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IN THE BEGINNING WAS FORTESCUE:
ON THE INTELLECTUAL ORIGINS OF THE ADVERSARIAL AND INQUISITORIAL
SYSTEMS AND COMMON AND CIVIL LAW IN COMPARATIVE CRIMINAL
PROCEDURE

By Máximo Langer*

I. Introduction: The Need for an Intellectual History of Comparative Criminal Procedure

The distinctions between adversarial and inquisitorial systems and between common and civil law have been central to comparative criminal procedure.¹ In the United States, the Supreme Court invokes the adversary character of American criminal procedure to make decisions in individual cases and to distinguish it from the criminal process in civil law.² In France, commentators characterize continental European criminal procedure as a mix between adversarial and inquisitorial models, in contrast to Anglo-

* Professor of Law, UCLA School of Law. I would like to thank Stuart Banner, Samuel Bray, Beth Colgan, Mirjan Damaška, Sharon Dolovich, Ingrid Eagly, Henry Ansgar Kelly, Samuel J. Levine, Richard Re, Richard J. Ross, Debora Shuger, David Sklansky, Sebastian Sobecki, and participants at the conference in honor of Mirjan Damaška, “The Administration of Justice—Past Experiences and Challenges for the Future”, Cavtat, Croatia, May 28-29, 2015, and the UCLA Criminal Justice Faculty Workshop, for their feedback on earlier versions of this paper. I would also like to thank the Hugh and Hazel Darling Law Library at UCLA School of Law, especially Gabriel Juárez, Nory Loeung, John Wilson for his research support, and Elyse Meyers for editing the piece. I dedicate this chapter to my mentor Mirjan Damaška, with deep admiration, affection and gratitude.

¹ See Máximo Langer, “The Long Shadow of the Adversarial and Inquisitorial Categories”, in *The Oxford Handbook of Criminal Law* 887 (Markus D. Dubber & Tatjana Hörnle eds., Oxford University Press, 2014) [hereinafter “The Long Shadow”]; Máximo Langer, “Strength, Weakness or Both? On the Endurance of the Adversarial-Inquisitorial Systems in Comparative Criminal Procedure”, in *Research Handbook on Comparative Criminal Procedure* (Jacqueline Ross & Stephen Thaman eds., Edward Elgar Publishing, forthcoming 2016) [hereinafter “Strength, Weakness or Both”].

² See, generally, David A. Sklansky, “Anti-Inquisitorialism”, 122 *Harvard Law Review* 1634 (2009) [hereinafter “Anti-Inquisitorialism”].

American criminal procedure that would be predominantly adversarial.³ Italy and almost all Latin American countries have introduced substantial criminal procedure reforms in the last few decades that reformers have presented as a move from an inquisitorial or mixed criminal process to an adversarial one.⁴ At international criminal tribunals and the International Criminal Court, commentators, judges, and policy-makers have used the adversarial and inquisitorial categories to justify the adoption of procedural rules, make decisions in individual cases, and explain what type of criminal process these jurisdictions have.⁵

Comparativists and historians have written on the history of these systems. The predominant account is that the inquisitorial system originated in continental Europe around the twelfth and thirteenth centuries when the Catholic Church and individual secular jurisdictions established professional bureaucracies to prosecute and adjudicate crime, authorized the initiation of legal process by public officials, and adopted a system of legal proof and legal torture.⁶ As for the adversarial system, the predominant account states that it originated in the eighteenth century when English law and judges gradually authorized the participation of professional defense attorneys in felony trials, which gradually led to the adoption of common law rules of

³ See, e.g., Michèle-Laure Rassat, *Procédure pénale* (2010) § 21.

⁴ See, e.g., Elisabetta Grande, “Italian Criminal Justice: Borrowing and Resistance”, 48 *American Journal of Comparative Law* 227 (2000); Máximo Langer, “Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery”, 55 *American Journal of Comparative Law* 617 (2007) [hereinafter “Revolution in Latin American Criminal Procedure”].

⁵ See, e.g., Kai Ambos, “International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?”, 3 *International Criminal Law Review* 1 (2003); Cassesse’s *International Criminal Law* 329-346 (revised by Antonio Cassesse et al., Oxford University Press, 2013); Máximo Langer, “The Rise of Managerial Judging in International Criminal Law”, 53 *American Journal of Comparative Law* 835 (2005); *International Criminal Procedure. Rules and Principles* (Göran Sluiter et al. eds., Oxford University Press, 2013).

⁶ 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 Chiffolleau, “Avouer l’inavouable: l’aveu et la procédure inquisitoire à la fin du Moyen Âge”, in *L’aveu* 57 (Renaud Dulong ed., 2001); John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (with a new preface, University of Chicago Press, 2006) [hereinafter *Torture and the Law of Proof*]; Lotte Kéry, “Inquisitio—denunciatio—exceptio: Möglichkeiten der Verfahrenseinleitung im Dekretalenrecht”, (2001) 87 *ZRG* 226; James Q. Whitman, *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial* 98 et seq. (Yale University Press, 2008).

evidence and to the redefinition of the role of judges as passive umpires, among other changes.⁷

I want to write a different history of these categories: an intellectual history or genealogy about how the adversarial and inquisitorial systems and common and civil law became central categories of comparative criminal procedure. Rather than asking when the adversarial and inquisitorial systems' rules and institutional features originated, I am interested in a different set of questions, such as: 1) when, how and why judges, legal practitioners, policy-makers, and scholars around the world started to think that the contrast between Anglo-American and continental European jurisdictions was central to the comparative understanding of criminal process; 2) when, how and why judges, practitioners, policy-makers, and scholars started to think that the doctrinal and institutional differences between Anglo-American and continental European criminal processes were based on different epistemological paradigms for how the legal process does or should produce truthful verdicts; 3) when, how and why judges, practitioners, policy-makers, and scholars started to think that these legal and institutional differences could be explained through or were associated with differences between Anglo-American and continental European societies and cultural values and with different conceptions of the state; and 4) when, how and why judges, legal practitioners, policy-makers, and scholars started to use the adversarial and inquisitorial categories as a way to make sense of the differences between Anglo-American and continental European jurisdictions.

In this chapter, I want to start writing this genealogy or intellectual history by analyzing Sir John Fortescue and his book *De Laudibus Legum Angliae* (*In Praise of the Laws of England*) [hereinafter *De Laudibus*]. Legal historians and constitutional and political theorists have analyzed Fortescue as a legal and political figure and considered him to be an important political theorist in fifteenth century England.⁸ However, comparative criminal

⁷ See e.g. J.M. Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries", 9 *Law and History Review* 221 (1991); Stephen Landsman, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England", 75 *Cornell Law Review* 497 (1990); John H. Langbein, *The Origins of Adversary Criminal Trial* (2003) [hereinafter *Origins*].

