for adversarial process may partially be the result of substantive reasons and debate. However, other phenomena, such as the influence of the U.S. criminal procedure and agencies around the world and the old association between the term "inquisitorial" and the criminal process of the *ancien régime*, may also help to explain why the adversarial process has been considered a more appealing procedural model. This normatively positive and negative connotation of "adversarial" and "inquisitorial" helps to explain why the terms have been used as rhetorical devices and slogans in criminal adjudication or for criminal procedure reforms around the world.[65]

IV. Alternative Approaches and the Adversarial–Inquisitorial Long Theoretical Shadow

Given the centrality of the adversarial–inquisitorial categories for comparative criminal procedure, it is not surprising that commentators have articulated alternative approaches to them. This section will argue that
p. 902 even though these alternative ↳ approaches have often improved our understanding of criminal procedure, they are simply elaborations on the adversarial and inquisitorial categories or still operate within the adversarial and inquisitorial long theoretical shadow. My analysis of these alternative approaches will sequentially follow the theoretical mapping of the adversarial–inquisitorial opposition of the previous section as: (a) descriptive ideal-types; (b) historical or sociological systems present in actual criminal procedures; (c) opposing interests or values that coexist in any criminal process; (d) functions of the criminal process; and (e) normative models.

Mirjan Damaška's framework in *The Faces of Justice and State Authority* is the most sophisticated and influential of these alternatives approaches.[66] Damaška proposes two sets of opposing ideal-types instead of the adversarial and inquisitorial categories in order to avoid "narrow and sterile constructs" and "vain attempts to express the core of the contrast between Continental and Anglo-American administration of justice."[67] A first set of opposing ideal-types includes the *hierarchical* and *coordinate ideals*; these types articulate two ways in which authority within the administration of justice may be structured. In the hierarchical ideal, the administration of justice is composed of professional decision-makers who apply technical rules to cases and who are in hierarchical relationships of authority among themselves. In the coordinate ideal, the administration of justice is composed of lay decision-makers who apply community standards to cases and who are in horizontal relationships of authority among themselves. The second set of opposing ideal-types includes the *policy-implementing* and the *conflict-solving models*. These types articulate two goals that the administration of justice may pursue. In the conflict-solving model, the goal of the administration of justice and the state is to provide a framework within which individuals may choose their own conceptions of the good. In the policy-implementing model, the goal of the administration of justice and the state is to implement a certain conception of the good.

Damaška's insightful framework renovated the comparative study of the legal process by providing two original sets of opposing ideal-types that connect features of the legal process to different types of authority and goals of the administration of justice.[68] However, original as the framework is, it can be understood as an elaboration on the adversarial and inquisitorial categories rather than a true alternative to them. Like an important strand of the adversarial–inquisitorial literature, Damaška's framework relies on ideal-types as theoretical devices. In other words, like that adversarial–inquisitorial strand, Damaška creates abstract models
p. 903 as a way to classify and analyze actual ↳ legal processes. In addition, Damaška's conflict-solving and policy-implementing models can be considered elaborations on the classical adversarial–inquisitorial opposition between party-contest versus impartial inquiry, while the coordinate and hierarchical models can be considered elaborations on the classical adversarial–inquisitorial opposition between lay versus professional decision-makers. The conflict-solving and policy-implementing models can also be considered an elaboration on the classical comparative criminal procedure theme that there is a link between types of criminal process and types of political states. If in classical articulations the adversarial is linked to a democratic conception and the inquisitorial to an authoritarian or monarchical conception of the state, Damaška's framework links contest-like proceedings to a liberal conception and inquiry-like proceedings to non-liberal conceptions of the state. The contribution is new but operates within an intellectual space that the literature on adversarial and inquisitorial systems had already opened.

A second set of alternative approaches includes historical and sociolegal analyses of the legal process that do not (heavily) rely on the adversarial–inquisitorial distinction and propose instead other concepts to compare Anglo-American and continental jurisdictions. These studies have also honed our understanding of the criminal process by arguing, for instance, that different conceptions of lay participation in criminal adjudication may reflect different conceptions of the nation; that relationships between criminal justice institutions and local non-state institutions are described dissimilarly in different countries because of different attitudes toward the idea of "community"; that differing concerns about undercover surveillance reflect different conceptions of its goals and the problems it may present; that there is a link between prosecutorial discretion and different conceptions of equality; that differences in legal regulations may reflect different conceptions of privacy; and that major differences in the way in which evidence of the defendant's character is treated reflect different conceptions of relations between state and citizen in Anglo-American and continental jurisdictions or a subgroup within them—to mention just a few examples.[69]

However, once again, these studies can be considered to operate within the space already opened by the literature on adversarial and inquisitorial process. Like conceptualizations of "adversarial" and "inquisitorial" as historical or sociological systems, this literature takes common law and civil law or Anglo-American and

p. 904 continental jurisdictions (or a subgroup within them) as a given central division ↳ that can be explained by identifying principles or rationales that would underpin each type of jurisdiction. In addition, the type of explanations proposed operate within the culturalist tradition of comparative criminal procedure that finds in different values or social norms or political conceptions the explanatory variables of legal differences between the criminal processes of common and civil law.

A third set of alternative accounts for the adversarial–inquisitorial opposition has applied Herbert Packer's classical crime control and due process models to the comparative analysis of criminal procedure. Per the crime control model, criminal procedure is an assembly line that has as its main goal the efficient enforcement of criminal law through plea bargaining. Under the due process model, criminal procedure is an obstacle course that emphasizes the protection of the defendant's rights through a trial before an impartial tribunal.[70] Packer conceived of the crime control and due process models as tensions between two value systems within the U.S. adversary process.[71] However, commentators have used the crime control and due process models for comparative analyses of the criminal process.[72]

It is hard to exaggerate the influence of Packer's models on thinking about criminal procedure not only in the United States, but throughout the world.[73] Packer elegantly articulated his two detailed models to capture a classical tension within the criminal process. However, he was not the first to see this tension. As already mentioned, well before Packer identified this issue, a number of comparative criminal procedure scholars had already considered that the opposition between adversarial and inquisitorial criminal process captured this very tension between efficient law enforcement and due process—and they were not the first ones to articulate this tension either. In short, Packer's models, though original, are not truly alternatives to the adversarial and inquisitorial categories, but rather can be considered elaborations on a way of thinking about the criminal process that had already been opened and that was already present in the comparative criminal procedure literature.

A fourth set of alternative accounts has concentrated on the *functions* that the legal process plays, rather than its form. Martin Shapiro's comparative account of courts is probably the most sophisticated example of this conception. Shapiro questioned the predominant understanding of courts as "involving (1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous
p. 905 decision in which one of the parties was assigned the legal right and ↳ the other party found wrong."[74] Instead, he explored the role of consent by the case parties and the population in the legitimation of adjudicatory bodies and emphasized the conflict-solving, lawmaking, and social control functions that they perform.[75]

Shapiro's work has made important contributions to the comparative analysis of the legal process. Through his emphasis on the need for consent and the functions that adjudicatory bodies perform, Shapiro provided a fresh perspective by studying courts as part of the spectrum of bodies that play conflict-solving, lawmaking, and social-control functions in any given society. However, his theoretical perspective operates within an existing scholarly framework, namely the comparative law functionalist school as applied to the adversarial and inquisitorial categories and to the criminal process and comparative law more generally.[76] Like the functionalists, Shapiro questioned the importance of legal discourse and procedural form and concentrated instead on the functions that courts and process perform. His contributions are new but operate within a theoretical strand already present in comparative studies.

A fifth set of alternative approaches has adopted a normative perspective. These approaches have questioned the adversarial–inquisitorial distinction and have tried to move beyond it by proposing procedural reforms or interpretation of procedural legal texts on the basis of regional or universal human rights or procedural tradition.[77] Such reforms and interpretations have included, for instance, proposals that criminal courts should not have investigating functions or that only the evidence produced at trial should be the basis for a conviction. According to these approaches, one of the problems with the adversarial and inquisitorial categories is that they respectively connote Anglo-American and continental jurisdictions. Proposing reforms inspired by features of the adversarial and inquisitorial models may thus trigger nationalist reactions that can impede substantive discussions and hinder reform efforts.[78]

These normative proposals have enriched national, regional, and global debates about how the criminal process should be structured. For instance, the work of the Delmas-Marty Commission in France fostered debate on whether the investigating judge is compatible with international or European fair trial standards. However, once we study these alternative models in detail, these models substantially parallel the normative conceptions of the adversarial and inquisitorial systems described earlier. In fact, the elements of these normative models include many of the elements of ↳ adversarial normative models, such as a sharp
p. 906 distinction between the role of prosecuting and adjudicating, the elimination of the preliminary investigation judge, the conception of a criminal process in terms of an "accusatorial trinity," the strengthening of defendants' rights, the introduction of consensual mechanisms for prosecution and defense to deal with criminal cases, and the strengthening of public and oral trials.[79]

V. The Thematic Shadow of the Adversarial–Inquisitorial Categories

In this section I will argue that the shadow of the adversarial and inquisitorial categories runs even longer. This is the case because the adversarial–inquisitorial and alternative approaches to the comparative study of the criminal process share not only theoretical traditions, but also an interest in only certain aspects of the criminal process. My main argument is that the juxtaposition of the adversarial and inquisitorial categories has made salient certain jurisdictions and certain aspects of the administration of criminal justice to the detriment of others. Due to space constraints, I can only sketch, rather than demonstrate my statements, over this matter.

First, comparative criminal procedure has been mostly interested in understanding and explaining the differences between Anglo-American and continental European jurisdictions. While not the exclusive interest, it has been central to the discipline for a long time.[80] The centrality of the association of the adversarial and inquisitorial categories with, respectively, Anglo-American and continental jurisdictions has likely contributed to perpetuate the geographical limitations of the field. This association has conferred a premier role to England and the United States and to France, Germany, and Italy as the primary jurisdictions that have to be explained because the adversarial and inquisitorial systems have been abstracted from these countries' criminal processes or because these jurisdictions are considered the most influential or the originators of adversarial and inquisitorial systems. These limitations have downplayed the criminal processes of lower income countries and non-Western countries, making most comparative criminal procedure scholarship an enterprise
p. 907 to understand the differences within the developed West, rather than a truly global exercise. ↳