⁸ See, e.g., J.H. Baker, *An Introduction to English Legal History* (4th ed. 2007) [hereinafter *English Legal History*], at 166: "It was the professional training of the judiciary, and the notion of a constitutional democracy as expounded by Fortescue in the

procedure scholarship has not paid attention to Fortescue as one of the intellectual founders of the field.⁹ At most, Fortescue has been cited as a source of information about the criminal process in England in the fifteenth century or has had his position on individual topics noted.¹⁰ But scholars and

fifteenth century, which transformed the personal loyalty which judges owed the king into a more objective form of loyalty to an impersonal Crown and to the king's common law"; Alan Cromartie, *The Constitutionalist Revolution. An Essay on the History of England, 1450-1642* (Cambridge University Press, 2006); W. S. Holdsworth, II *A History of English Law* 566-571 (third edition, rewritten, Methuen & co. Ltd., 1923) [hereinafter II *History of English Law*], especially at 569: "(Fortescue) shares with Bentham the fame of being at once a lawyer and a practical political philosopher. Both men clearly saw some of the evils from which their own age suffered. Both suggested the remedies which were successfully adopted by the age which followed...."; D.J. Galligan and C. Palmer, "Patterns of Constitutional Thought from Fortescue to Bentham", in *Constitutions and the Classics* 1 (D.J. Galligan ed., Oxford University Press, 2014); M.R.L.L. Kelley, "Sir John Fortescue and the Political Dominium: The People, the Common Weal, and the King", in *Constitutions and the Classics* 1 (D. J. Galligan ed., Oxford University Press, 2014); Shelley Lockwood, *Introduction to Sir John Fortescue's On the Laws and Governance of England* (Cambridge Texts in the History of Political Thought, 1997) [hereinafter *Introduction*], at xv: "Sir John Fortescue ... was undoubtedly the major English political theorist of the fifteenth century."; Sebastian Sobecki, *Unwritten Verities. The Making of England's Vernacular Legal Culture, 1463-1549* 100 (2015) (arguing that Fortescue offered "a first political theory of the common law that defined its assertively conciliar position toward the monarchy and the state") [hereinafter Sobecki, *Unwritten Verities*]; William Stubbs, III *The Constitutional History of England* 240-246 (2nd ed., Oxford at Clarendon Press, 1878); Walter Ullman, *Law and Politics in the Middle Ages* 284-285 (Cornell University Press, Ithaca, 1975). Others have dismissed the value of Fortescue as a political theorist. See, e.g., J.G.A. Pocock, *The Machiavellian Moment: Florentine Thought and the Atlantic Republic Tradition* 9 (Princeton University Press, 1975) (describing Fortescue as "an English lawyer and an amateur of philosophy who helps us understand the ideas of an age by coarsening them slightly").

⁹ Within comparative law circles, Harold Berman briefly analyzed the work of Fortescue, though not in reference to the criminal or legal process. Arguing against authors like Thomas Stubbs, Henry Adams, Quentin Skinner and R.C. van Caenegem, Berman claimed that, despite praising the law of England, Fortescue did not consider English laws "to be essentially different in their fundamental nature, sources, and purposes from the customary laws of other countries, except in their antiquity". In support of this argument, Berman said that "Fortescue's principal work on legal philosophy was strictly on the school of natural law represented by Thomas Aquinas". See Harold J. Berman, *II Law and Revolution. The Impact of the Protestant Reformations on the Western Legal Tradition* 231-232 (2003).

¹⁰ See, e.g., Mirjan Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* 39-40 (1986) (explaining that Fortescue still celebrated the self-informing Angevin jury in the fifteenth century) [hereinafter *Faces of Justice*]; Langbein, *Origins*, at 262 (including Fortescue in a list of English writers who subscribed

policy-makers have not evaluated Fortescue as one of the originators of our contemporary understanding of the criminal process.

I argue here that Fortescue made at least five crucial contributions to comparative criminal procedure that have survived to this day. First, he was among the very first to concentrate on analysis of the differences between criminal process in civil law and English common law and to offer a specific conceptualization to capture these differences.¹¹ This work impacted later scholarship and policy-makers, but became obsolete as changes in civil and common law criminal process made Fortescue's conceptualization lose its heuristic value. However, the centrality of the civil law and common law distinction to analyze the criminal process and the idea that we need categories to capture the differences between these traditions persist.

Second, Fortescue used the distinction between civil law and English common law in both a descriptive and a normative sense, and argued for the superiority of the English legal process. Normative use of the civil law and common law distinction survives today in an important strand of contemporary comparative criminal procedure and in judicial and legal reform efforts around the world.

In addition, Fortescue claimed that England's criminal process was superior to the civil law's criminal process because it was more accurate. This epistemological perspective has also endured until modern day in comparative criminal procedure. However, I will explain that Fortescue believed in the superior ability of the English criminal process to reach truthful outcomes for reasons somewhat different than those typically articulated in contemporary criminal procedure analyses.

to the presumption of innocence); at 340 (mentioning Fortescue in a list of English authors that extolled the superiority of England's torture-free procedure); John H. Langbein et al., *History of the Common Law* 155-156 (2009) (quoting Fortescue to explain the degree of the serjeant-at-law); at 173 (quoting Fortescue to describe legal education in England); at 240 (citing a text that relies on Fortescue's statement on self-informing jurors); at 244-245 (quoting Fortescue's account of civil jury trial); at 697 (including Fortescue in a list of English writers who subscribed to the presumption of innocence) [hereinafter *Common Law*].

¹¹ In fact, S.B. Chrimes, "Notes", in Sir John Fortescue, *De Laudibus Legal Angliae* (S.B. Chrimes ed. and trans., Cambridge at the University Press, 1949) (hereinafter "Notes"), at 162, considered Fortescue's work to be "... the earliest ... comparison of English and Roman law...."

Fourth, Fortescue argued that there is a relationship between common law and civil law criminal processes and the societies in which they operate. As a consequence, he claimed that English criminal process could not be transplanted to other jurisdictions. These ideas have also been important in contemporary criminal procedure scholarship and judicial and legal reforms.