Secondly, though comparative criminal procedure has assumed that individual jurisdictions may be members of legal families and that jurisdictions may influence each other, it has been interested, almost exclusively, in a criminal process that investigates and prosecutes criminal cases within a single jurisdiction, most typically within a single nation-state.[81] The prosecution of cases whose crimes, persons, or evidence are found outside the prosecuting jurisdiction has attracted the interest of transnational criminal law, international relations, and international law scholars, but little attention from comparative criminal procedure quarters. This limited interest may relate to comparative criminal procedure's shaping as a discipline through the adversarial and inquisitorial categories before transnational crime became an important phenomenon. Within the traditional comparative criminal procedure paradigm, the goal has been to explain differences in the way civil and common law jurisdictions prosecute and adjudicate their own domestic crime, rather than to understand how jurisdictions may interact with each other in the prosecution and adjudication of individual cases.[82]

Thirdly, comparative criminal procedure has maintained a doctrinal, institutional and role perspective. The field has been mostly interested in explaining why civil and common law jurisdictions have different rules and institutions to prosecute and adjudicate crime, and why prosecutors, judges, defense attorneys, and other actors are assigned different roles in each type of jurisdiction; in explaining what may be the principles or rationales underlying these rules, institutional arrangements and roles; and in evaluating which set of rules, institutional arrangements and roles is more appealing.[83] It has explored little about other questions, such as whether and why criminal processes in different jurisdictions have the same or different types of "clients" (i.e. victims, defendants, witnesses, expert witnesses, and so on). This may again result from the comparison of adversarial and inquisitorial systems making salient rule, institutional and role differences rather than other types of differences and commonalities between criminal justice practices.

Fourthly, despite its institutionalist and role perspective, comparative criminal procedure scholarship has p. 908 showed interest mostly in a limited set of criminal justice ↳ institutions and actors—those related to the formal process of prosecution and adjudication. Once again, the comparison of adversarial and inquisitorial processes may result in highlighting differences in institutions and actors such as the office of the prosecutor, the courts, and the bar, rather than other institutions and actors such as the police, diversion/probation officers, post-conviction and post-appeal proceedings, and administrative agencies that play a role in the criminal process, just to mention a few. For instance, comparative criminal procedure has arguably done little to explain the police as an institution. To be sure, the powers and legal regulations of the police are often covered in comparative analyses of the criminal process.[84] However, we know little about how different police forces operate in the criminal process in relationship to different social groups, how police departments are demographically composed, how police departments are structured as organizations, and what is the array of functions that different police departments play in different jurisdictions.[85] The limited focus on the police may be a consequence of the police all over the world being, by definition, inquisitorial, in the sense that they investigate cases by their own motion. The adversarial–inquisitorial opposition may fail to trigger interest and study about the different configurations that these inquisitorial institutions may take. Similarly, we know very little about what type of administrative agencies other than the police play a role in the prevention, investigation, and prosecution of crime in different jurisdictions, and how these administrative agencies perform these roles.

VI. Transcending the Adversarial and Inquisitorial Long Shadow

This chapter has identified the main theoretical traditions of comparative criminal procedure, as well as the main issues it has investigated. That its theories and themes are limited is not exclusive to this field. Every p. 909 discipline engages with a limited set of ↳ theoretical traditions and has its own set of central themes. In fact, in comparison to other disciplines, comparative criminal procedure has engaged with a broader set of theoretical schools, which has allowed it to produce many insights on the criminal process.

However, if comparative criminal procedure wants to broaden and deepen its understanding and analysis of the criminal process, transcending the adversarial and inquisitorial categories is a task forward. The hope is that the identification of these theoretical traditions and themes may help scholars, practitioners, and policy-makers move past at least some of these limitations to make comparative criminal procedure an even stronger field of inquiry.

There are many ways to transcend these categories' shadow. Here I am going to sketch a few possible avenues. As a starting point, it is important to distinguish between the positive and normative levels. There is room for both types of analyses under the big umbrella of comparative criminal procedure. However, positive and normative analyses present different challenges that have to be addressed separately. In fact, one of the problems with some of the ways in which the adversarial and inquisitorial categories have been used is that they have often confounded the two levels.

At the positive level, there are at least three issues to consider. First, as already explained, a very important strand of comparative criminal procedure has heavily relied on models in order to analyze the criminal process. There is no question that these tools have enabled comparative criminal procedure to articulate different conceptions of the criminal process, analyze prevailing cultural understandings and norms as well as power and institutional dynamics in specific jurisdictions, identify different epistemological conceptions of the criminal process, and explore the relationship between these procedural conceptions and different types of societies and political systems. Nevertheless, these models are less able to produce other types of positive knowledge because they are multidimensional. In other words, comparative criminal procedure ideal-types or systems try to account for many features of the criminal process at once, such as prosecutorial discretion versus compulsory prosecution, guilty pleas versus non-guilty pleas, waivable versus non-waivable conception of rights, court as passive umpire versus court as active investigator, party-gathering of evidence versus impartial-gathering of evidence, lay adjudicators versus professional adjudicators, oral hearings versus written dossier, public versus secret proceedings, day-in-court conception versus sequential conception of the criminal process, and so on.

Even when these multiple dimensions are reduced to a few underlying variables, these underlying variables themselves are often multiple. For instance, adversarial and inquisitorial features are often reduced to two sets of opposing variables, such as dispute versus inquiry and day-in-court versus sequential process. And even when the underlying variables are sharply separated, each individual underlying variable is again often itself multidimensional. For instance, to take a sophisticated example, Damaška's coordinate and hierarchical models
p. 910 are multidimensional; they include ↳ not one but three variables: lay versus professional decision-makers, horizontal versus vertical relationships among decision-makers, and community standards versus technical rules of adjudication.