Finally, like a substantial number of policy-makers and a substantial part of contemporary comparative criminal procedure scholarship, Fortescue claimed that there is a close relationship between the criminal processes in common law and civil law and types of political authority. Specifically, he believed that political authority based on people's consent would not circumvent due process in English law, but political authority not based on such consent would do so in civil law. This framework could provide avenues for descriptive and normative inquiries that contemporary comparative criminal procedure has not explored.

II. The Adversarial and Inquisitorial Systems as Central Categories of Comparative Criminal Procedure

At least since the first half of the nineteenth century, the accusatorial (later adversarial) and inquisitorial systems have been central categories in comparative criminal procedure.¹² Judges, practitioners, and scholars have used these categories to capture the differences between common law and civil law jurisdictions. They have also used these two systems as normative models for procedural reform and to make decisions on individual cases.¹³

Though the precise characteristics of these categories vary in different formulations, the adversarial system is often defined as conceiving of the criminal process as a dispute between prosecution and defense, at an oral and public hearing before a bifurcated court composed of a passive professional judge and a jury. In contrast, the inquisitorial system is defined as conceiving of the criminal process as an impartial single inquiry, carried

¹² See, e.g., 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", 11 *Law Magazine Quarterly Review of Jurisprudence* 1 (1834); Faustin Hélie, *Traité de l'instruction criminelle*, Vol. 5, (1853); Karl J. A. Mittermaier, *Lehre vom Beweise im deutschen Strafprozesse* (1834).

¹³ See *supra* notes 1 to 5.

out through written, secret proceedings by a court composed of active professional judges.¹⁴

The adversarial and inquisitorial systems are, respectively, associated with Anglo-American common law jurisdictions and Continental civil law ones.¹⁵ Each system is based on different epistemological paradigms for how the legal process does or should produce truthful verdicts.¹⁶ Each system is also associated with a different conception of society—common law with a more individualistic conception and civil law with a more communitarian one—as well as with different conceptions of the political State—the adversarial system with a more democratic or liberal conception and the inquisitorial system with a more authoritarian or non-liberal one.¹⁷

¹⁴ See, e.g., Mirjan Damaška, *Evidence Law Adrift* (1997) [hereinafter *Evidence Law Adrift*]; Mirjan Damaška, “Adversary System,” in, *The Encyclopedia of Crime and Justice* 24 (Sanford H. Kadish ed., 1984); Mirjan Damaška, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,” 121 *University of Pennsylvania Law Review* 506 (1973) [hereinafter “Evidentiary Barriers”]; Malcolm Feeley, “The Adversary System,” in *Encyclopedia of the American Judicial System* 753 (Robert G. Janosik ed., 1987); John D. Jackson, “The Effect of Human Rights on Criminal Evidentiary Processes: Convergence, Divergence or Realignment?,” 68 *Modern Law Review* 737, 742–743 (2005) [hereinafter “The Effect of Human Rights”].

¹⁵ See, e.g., Jacqueline Hodgson, *French Criminal Justice. A Comparative Account of Investigation and Prosecution of Crime in France* (2005); Máximo Langer, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,” 45 *Harvard International Law Journal* 1 (2004) [hereinafter “Legal Translations”].

¹⁶ See, e.g., Mirjan Damaška, “Atomistic and Holistic Evaluation of Evidence. A Comparative View,” in *Comparative and Private International Law. Essays in Honor of John Merryman* 91 (David S. Clark ed., 1990); Damaška, *Evidence Law Adrift*; Damaška, “Evidentiary Barriers”; Mirjan Damaška, “Truth in Adjudication,” (1998) 49 *Hastings Law Journal* 289; Luigi Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (10th ed., 2009); William T. Pizzi, *Trials without Truth* (1999); Kent Roach, “Wrongful Convictions: Adversarial and Inquisitorial Themes,” 35 *North Carolina Journal of International Law & Commercial Regulation* 387 (2010); Thomas Weigend, “Should We Search for the Truth, and Who Should Do It?,” 36 *North Carolina Journal of International Law & Commercial Regulation* 389 (2011).

¹⁷ See, e.g., Alberto Binder, *Justicia Penal y Estado de Derecho* (1993) [hereinafter *Justicia Penal*]; Damaška, *Faces of Justice*; Maria Rosaria Ferrarese, “An Entrepreneurial Conception of the Law? The American Model through Italian Eyes,” in *Comparing Legal Cultures* (David Nelken ed., Aldershot: Dartmouth, 1997); Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France: Culture juridique française et common law* (2003); Abraham S. Goldstein, “Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure,” 26 *Stanford Law Review* 1009

Most of these characteristics are even present in contemporary criminal procedure accounts that use other categories instead of the adversarial and inquisitorial systems. Damaška's *The Faces of Justice and State Authority* is the most sophisticated and influential illustration of this phenomenon. In this book, 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."¹⁸

One set of opposing ideal-types includes the *hierarchical* and *coordinate ideals*; these ideal-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 *conflict-solving models*. These ideal-types articulate two goals for the state and its administration of justice. In the policy-implementing model, the goal of the administration of justice and the state is to implement a certain conception of the good. 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. Using these categories, Damaška classified legal processes from around the world.

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. However, original as the framework is, it can be understood as an elaboration on the adversarial and inquisitorial systems rather than as a true alternative to them. Like an important strand of the

(1974) [hereinafter "Reflections on Two Models"]; Robert A. Kagan, *Adversarial Legalism: The American Way of the Law* (2003) [hereinafter *Adversarial Legalism*]; Julio B. J. Maier, *I Derecho Procesal Penal* (2nd ed., 1996) [hereinafter *Derecho Procesal Penal*]; Bernd Schünemann, "Zur Kritik des amerikanischen Strafprozessmodells," in *Festschrift für Gerhard Fezer* (Edda Wesslau and Wolfgang Wohlers eds., 2008), 555 ff.

¹⁸ Damaška, *Faces of Justice*, at 6.

adversarial–inquisitorial literature, Damaška’s framework relies on the ideal-types as theoretical devices, effectively creating abstract models as a way to classify and analyze actual legal processes.¹⁹

In addition, Damaška’s conflict-solving and policy-implementing models can be considered an elaboration on the classical adversarial–inquisitorial opposition between party-contest and impartial inquiry, while the coordinate and hierarchical models can be considered an elaboration on the classical adversarial–inquisitorial opposition between lay and professional decision-makers.