My point is not to dismiss multidimensional models. Comparative criminal procedure has produced many positive insights through these models and should keep using them when they are appropriate to describe or analyze a given phenomenon. The problem with multidimensional constructs is that they can make it difficult to analyze certain phenomena.

Let me give an example to illustrate the point. Let us say that we want to study whether specific characteristics of some countries' criminal processes have an effect on the type of defendants (defined within a continuous spectrum of politically powerful or weak individuals) against whom these countries open formal proceedings for international crimes on the basis of universal jurisdiction. If we describe the criminal processes in question using multidimensional models, it may be impossible to know which specific characteristics of the criminal process, if any, affect the type of defendants against whom formal proceedings are opened. Are different patterns in different countries explained by differences in the degree of prosecutorial discretion, on whether these countries have certain rules of evidence, on whether the victim can be a party in the criminal process, or by none of the above? Unless we identify and analyze each individual variable separately, it may be impossible to answer these questions in a meaningful way.[86]

The second issue to consider is whether, to expand upon and transcend the main themes it has studied, comparative criminal procedure should engage with a larger array of theoretical literatures. For instance, to transcend its concentration on the developed West and its relative lack of interest in how the criminal process affects the transnational prosecution of crimes, comparative criminal procedure could benefit from deeper engagement with literatures on globalization of law, international relations, and postcolonial studies, just to mention three possible examples.[87]

To broaden and transcend its rule and institutional analysis, comparative criminal procedure could benefit from engaging with literatures or disciplines as law and economics, political science, criminology, and sociology. For instance, following the traditional theoretical traditions described, comparative criminal
p. 911 procedure scholarship has typically analyzed whether and how adversarial and inquisitorial institutional ↳

norms have shaped prosecutorial discretion and how prosecutors exercise discretion in different jurisdictions.[88] Applying law and economics and political science analyses, for example, would instead encourage focus on the structure of incentives that legislatures, the executive branch, and judges have to give discretion to prosecutors, and on the incentives of the prosecutors themselves to exercise their discretion in particular ways.[89] In another example, comparative criminal procedure could engage with criminological and sociological literatures concentrated on who the "clients" of public institutions are, and on how the class, race, ethnicity, gender, age, and immigration status of victims and crime participants affect the way the criminal process works.

The third issue is methodological. Comparative criminal procedure has been strong in producing qualitative studies based on historical archival research, interviews with criminal justice participants, and direct observations of criminal justice practices.[90] However, very little has been done using quantitative methods.[91] Unlike trends in some disciplines, the idea is not to reject any non-quantitative empirical methodology that does not use multivariable regressions. Rather, the suggestion is to expand the methodological tools and approaches so that quantitative studies complement qualitative ones.[92]

At the normative level, it is important that we distinguish between form and substance. The adversarial and inquisitorial systems are two ways to implement the principles and goals of the criminal process, but they should not be confounded with the principles and goals themselves. Instead of starting by asking which system, adversarial or inquisitorial, is normatively superior, we should start by asking which principles and goals we value in the criminal process and then discuss the best ways to implement those principles and goals in specific jurisdictions. There have been a handful of attempts to proceed with this discussion in this way,[93]
p. 912 but these types of approaches are still too new and too few. ↳

VII. Conclusion

This chapter has looked at the adversarial and inquisitorial categories as a means to analyze the field of comparative criminal procedure. The chapter briefly described some of the knowledge and insights produced by this field and also indicated the theoretical and thematic limitations of the field. These limitations have been partially reflected and partially produced by the adversarial and inquisitorial categories. Expanding the horizons of our comparative understanding and analysis of the criminal process will require transcending the adversarial and inquisitorial categories without forgetting what these categories have enabled us to see and do.

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Notes

1 Though there have been many historical studies on adversarial and inquisitorial process, the intellectual history of the adversarial–inquisitorial categories and comparative criminal procedure still needs to be written. I am currently engaged at an early stage in such a research project. This assertion about the use of the categories in the twelfth and thirteenth centuries, and the other statements I make in this chapter's historical section, are thus only tentative and preliminary since I have not yet been able fully to test them.

2 For a recent review of the main tracts on procedure by medieval and early modern jurists, including their analysis of accusatorial and inquisitorial process, see Kenneth Pennington, "The Jurisprudence of Procedure," in Wilfried Hartmann and Kenneth Pennington (eds.), *The History of Courts and Procedure in Medieval Canon Law* (forthcoming 2014).

3 On the influence of English criminal procedure on Enlightenment commentators, see Antonio Padoa Schioppa, "I

Philosophes e la Giuria Penale," (1986) I-II *Nuova Rivista Storica* 107.

4 See e.g. Faustin Hélie, *Traité de l'instruction criminelle*, Vol. 5 (1853), § 308; Karl J. A. Mittermaier, *Das deutsche Strafverfahren* (1832), § 28; Karl J. A. Mittermaier, *Lehre vom Beweise im deutschen Strafprozesse* (1834), § 3; H., "An Account of the Criminal Law, Criminal Courts, and Criminal Procedure of Germany; With Notices of the Principal Writers on Penal Jurisprudence, and the Principal Theories of Penal Legislation Prevailing There," (1834) 11 *Law Magazine Quarterly Review of Jurisprudence* 1, 18–23.

5 See e.g. Edmund M. Morgan, "Some Observations Concerning Presumptions," (1930–31) 44 *Harvard LR* 906, 910. Though the terms "accusatorial" and "adversarial" are most commonly used indistinctively or as synonyms, some people have distinguished between them. See e.g. Abraham S. Goldstein, "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure," (1974) 26 *Stanford LR* 1009 ff. (using the term "adversary system" to refer to a method for resolving disputes in a contested trial, while stating that the term "accusatorial system" includes the "adversary system" but also other fundamental procedural premises like the presumption of innocence and a reactive enforcement of criminal law); Richard Vogler, *A World View of Criminal Justice* (2005), 129 (using the term "accusatorial" to refer to premodern forms of procedure and the term "adversarial" to refer to contemporary proceedings in England and the United States). For the purposes of this chapter, I use the two terms indistinctively because, for the most part, comparative criminal procedure has used them in such a way, and because my arguments in this chapter do not require making distinctions between the two terms.

6 See e.g. Mittermaier, *Strafverfahren* (n. 4) § 28.

7 See e.g. Hélie (n. 4) § 308; Mittermaier, *Lehre* (n. 4) § 3; H., (1834) 11 *Law Magazine Quarterly Review of Jurisprudence* 1.

8 See Mittermaier, *Lehre* (n. 4) § 3.

9 See e.g. Hélie (n. 4) § 308; Karl J. A. Mittermaier, *Theorie des Beweises im Peinlichen Prozesse* (1809), § 1.

10 See e.g. Hélie (n. 4) § 308; Mittermaier, *Lehre* (n. 4) § 3.

11 See e.g. Mittermaier, *Lehre* (n. 4) § 3; Mittermaier, *Theorie* (n. 9) § 1.

12 See e.g. Hélie (n. 4) § 308.

13 For reviews of the field, see Elisabetta Grande, "Comparative Criminal Justice," in Mauro Busani and Ugo Mattei (eds.), *The Cambridge Companion to Comparative Law* (2012), 191 ff.; Paul Roberts, "On Method: The Ascent of Comparative Criminal Justice," (2002) 22 *OJLS* 539 ff. (book review).

14 On the different conceptualizations of the adversarial and inquisitorial categories, see Máximo Langer, "La Dicotomía Acusatorio Inquisitivo y la Importatión de Mecanismos Procesales de la Tradición Jurídica Anglo-Sajona," in Julio Maier and Alberto Bovino (eds.), *Procedimiento Abreviado* (2001), 97 ff. In this previous article, I distinguished between six different theoretical uses of the categories "adversarial" and "inquisitorial." Since the conception of these categories as normative principles would unnecessarily complicate this chapter's analysis, I will concentrate here on only five of these uses. For analysis of procedural models more generally, see e.g. Mirjan Damaška, "Models of Criminal Procedure," (2001) 51 *Zbornik* (Collected Papers of Zagreb Law School) 477 ff.

15 See e.g. Mirjan Damaška, "Adversary System," in Sanford H. Kadish (ed.), *The Encyclopedia of Crime and Justice*, Vol. 1 (1984), 24 ff.

16 See e.g. John D. Jackson, "The Effect of Human Rights on Criminal Evidentiary Processes: Convergence, Divergence or Realignment?," (2005) 68 *Modern LR* 737, 742–743.

17 See e.g. Nico Jörg, Stewart Field, and Chrisje Brants, "Are Inquisitorial and Adversarial Systems Converging?," in Phil Fennell et al. (eds.), *Criminal Justice in Europe* (1995), 41 ff.

18 See e.g. C.H. W. Gane, "Classifying Scottish Criminal Procedure," in P. Duff and N. Hutton (eds.), *Criminal Justice in Scotland* (1999), 56 ff.

19 See e.g. Mirjan Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study," (1973) 121 *University of Pennsylvania LR* 506 ff.

20 See e.g. Louise Ellison, "The Protection of Vulnerable Witnesses: an Anglo-Dutch Comparison," (1999) 3 *International Journal of Evidence & Proof* 1 ff.

21 Inga Markovits, "Playing the Opposite Game: On Mirjan Damaška's The Faces of Justice and State Authority," (1989) 41 *Stanford LR* 1313 ff. (book review).

22 Joachim Hermann, "Various Models of Criminal Proceedings," (1978) 2 *South African Journal of Crim. Law & Criminology* 3, 4–6.

23 See e.g. Damaška (n. 15).

24 A classical reference in this line of work is Adhémar Esmein, *Histoire de la Procédure Criminelle en France* (1882). For recent related historiography, see e.g. Jacques Chiffoleau, "Avouer l'inavouable: l'aveau et la procédure inquisitoire à la fin du Moyen Âge," in Renaud Dulong (ed.), *L'aveu* (2001), 57 ff; Lotte Kéry, "Inquisitio—denunciato—exception: Möglichkeiten der Verfahrenseinleitung im Dekretalenrecht," (2001) 87 *ZRG* 226 ff.

25 See e.g. John H. Langbein, *The Origins of Adversary Criminal Trial* (2003).

26 See e.g. Langbein (n. 25).

27 See e.g. Chiffoleau (n. 24); John H. Langbein, "The Criminal Trial Before the Lawyers," (1978) 45 *University of Chicago LR* 263 ff.

28 See e.g. Jacqueline Hodgson, *French Criminal Justice. A Comparative Account of Investigation and Prosecution of Crime in France* (2005).