The conflict-solving and policy-implementing models can also be considered an elaboration on the classical comparative criminal procedure idea that there is a link between types of criminal process and types of political states. Traditional articulations link the adversarial to a democratic conception of the state and the inquisitorial to an authoritarian or monarchical one, while Damaška’s framework links contest-like proceedings to a liberal conception of the state and inquiry-like proceedings to a non-liberal one. The contribution is new but operates within an intellectual space already opened by the literature on adversarial and inquisitorial systems.²⁰

III. A Normatively-Driven Comparative Law of Differences: Politics, English National Identity and the Self-Interest of the English Legal Profession

I would like to write a history of how these concepts and themes became central to the comparative analysis of criminal process. One of my working hypotheses for this project is that English jurists played a principal role in the articulation and development of these ideas.

Scholars and lawyers on the Continent were already distinguishing between accusatorial and inquisitorial process in the twelfth and thirteenth centuries, as a way to differentiate a legal process requiring initiation by a

¹⁹ On the conceptualization of the adversarial and inquisitorial systems as ideal-types, see Máximo Langer, “La Dicotomía Acusatorio-Inquisitivo y la Importación de Mecanismos Procesales de la Tradición Jurídica Anglo-Sajona”, in Julio Maier and Alberto Bovino (eds.), *Procedimiento Abreviado* 97 (2001); Langer, “The Long Shadow”.

²⁰ See Langer, “The Long Shadow”, at 902-903.

private individual's accusation from a legal process allowing initiation by public officials on their own motion based on public rumors (*fama*).²¹ However, the distinction between these two processes was a distinction within, rather than between, legal systems. In other words, the terms were mainly used to refer to two types of legal processes that coexisted within the same legal system, rather than as a means to compare the processes of different legal systems. Relatedly, at this early time, accusatorial process and inquisitorial process did not connote, respectively, English and Continental jurisdictions. In addition, at least initially, accusatorial and inquisitorial processes were not two autonomous, full procedural systems, but rather two ways to initiate a legal process. In other words, once initiated either by private accusation or by public officials' motion, the legal processes shared similar features.²²

Leaving aside English men trained in civil law and civil law-trained men who lived in England,²³ continental scholars did not tend to pay substantial attention to English common law, which was considered an anomaly within European law at the time: "The common law lawyers had virtually no intellectual rapport with their Continental counterparts, and their law-French dialect would not have been understood in Paris. Their system of law was so embedded in the procedure of the king's courts as to be largely incomprehensible outside them."²⁴

In contrast, for English common law lawyers, explaining why common law was as sound as, and even superior to, civil law was crucial to

²¹ 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 *The History of Courts and Procedure in Medieval Canon Law* (Wilfried Hartmann and Kenneth Pennington eds., Catholic University Press of America, forthcoming 2016).

²² See, e.g., IV Lateran Council, Canon 8 (1215). For an English translation, see Rev. H.J. Schroeder, *Disciplinary Decrees of the General Councils* 248-250 (1937).

²³ See, e.g., J.H. Baker, "Introduction. English Law and the Renaissance", in II *The Reports of Sir John Spelman* (J.H. Baker ed., 1978), 94 Selden Society 23 [hereinafter "The Renaissance"], at 24: "Intellectuals such as Erasmus and Starkey were attacking the language and content of English law as barbarous and praising the Civil law as refined and humane"; S.E. Thorne, "English Law and the Renaissance", in his *Essays in English Legal History* 187 (The Hambledon Press, 1985) [hereinafter "English Law and the Renaissance"] (describing criticism of English law and reform proposals in England inspired in Roman law).

²⁴ See, e.g., Baker, *English Legal History*, at 29.

maintaining their legitimacy, because civil law was not only the prevailing law in the rest of Europe but was also used in some English courts, including in the admiralty, the ecclesiastical, and even the chancery courts.²⁵ In addition, the distinction between common law and civil law played a role in the construction of English national identity and in political and religious conflict.²⁶ It is thus not surprising that English lawyers were among the first to think comparatively in a more sustained way about civil law and common law.

The competition between the ancient common law courts and other jurisdictions was very much alive at the time Fortescue wrote *De Laubidus Legum Angliae (In Praise of the Laws of England)* (written 1468-71);²⁷ its title and content reflect national identity and national pride.²⁸ John Fortescue became Lord Chief of Justice of the King's Bench in 1442 and served in that position for more than eighteen years, until the dethronement of Henry VI in 1461. Fortescue followed his dethroned master into exile in Scotland and

²⁵ On civil law's presence in and influence over English courts and English legal culture, see, e.g., Baker, *English Legal History*, at 27-29; Baker, "The Renaissance"; Christopher W. Brooks, *Law, Politics and Society in Early Modern England* 12, 121-122, 148 (Cambridge University Press, 2008) [hereinafter *Early Modern England*]; Frederic William Maitland, *English Law and the Renaissance* (Cambridge: at the University Press, 1901) [hereinafter, *English Law*]; Thorne, "English Law and the Renaissance". On the legal process of ecclesiastical courts in England and its evolution over time, see, e.g., Henry Ansgar Kelly, "Thomas More on Inquisitorial Due Process", CXXIII-503 *English Historical Review* 847 (2008); Henry Ansgar Kelly, "Inquisition, Public Fame and Confession: General Rules and English Practice", in *The Culture of Inquisition in Medieval England* (Mary C. Flannery & Katie T. Walter eds., Cambridge: D.S. Brewer, 2013); Henry Ansgar Kelly, "Mixing Canon and Common Law in Religious Prosecutions under Henry VIII and Edward VI: Bishop Bonner, Anne Askew, and Beyond", XLVI/4 *Sixteenth Century Journal* 99 (2015).

²⁶ See, e.g., Baker, "The Renaissance", at 25: "The reception of imperial law would surely have embarrassed a king who asserted his completed independence from foreign (especially Roman) authority"; Brooks, *Early Modern England*, at 98-99, 120; R. C. van Caenegem, *The Birth of the English Common Law* (2nd ed., Cambridge University Press, 1988) [hereinafter *Birth*]; Maitland, *English Law*; Thorne, "English Law and the Renaissance", at 188: "It would indeed be curious if at the very moment when an unmistakable nationalistic note was being sounded ..., when the usurped authority of the bishop of Rome was being cast off under the guise of restoring traditional English liberties, that a movement should be under way to substitute an alien system of law for the native variety."

²⁷ See, e.g., Baker, *English Legal History*, at 39-41.

²⁸ See Brooks, *Early Modern England*, at 23; van Caenegem, *Birth*, at 98.