29 Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," (2004) 45 *Harvard International LJ* 1 ff; Máximo Langer, "The Rise of Managerial Judging in International Criminal Law," (2005) 53 *American Journal of Comparative Law* 835 ff. For critical discussion about the concept of legal culture with special relation to criminal justice, see e.g. David Nelken (ed.), *Comparing Legal Cultures* (1997); David Nelken (ed.), *Contrasting Criminal Justice* (2000); David Nelken, *Comparative Criminal Justice: Making Sense of Difference* (2010).

30 Langer, (2004) 45 *Harvard International LJ* 1.

31 Langer, (2005) 53 *American Journal of Comparative Law* 835.

32 Langer, (2004) 45 *Harvard International LJ* 1.

33 See e.g. Máximo Langer and Kent Roach, "Rights in the Criminal Process: A Case Study of Convergence and Disclosure Rights," in Mark Tushnet et al. (eds), *Handbook on Constitutional Law* (2013), 273.

34 Toby S. Goldbach, Benjamin Brake, and Peter J. Katzenstein, "The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating," (2013) 20 *Indiana Journal of Global Legal Studies* 141 ff.; Elisabetta Grande, "Italian Criminal Justice: Borrowing and Resistance," (2000) 48 *American Journal of Comparative Law* 227 ff.; Langer, (2004) 45 *Harvard International LJ* 1; Máximo Langer, "Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery," (2007) 55 *American Journal of Comparative Law* 617 ff.; Allegra MacLeod, "Exporting U.S. Criminal Justice," (2010) 29 *Yale Law & Policy Review* 83; William T. Pizzi, "Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform," (1993) 54 *Ohio State LJ* 1325.

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36 For a general review of what may be at stake in the choice between adversarial and inquisitorial systems, see Malcolm Feeley, "The Adversary System," in Robert G. Janosik (ed.), *Encyclopedia of the American Judicial System* (1987), 753 ff.

37 See e.g. Mirjan Damaška, *Evidence Law Adrift* (1997); Mirjan Damaška, "Atomistic and Holistic Evaluation of Evidence. A Comparative View," in David S. Clark (ed.), *Comparative and Private International Law. Essays in Honor of John Merryman* (1990), 91 ff.; Mirjan Damaška, "Truth in Adjudication," (1998) 49 *Hastings LJ* 289 ff.; Thomas Weigend, "Should We Search for the Truth, and Who Should Do It?," (2011) 36 *North Carolina Journal of International Law & Commercial Regulation* 389 ff.

38 See e.g. Kent Roach, "Wrongful Convictions: Adversarial and Inquisitorial Themes," (2010) 35 *North Carolina Journal of International Law & Commercial Regulation* 387 ff.; Christopher Slobogin, "Lessons from Inquisitorialism," (2014) 87 *Southern California Law Review* 699. For a critique of the ability of the U.S. adversary system to reach truthful outcomes, see William T. Pizzi, *Trials without Truth* (1999). On the relationship between different types of psychological biases and the adversarial and inquisitorial process, see e.g. Bernd Schünemann, "Der Richter im Strafverfahren als manipulierter Dritter?—Zur empirischen Bestätigung von Perseveranz- und Schulterschlußeffekt," in Günther Bierbrauer, Walter Gottwald, and Beatrix Birnbreier-Stahlberger (eds.), *Verfahrensgerechtigkeit. Rechtspsychologische Forschungsbeiträge für die Justizpraxis* (1995), 215 ff.; Peter J. van Koppen and Steven D. Penrod (eds.), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2003).

39 See e.g. Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France: Culture juridique française et common law* (2003).

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41 See e.g. Robert A. Kagan, *Adversarial Legalism: The American Way of the Law* (2003).

42 Eugeny Pashukanis, *Selected Writings on Marxism and Law* (ed. P. Beirne and R. Sharlet, transl. P. Maggs, 1980).

43 Mittermaier, *Lehre* (n. 4) § 1.

44 Mittermaier, *Lehre* (n. 4) § 3.

45 Mittermaier, *Lehre* (n. 4) § 3.

46 René Garraud, *Traité Théorique et Pratique d'Instruction Criminelle et de Procédure Pénale*, Vol. I (1907), § 1.

47 Garraud (n. 46) § 21.

48 See e.g. Michèle-Laure Rassat, *Procédure pénale* (2010), §§ 16 and 17.

49 Rassat (n. 48) §§ 16 and 17.

50 Rassat (n. 48) § 21.

51 See e.g. Note, "Excluding Coerced Witness Testimony to Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Policy Misconduct," (2011) 38 *Fordham Urban LJ* 1221, 1224.

52 See e.g. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (transl. Tony Weir, 3rd ed., 1998).

53 For historical analysis of and qualifications about the practice of torture in the criminal process of the *ancien régime*, see e.g. Mirjan Damaška, "The Death of Legal Torture," (1978) 87 *Yale LJ* 860 ff. (book review); Mirjan Damaška, "The Quest for Due Process in the Age of Inquisition," (2012) 60 *American Journal of Comparative Law* 919 ff.; John Langbein, *Torture and the Law of Proof* (1976); Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (1993).

54 See e.g. *Colorado v. Connelly*, 479 U.S. 157, 181 (1986); *Rogers v. Richmond*, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961).

55 See e.g. R. H. Helmolz et al., *The Privilege against Self-Incrimination. Its Origins and Development* (1997); Gordon van Kessel, "European Perspectives on the Accused as a Source of Testimonial Evidence," (1998) 100 *West Virginia LR* 799 ff.