Henry VI appointed him as his Lord Chancellor. He later followed Henry's wife Margaret and their son Edward to Flanders and France.²⁹

While in exile, Fortescue undertook, among other functions, the education of Edward on the laws of England and the duties of the King of England.³⁰ In this context, Fortescue wrote *De Laudibus Legum Angliae*.³¹ In fact, *De Laudibus* is written as a dialogue between the Prince (Edward) and the Chancellor (Fortescue) and is an example of the "mirror for princes" genre—i.e., as a work written to instruct and advise the prince.³²

The book's influence is indicated by its multiple editions in Latin and English and translations from Latin to English over the centuries.³³ This book was among a short list of textbooks that could be recommended to intending barristers for the initial course of reading between the Restoration and the reign of George II (1727-1760).³⁴ The book also had practical influence and was used in legal and political debates.³⁵ For instance, it has

²⁹ See, e.g., Thomas (Fortescue) Lord Clermont, "Life of the Author", in Chancellor Sir John Fortescue, *De Laudibus Legum Angliae. A Treatise in Commendation of the Laws of England* viii, xi-xii, xvii, xx, xxiv-xxx (with translation by Francis Gregor and notes by Andrew Amos, Cincinnati: Robert Clarke and Co., 1874) [hereinafter Lord Clermont, "Life"].

³⁰ *Id.* at xxx.

³¹ See S.B. Chrimes, "Chronology of Fortescue's Life", in Sir John Fortescue, *De Laudibus Legum Angliae* lxvi (edited and translated by S.B. Chrimes, 1949).

³² See, e.g., Rosemarie McGerr, *A Lancastrian Mirror for Princes* (2011).

³³ For descriptions of these editions and translations, see "Lord Clermont's Preface", in Chancellor Sir John Fortescue, *De Laudibus Legum Angliae. A Treatise in Commendation of the Laws of England* lvii-lix (with translation by Francis Gregor and notes by Andrew Amos, Cincinnati: Robert Clarke and Co., 1874); S.B. Chrimes, "Introduction", in Sir John Fortescue, *De Laudibus Legum Angliae* xcv (edited and translated by S.B. Chrimes, 1949); and Harold Dexter Hazeltine, *General Preface*, in *id.* at ix. There is a contemporary edition of S.B. Chrimes' translation edited by Shelley Lockwood in Sir John Fortescue, *On the Laws and Governance of England* (Shelley Lockwood ed., 1997) [hereinafter *In Praise of the Laws of England*]. Unless otherwise indicated, all my quotations of *De Laudibus Legum Angliae* in English come from this latest edition by Lockwood.

³⁴ Langbein et al., *Common Law*, at 935.

³⁵ See, e.g., Holdsworth, II *History of English Law*, at 571: "Without departing in any way from the constitutional position which (Fortescue) had taken up in *De Laudibus*, he made suggestions which were carried out by the Tudors.... At the end of the fifteenth century it was possible to advocate a strong executive founded upon the prerogative, and yet to believe in parliamentary control. It is for this reason that the practical influence of Fortescue's works has been curiously double. They have enjoyed the rare distinction of

been stated that, “(n)ext to Bracton, among medieval English writers on law and politics, the author probably most quoted in the great struggles of the seventeenth century was Sir John Fortescue.”³⁶

One of Fortescue’s points in *De Laudibus* was to argue why the King of England could not reject common law even if he wanted to. Another point was to argue why common law was superior to civil law. In the text, after being persuaded that studying the law was important, the Prince asks “whether I shall devote myself to the study of the laws of England or of the civil laws which are renowned throughout the world”.³⁷ The Chancellor responds that “the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political.”³⁸ Consequently he cannot “... change the laws without the assent of his subjects nor to burden an unwilling people with strange impositions”³⁹

The Chancellor says that “... comparisons are ... odious”⁴⁰ However, he tells the Prince that he “... will be able to gather more effectively whether both of these laws are of equal merit, or whether one more richly deserves praise than the other ... from those points wherein their judgements differ. For where both laws agree, they are equally praiseworthy, but in the cases wherein they differ, the superiorities of the more excellent law will appear after due reflection.... For if the principles of the two laws are set alongside each other, their qualities will stand out more clearly since, as Aristotle says, ‘Opposites placed in juxtaposition are more manifest’.”⁴¹

In this sense, *De Laudibus* can be considered one of the originators of the *comparative law of differences* (as opposed to the *comparative law of*

having suggested both the measures which led to the establishment of the strongest monarchy which England had had since the time of the Norman and Angevin kings, and the arguments which were frequently and effectively used by the opponent to arbitrary rule.” On the issue of Fortescue’s influence more generally, see Caroline A. J. Skeel, “The Influence of the Writing of Sir John Fortescue”, 10 *Transactions of the Royal Historical Society* 77 (1916).

³⁶ Charles Howard McIlwain, *Growth of Political Thought in the West* 354 (1932) [hereinafter *Political Thought*].

³⁷ Fortescue, *In Praise of the Laws of England*, at 14.

³⁸ *Id.* at 17.

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 29.

⁴¹ *Id.* at 29 and 35.

commonalities). With its emphasis on civil and common law, comparative criminal procedure has tended to concentrate on explaining the differences between the legal systems of the different traditions, rather than their commonalities.

To capture differences, Fortescue uses binary oppositions such as civil law and English law, and others that I analyze later. This use of oppositions continues in contemporary comparative criminal procedure, with the use of oppositions like common law-civil law and adversarial-inquisitorial systems, and alternatives to them.⁴²

Fortescue's study of the *comparative law of differences* and the use of the English law-civil law opposition are normatively driven; his goal in comparing English law and civil law is to argue that one is clearly superior. This normative use of common law and civil law in comparative criminal procedure is very much alive now, among judges and policy-makers⁴³ and a share of comparative criminal procedure scholars.⁴⁴

⁴² See, e.g., Langer, "The Long Shadow"; Inga Markovits, "Playing the Opposite Game: On Mirjan Damaška's The Faces of Justice and State Authority", 41 *Stanford Law Review* 1313 (book review) (1989).

⁴³ See, e.g., Langer, "Revolution in Latin American Criminal Procedure"; Sklansky, "Anti-Inquisitorialism".

⁴⁴ See e.g. Ennio Amodio and Eugenio Selvaggi, "An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure", 62 *Temple Law Review* 1211 (1989); Binder, *Justicia Penal*; 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?", 78 *California LR* 539 (1990); Richard S. Frase and Thomas Weigend, "German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?", 18 *Boston College International & Comparative LR* 317 (1995); Jenia Iontcheva Turner, "Judicial Participation in Plea Negotiations: A Comparative View", 54 *American Journal of Comparative Law* 199 (2006); John H. Langbein, "Land without Plea Bargaining: How the Germans Do It", 78 *Mich. L. Rev.* 204 (1979); John H. Langbein, "Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?", *American Bar Foundation Research Journal* 195 (1981); Lloyd L. Weinreb, *Denial of Justice: Criminal Process in the United States* (1977).

IV. Trial by Witnesses versus Trial by Jury

The distinction between English law and civil law, together with the distinction between royal *dominium* and political *dominium* that I analyze in detail later, are the central distinctions in *De Laudibus Legum Angliae*. The first and main difference between civil law and the law of England Fortescue refers to is the legal process. Fortescue spends thirteen of his fifty-four chapters analyzing this difference (and only seven chapters to analyze three other major differences between civil law and English law).⁴⁵

For Fortescue, the primary difference between civil law and English law legal process is captured by the reliance on trial by witnesses versus trial by jury:

“If parties before a judge come to joinder of issue on the matters of fact ..., the truth of such issue ought, by the civil laws, to be proved by the deposition of witnesses, for which two suitable witnesses suffice. But by the laws of England, the truth cannot be settled for the judge, unless by the oath of twelve men of the neighborhood where the fact is supposed to have been located.”⁴⁶

Fortescue treated trial by witnesses and trial by jury as two types of procedure for the discovery of the truth.⁴⁷ This may be initially surprising coming from a contemporary perspective because, in our current view, we think of witnesses as a source of information and their testimony as an element of proof and we think of the jury as a type of adjudicator.

However, the opposition makes sense if one considers that, according to Fortescue, in the case of trial by witnesses, the deposition of two suitable witnesses was enough to prove an issue and, therefore, to adjudicate a case.⁴⁸ In addition, Fortescue conceived of jurors as not only adjudicators, but also witnesses. In other words, jurors not only got information about the case

⁴⁵ See Fortescue, *In Praise of the Laws of England*, chapters XXXIX-XLI (on children born out of wedlock); XLII-XLIII (on whether the servile or free condition of children should follow the condition of the mother or the father); and XLIV-XLV (on guardianship of minors). Fortescue also has two additional chapters on procedural matters, LII and LIII, to discuss delays in proceedings.

⁴⁶ *Id.* at 29.

⁴⁷ *Id.* at 29-30.

⁴⁸ *Id.* at 29-31.

through evidence and witness testimony,⁴⁹ but could also rely on their own prior knowledge about and inquiry into the case to adjudicate it.⁵⁰

The distinction between trial by witnesses and trial by jury tracks the distinction between “trial per proves” (trial by proofs) and “trial per pais” (trial by country) that predated Fortescue in English law. On this distinction, *Reeves’ History of English Law* says:

“The trial by *proofs*, which is often mentioned in Glanville and Bracton ... seems to have been resorted to only in such cases where the matter could not, by construction of law, be supposed to be within the knowledge of the *pais* or country. The most common instances ... of this trial were, where the husband was alleged to be alive in another county.”⁵¹

Likewise, trial by witnesses “was applicable, anciently, to an issue arising on the death of the husband in an action of dower In dower, if tenant pleads that the husband is still living, the trial shall not be by jury, but witnesses In case of trial by witnesses, the court upon issue of writ orders that both parties produce in court, at a given day, their respective witnesses. The judges examine and decide, and the judgment is pronounced accordingly. On this trial the affirmative must be proved by two witnesses at least”⁵²

A distinction between trial by witnesses and trial by jury already existed in English law, as Fortescue himself recognizes.⁵³ Instead of using it to

⁴⁹ *Id.* at 38-40.

⁵⁰ *Id.* at 38. On Fortescue’s conception of jurors as self-informed, see Chrimes, “Notes”, at 172; David J. Seipp, “Jurors, Evidences and the Tempest of 1499”, in “*The Dearest Birth Right of the People of England*”—*The Jury in the History of the Common Law* 75, 82 (John W. Cairns & Grant McLeod eds., Hart Publishing, 2002); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 115 (Elibron Classics series, 2005). For a summary on the debate on whether English juries were ever self-informed, see, e.g., Daniel Klorman, “Was the Jury Ever Self-Informing?”, 77 *Southern California Law Review* 123 (2003).

⁵¹ See, e.g., *Reeves’ History of the English Law*, Vol. 2, (W.F. Finlanson ed. 1869), at 401.

⁵² *Id.* at 401.

⁵³ See Fortescue, *In Praise of the Laws of England*, at 46. On the use of the two-witness rule in treason cases in England after the time of Fortescue, see L. M. Hill, “The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedure Law”, 12 *Am. J. Legal Hist.* 95 (1968).

distinguish between two types of legal process within English law, however, Fortescue uses it as a tool to compare civil law and English law.

Comparative analyses of the legal process in England and also in the United States employed Fortescue's use of these categories. For instance, Sir Matthew Hale relied on the opposition between trial by jury and trial by witnesses in his classical and influential book *The History of the Common Law of England* "... in order to evidence the Excellency of the Laws of England above those of other Nations...."⁵⁴ This opposition still was in use in the United States in the early nineteenth century.⁵⁵

The focus on trial by jury versus trial by witnesses was later abandoned either because the distinction became obsolete as civil law jurisdictions ended the system of legal proof during the nineteenth century—and with it the two-witnesses rule—or because accusatorial and inquisitorial systems became the central categories of comparative criminal procedure. In fact, the opposition between trial by witnesses versus trial by jury seems to be completely unknown in comparative criminal procedure today, this chapter being the first contemporary work that discusses it.

However, even if the distinction between trial by jury versus trial by witnesses was abandoned, Fortescue's broader ideas were not. Comparative criminal procedure still assumes that we must distinguish civil law and common law to understand the criminal process and that we need theoretical categories to make sense of the criminal procedure differences between the two traditions.⁵⁶

⁵⁴ See Sir Matthew Hale, *The History of the Common Law of England* 160 (Charles M. Gray ed., The University of Chicago Press, 1971). See specially *id.* at 164-167.

⁵⁵ See, e.g., *The Case of the Sloop Active* 36-39 (Philadelphia, published by G. & A. Conrad, Mathew Carey, and others, 1809).

⁵⁶ See Langer, "The Long Shadow" (analyzing the different ways in which the adversarial and inquisitorial categories are used in comparative criminal procedure as well as alternative approaches to these categories that also try to capture differences between common law and civil law).