56 John H. Langbein, "Torture and Plea Bargaining," (1978) 46 *University of Chicago LR* 3 ff.; Máximo Langer, "Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure," (2006) 33 *American Journal of Crim. Law* 223 ff. For comparative analysis on prosecutors as de facto adjudicators, see e.g. Erik Luna and Marianne Wade (eds.), *The Prosecutor in Transnational Perspective* (2012).

57 On the regulation of the right against compulsory self-incrimination in England and Wales, see e.g. David J. Feldman, "England and Wales," in Craig M. Bradley (ed.), *Criminal Procedure. A World Wide Study* (2007), 149, 166–172.

58 For a critical analysis of the consequentialist and nonconsequentialist justifications of the adversarial system, see David Luban, *Law and Justice* (1988), 67–102. On the alleged superior or inferior epistemological value of the adversarial process, see e.g. Luigi Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (10th ed., 2009); Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World," (1996) 38 *William & Mary LR* 5 ff. On the alleged superior consistency of the adversarial or inquisitorial system with human rights, transparency, and democracy more generally, see e.g. Alberto Binder, *Justicia Penal y Estado de Derecho* (1993); Julio B. J. Maier, *I Derecho Procesal Penal* (2nd ed., 1996); and Bernd Schünemann, "Zur Kritik des amerikanischen Strafprozessmodells," in Edda Wesslau and Wolfgang Wohlers (eds.), *Festschrift für Gerhard Fezer* (2008), 555 ff. On whether the adversarial or inquisitorial systems are more efficient, see e.g. Richard A. Posner, "An Economic Approach to the Law of Evidence," (1999) 51 *Stanford LR* 1477 ff.

59 There have also been commentators who have considered that legitimate criminal processes have to combine aspects of the adversarial and the inquisitorial categories, rather than opting for one over the other. See e.g. Vogler (n. 5) (arguing that legitimate criminal processes have to combine elements of the adversarial, the inquisitorial, and the popular justice traditions).

60 See e.g. Ennio Amodio and Eugenio Selvaggi, "An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure," (1989) 62 *Temple LR* 1211 ff.; Binder (n. 58); Richard S. Frase, "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How Can We Find Out, and Why Should We Care?," (1990) 78 *California LR* 539 ff.; Richard S. Frase and Thomas Weigend, "German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?," (1995) 18 *Boston College International & Comparative LR* 317 ff.; Jenia Iontcheva Turner, "Judicial Participation in Plea Negotiations: A Comparative View," (2006) 54 *American Journal of Comparative Law* 199; John H. Langbein, "Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?," (1981) *American Bar Foundation Research Journal* 195 ff.; Lloyd L. Weinreb, *Denial of Justice: Criminal Process in the United States* (1977).

61 See e.g. *Kennedy v. U.K.*, App. no. 26839/05 (2011) 52 EHRR 4, para. 184.

62 See e.g. *Fitt v. U.K.*, App. no. 29777/96 (2000) 30 EHRR 480, para. 44; *Rowe and Davis v. U.K.*, App. no. 28901/95, ECHR 2000-II, para. 60 (Grand Chamber).

63 See e.g. *Kostovski v. Netherlands*, App. no. 11454/85 (1989) 12 EHRR 434, para. 41.

64 See e.g. Jackson, (2005) 68 *Modern LR* 737, 742–743.

65 See e.g. Amodio and Selvaggi, (1989) 62 *Temple LR* 1211; Langer, (2007) 55 *American Journal of Comparative Law* 617; David A. Sklansky, "Anti-Inquisitorialism," (2009) 122 *Harvard LR* 1634.

66 Mirjan Damaška, *The Faces of Justice and State Authority* (1986).

67 Damaška (n. 66) 6.

68 On the importance and influence of Damaška's work, see John Jackson, Máximo Langer, and Peter Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (2008).

69 See e.g. Markus D. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," (1995) 43 *American Journal of Comparative Law* 227 ff.; Stewart Field, "State, Citizen, and Character in French Criminal Process," (2006) 33 *Journal of Law & Society* 522 ff.; Nicola Lacey and Lucia Zedner, "Community in German Criminal Justice: A Significant Absence?," (1998) 7 *Social & Legal Studies* 7 ff.; Jacqueline E. Ross, "The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany," (2007) 55 *American Journal of Comparative Law* 493 ff.; James Q. Whitman, "Equality in Criminal Law: The Two Divergent Western Roads," (2009) 1 *Journal of Legal Analysis* 119 ff.; James Q. Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty," (2004) 113 *Yale LJ* 1151.

70 Herbert L. Packer, "Two Models of Criminal Procedure," (1964) 113 *University of Pennsylvania LR* 1 ff.

71 Packer, (1964) 113 *University of Pennsylvania LR* 1, 7–9.

72 See e.g. Eric Luna, "A Place for Comparative Criminal Procedure," (2004) 42 *Brandeis LJ* 277 ff.; Kent Roach, "Four Models of the Criminal Process," (1999) 89 *Journal of Crim. Law & Criminology* 671 ff.

73 For critical analysis of Packer's models, see e.g. John Griffiths, "Ideology in Criminal Procedure *or* A Third 'Model' of the Criminal Process," (1970) 79 *Yale LJ* 359 ff. For a recent review of Packer's work and the main reactions to it, see Hadar Aviram, "Packer in Context: Formalism and Fairness in the Due Process Model," (2011) 36 *Law & Social Inquiry* 237 ff.

74 Martin Shapiro, *Courts. A Comparative and Political Analysis* (1981), 1.

75 Shapiro (n. 74).

76 On the comparative law functionalist school, see e.g. Zweigert and Kötz (n. 52) and accompanying text.

77 See e.g. Commission Justice pénale et Droits de l'homme, *La mise en état des affaires pénales* (1991); Sarah Summers, *Fair Trials. The European Criminal Procedure Tradition and the European Court of Human Rights* (2007).

78 See e.g. Summers (n. 77) 11–13.

79 See e.g. Commission Justice pénale et Droits de l'homme (n. 77); Summers (n. 77).

80 There have been exceptions to this trend. A recent example is Paul Roberts and Jill Hunter (eds.), *Criminal Evidence and Human Rights* (2012) (exploring the impact of human rights on a wide range of common law jurisdictions).

81 For criticisms of comparative law and Western legal culture more generally that parallel the first two thematic limitations that I just mentioned, see the three following works by William Twining: *General Jurisprudence* (2009), ch. 1; *Globalisation and Legal Theory* (2001), chs. 6 and 7; "Globalization and Comparative Law," in Esin Örücü and David Nelken (eds.), *Comparative Law. A Handbook* (2007), 69 ff. In these works, Twining articulates other criticisms to comparative law such as an almost exclusive interest in doctrine that does not apply to comparative criminal procedure that has a long tradition of institutional analyses that go beyond the letter of the law. In that sense, comparative criminal procedure can be understood not simply as a subspecies of comparative law, but rather as a field that, while related to comparative law, also has its own set of theoretical traditions and thematic interests.

82 For a recent exception by a scholar with a strong international law background, see Chimene Keitner's comparative exploration of this type of question, "Rights Beyond Borders," (2011) 36 *Yale Journal of International Law* 55 ff.

83 For a good example of this type of doctrinal, institutional and role approach, see Mireille Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures* (2002). Some of these doctrinal, institutional and role approach limitations may apply not only to comparative criminal procedure, but to criminal procedure more generally. See, e.g., Paul Roberts, "Groundwork for a Jurisprudence of Criminal Procedure', in R.A. Duff and S.P. Green (eds.), *Philosophical Foundations of Criminal Law* (2011) 379–408.

84 See e.g. Craig M. Bradley (ed.), *Criminal Procedure. A World Wide Study* (2007); Steven Thaman, *Comparative Criminal Procedure: A Casebook Approach* (2nd ed., 2008).

85 A remarkable exception is the work of David H. Bayley, to which comparative criminal procedure scholars have paid limited attention. See his *Patterns of Policing* (1990) and *Changing the Guard: Developing Democratic Police Abroad* (2006).

86 It is for this reason that I did not use the adversarial–inquisitorial categories or similar multidimensional models as independent variables in Máximo Langer, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes," (2011) 105 *American Journal of International Law* 1 (arguing that the degree of control by the executive branch on whether or not formal proceedings are open has affected the type of defendants against whom these proceedings have been opened).

87 For comparative criminal procedure's attempts to engage with some of these literatures, see Langer, (2007) 55 *American Journal of Comparative Law* 617; Langer, (2011) 105 *American Journal of International Law* 1.

88 See e.g. Abraham S. Goldstein and Martin Marcus, "The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany," (1977) 87 *Yale LJ* 240 ff.; John H. Langbein and Lloyd L. Weinreb, "Continental Criminal Procedure: 'Myth' and Reality," (1978) 87 *Yale LJ* 1549 ff.

89 For comparative analysis of prosecutors' behavior based on their incentives, see Nuno M. Garoupa, "The Economics of Prosecutors," in Alon Harel and Keith N. Hylton (eds.), *Research Handbook on the Economics of Criminal Law* (2012), 231 ff.; Langer, (2011) 105 *American Journal of International Law* 1.

90 See e.g. Hodgson (n. 28); David T. Johnson, *The Japanese Way of Justice. Prosecuting Crime in Japan* (2001); Langbein (n. 25); Langer, (2007) 55 *American Journal of Comparative Law* 617.

91 For a rare exception that has been mostly ignored by the comparative criminal procedure literature, see Floyd F. Feeney, *German and American Prosecutions: An Approach to Statistical Comparison* (1998).

92 For an attempt to integrate quantitative and qualitative methods with comparative criminal procedure's models, see Máximo Langer and Joseph W. Doherty, "Managerial Judging Goes International, but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms," (2011) 36 *Yale Journal of International Law* 241 ff.

93 See Mirjan Damaška, "What is the Point of International Criminal Justice?," (2008) 83 *Chicago-Kent LR* 229 ff.; R. A. Duff et

al. (eds.), *The Trial on Trial*, Vol. 3 (2007); Ferrajoli (n. 58); Jackson, (2005) 68 *Modern LR* 737; John D. Jackson and Sarah J. Summers, *The Internationalization of Criminal Evidence. Beyond the Common Law and Civil Law Traditions* (2012); Paul Roberts, "Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication," in Duff et al., ibid., Vol. 2 (2006), 37 ff.; Sergey Vasiliev, 'International Criminal Trials: A Normative Theory,' PhD dissertation, University of Amsterdam, 2014.

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