V. The Higher Accuracy of the English Trial by Jury and the Problem of Torture

Why did Fortescue believe it important to compare the legal process in civil law and English law? As it is for an important group of comparative criminal procedure scholars today, the comparison was useful in determining which type of legal process better reached accurate verdicts and treated defendants decently.⁵⁷

Fortescue says that “[t]he question ... is which of those two very different procedures should be held to be more reasonable and effective for the discovery of the truth thus in doubt. For the law that can reveal it better and more certainly is superior in this respect to the law that is of less effect and virtue.”⁵⁸

According to Fortescue, one problem with trial by witnesses was that it required depositions by two witnesses and led to the fabrication of evidence that could not be adequately challenged because the witnesses were often unknown to the opposing party:

“By the civil law, the party who has taken the affirmative in the joinder of issue ought to produce the witnesses, whom he shall name at his pleasure.... He who cannot find, out of all the men he knows, two who are so lacking in conscience and truth that, for fear, love, or advantage, they will contradict every truth, is deemed feeble indeed and of little diligence. These, then, the party can produce as witnesses in his cause. And if the other party wants to object to them or to their evidence, it does not always happen that they, their conduct, and their habits are known to he who wishes to object, so that such witnesses could be rejected on account of their depravity and viciousness.... Who, then, can live secure of himself or his own under such law – a law that offers assistance to anyone hostile to him?”⁵⁹

Two of the three examples that Fortescue gives to illustrate these dangers come from criminal law-type cases.⁶⁰ They consist of an allegation by lying

⁵⁷ See works cited *supra* notes 16, 17 and 44.

⁵⁸ Fortescue, *In Praise of the Laws of England*, at 29-30.

⁵⁹ *Id.* at 30.

⁶⁰ *Id.* at 30-31. The third case is that of John Fringe, a priest who, according to Fortescue, presented two false witnesses to prove that he had been betrothed to a young woman and was thus compelled to relinquish his holy orders and to consummate a marriage with her.

witnesses of a defendant's violations of basic prohibitions, followed by punishment. These examples include the story of Noboth, falsely accused by two witnesses of cursing God and the king and stoned to death⁶¹ and the story of Susanna, falsely accused by two witnesses of adultery and sentenced to death—though later saved by God through a boy named Daniel who examined the men and showed contradictions between their testimonies.⁶²

According to Fortescue, a second problem with trial by witnesses is that it may encourage the use of torture, a theme still weighing on legal historians and comparative criminal procedure scholars today.⁶³

“The law of France ... prefers the accused to be racked with tortures until they themselves confess their guilt, than to proceed by the deposition of witnesses who are often provoked to perjury by wicked passions and sometimes by the subornation of evil persons.”⁶⁴

Fortescue argues that torture leads to unreliable verdicts in criminal cases:

“The civil laws themselves extort the truth by ... tortures in criminal cases where sufficient witnesses are lacking, and many realms do likewise. But who is so hardy that, having once passed through this atrocious torment, would not rather, though innocent, confess to every kind of crime ...?”⁶⁵

Torture not only leads to unreliable verdicts, but it is also cruel:

“... (I)f some innocent man ... will not lie to the peril of his soul, so that the judge pronounces him innocent, does not the judge by such a judgement declare himself guilty of inflicting all that cruelty and pain on an innocent man? O! how cruel is a law such that when it is unable to convict the

On this case, see Chrimes, “Notes”, at 163-165; and Henry C. Lea, I *History of Sacerdotal Celibacy in the Christian Church* 393 (3rd ed. revised, 1907).

⁶¹ See I Kings 21. <https://www.biblegateway.com/passage/?search=1+Kings+21&version=CEV>.

⁶² Daniel 13 (Vulgate). <http://www.usccb.org/bible/daniel/13>.

⁶³ See, e.g., Langbein, *Torture and the Law of Proof*; Mirjan Damaška, “The Death of Legal Torture”, 87 *Yale L.J.* 860 (1978) (book review); Whitman, *The Origins of Reasonable Doubt*, at 100 et seq.

⁶⁴ Fortescue, *In Praise of the Laws of England*, at 31-32.

⁶⁵ *Id.* at 32.

innocent, it condemns the judge himself! Truly, such a practice is not to be called a law, but is rather a pathway to hell.”⁶⁶

According to Fortescue, in contrast with the civil law’s legal process, the English system was more flexible about possible evidentiary bases for conviction, the proceedings were public, and the proceedings used self-informed jurors who were reliable and honest because they had to meet a minimum wealth bar and because they were selected by impartial and independent officials.⁶⁷

Specifically regarding criminal trials, Fortescue argues that it is crucial who the jurors are and that the accused may challenge potential jurors:

“But it is now very necessary to enquire how the laws of England examine the truth in criminal cases, so that the form of the laws being clearly apprehended, we can know for certain which more effectively reveals the hidden truth. If any suspected person in England, accused of felony or treason, denies his crime before the justices, the sheriff of the county where the deed was done shall cause to come before those judges ... good and lawful men of the neighbourhood of the vill where the deed was done, who are related to the accused by no affinity, and each of whom has a hundred shillings of land or rents, to certify to the judges as to the truth of that crime. All this having been done, the accused man can challenge them.... And further, the accused can challenge, in favour of his own life, the thirty-five men most feared by him, who at his challenge shall be cancelled from the panel ..., even though he knows no cause to give for his exception and challenge.”⁶⁸

Fortescue believes this system not only protects the innocent, but also prevents impunity and the use of torture:

“Who, then, in England can die unjustly for a crime, when he can have so many aids in favour of his life, and none save his neighbours, good and faithful men, against whom he has no manner of exception, can condemn

⁶⁶ *Id.* at 33.

⁶⁷ *Id.* at 35-42. See also *id.* at 46-47. On the history of jurors’ factual and formal powers to make witness credibility determinations and their relationship with the oaths of witnesses, see George Fisher, “The Jury’s Rise as Lie Detector”, 107 *Yale Law Journal* 575 (1997).

⁶⁸ *Id.* at 40.

him? I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly. Nevertheless, it cannot be supposed that a suspect accused in this form can escape punishment, when his life and habits would thereafter be a terror to them who acquitted him of his crime. In this process nothing is cruel, nothing inhuman; an innocent man cannot suffer in body or members. Hence he will not hear the calumny of his enemies because he will not be tortured at their pleasure. Under this law, therefore, life is quiet and secure.”⁶⁹

VI. Fortescue on Criminal Procedure, Law and Society, and Transplanting Legal Institutions

An important theme in contemporary comparative criminal procedure is that there is a deep relationship between the criminal process in civil law and common law and the institutional and societal context in which it operates.⁷⁰ This is why transplanting criminal procedure rules and institutions between common law and civil law jurisdictions often leads to substantial transformations or the rejection of the transplanted rule or institution.⁷¹

Though Fortescue’s work is absent from contemporary comparative law analyses, *De Laudibus* actually anticipated and discussed these very issues. Fortescue was not the first to analyze possible relationships between law,

⁶⁹ *Id.* at 41.

⁷⁰ See, e.g., Markus D. Dubber, “The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology”, 43 *American Journal of Comparative Law* 227 (1995); Stewart Field, “State, Citizen, and Character in French Criminal Process”, 33 *Journal of Law & Society* 522 (2006); Nicola Lacey and Lucia Zedner, “Community in German Criminal Justice: A Significant Absence?”, 7 *Social & Legal Studies* 7 (1998); Jacqueline E. Ross, “The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany”, 55 *American Journal of Comparative Law* 493 (2007); James Q. Whitman, “Equality in Criminal Law: The Two Divergent Western Roads”, 1 *Journal of Legal Analysis* 119 (2009); James Q. Whitman, “The Two Western Cultures of Privacy: Dignity versus Liberty”, 113 *Yale Law Journal* 1151 (2004).

⁷¹ See, e.g., Mirjan Damaška, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments”, 45 *American Journal of Comparative Law* 839 (1997); Otto Kahn-Freund, “On Uses and Misuses of Comparative Law”, 37 *Modern Law Review* 1 (1974); Langer, “Legal Translations”.

environment and society.⁷² His contribution was making the legal process and the opposition between civil law and common law the central focus of and the foundation for his comparative analysis and then connecting legal process and the civil law-common law opposition to environment and society.

In the text, once he is persuaded that English legal process is superior to civil law process, the Prince wonders "... very much why this law of England, so fitting and so desirable, is not common to all the world."⁷³

The Chancellor claims that England has the soil, flora, fauna, and society that enable a successful jury system and that these conditions are not present elsewhere. Regarding the soil, flora, and fauna, Fortescue says:

"England is indeed so fertile that, compared area to area, it surpasses all other lands in the abundance of its produce. It is productive of its own accord, scarcely aided by man's labour, for its fields, plains, glades, and groves abound in vegetation with such richness that they often yield more fruits to their owners uncultivated than ploughed lands, though those are also very fertile in crops and corn Moreover, in that land, pastures are enclosed with ditches and hedges and planted over with trees, by which the flocks and herds are protected from the wind and the sun's heat and most of them are irrigated, so that the animals ... do not need watching by day or by night. For in that land there are neither wolves, bears, nor lions, so that sheep lie by night in the fields without guard in their cotes and folds, whereby their lands are fertilised."⁷⁴

⁷² See, e.g., Aristotle, *Politics* (translated with introduction and notes by C.D.C. Reeve, Hackett Publishing Company, 1998), at 38 (stating that the legislator should look at the people, the territory, the amount of property and neighboring states when establishing his laws); 99 (analyzing what kind of people are suited to kingship, aristocracy and polity); 121-123 (discussing which type of constitution is beneficial for which kind of people); 180 (describing laws that are useful to establish a farming people that enable the best democracies); 197-211 (discussing the conditions that should be presupposed to exist by the ideal city-state, including conditions about the population, the territory, access to the sea and to water, and geographical location).

⁷³ Fortescue, *In Praise of the Laws of England*, at 42.

⁷⁴ *Id.* at 42.

Fortescue argues that this environment has led the people of England to become more highly-minded, better investigators and adjudicators than people in other countries:

“Hence, the men of that land [England] are not very much burdened with the sweat of labour, so that they live more spiritually, as the ancient fathers did, who preferred to tend flocks rather than to distract their peace of mind with the cares of agriculture. For this reason, the men of that land are made more apt and disposed to investigate causes which require searching examination than men who, immersed in agricultural work, have contracted a rusticity of mind from familiarity with the soil.”⁷⁵

According to Fortescue, this environment has also created a higher number of land owners and wealthy people who can serve as jurors and not be easily corrupted:

“... that land is so well stocked and replete with possessors of lands and fields that in it no hamlet, however small, can be found in which there is no knight, esquire, or householder ...; nor numerous other free tenants, and many yeomen, sufficient in patrimony to make a jury Furthermore, there are various yeomen in that country who can spend more than six hundred scutes a year, so that juries in that country are often made up, especially in important causes, of knights, esquires, and others, whose possessions exceed two thousand *scutes* a year in total. Hence it is unthinkable that such men could be suborned or be willing to perjure themselves, not only because of their fear of God, but also because of their honour, and the scandal which would ensue, and because of the harm they would do their heirs through their infamy.”⁷⁶

Fortescue argues that these conditions were not present in other countries:

“Not any other kingdoms of the world ... are disposed and inhabited like this. For although in them there are men of great power, great wealth and possessions, yet not one of them lives close to another, as so many do in England, nor does so great an abundance of heirs and possessors of lands exist as is to be found there.... For in those other countries in scarcely a

⁷⁵ *Id.* at 42-43.

⁷⁶ *Id.* at 43. *See also id.* at 38.

single town can one man be found sufficient in patrimony to serve on a jury. For, outside cities and walled towns, it is rare for any except nobles to be found who are possessors of fields or other immovables.”⁷⁷

Fortescue says that, since the conditions that enable the jury system would be absent in other countries, other countries may not adopt such a system:

“How, then, can a jury be made up in such regions from among twelve honest men of the neighbourhood where the fact is brought into trial, when those who are divided by such great distance cannot be deemed neighbours? Indeed, the twelve jurors there will be very remote from the fact, after the accused in those regions has challenged, without cause shown, the thirty-five nearer ones. Thus it would be necessary in those countries to make a jury either of persons so remote from the fact in dispute that they do not know the truth about it, or of paupers who have neither shame of being infamous nor fear of the loss of their goods, since they have none, and are also so blinded by rustic ignorance so that they cannot clearly perceive the truth.... Do not wonder, therefore, Prince, if the law by which the truth is sought in England is not common to other nations, for they cannot, like England, make adequate and similar juries.”⁷⁸

Since other countries may not successfully import the English legal process, civil law is appropriate for them, even if civil law is a worse law than England’s. The Prince says:

“... the civil law in the comparison made by you is delivered from all blame, because, though you have preferred the law of England to it, yet it does not deserve odium, since you have not disparaged it or its makers, but have shown only that the land where it rules is the cause of its not eliciting the truth in disputes by as good a procedure as the law of England does. We cannot dispute that the law of England is, indeed, ... more suitable for that realm than the civil law and we have no desire to exchange it for the civil law. Yet still this superiority of the law of England does not spring from the defects of the other law, but is caused only by the fertility of England.”⁷⁹

⁷⁷ *Id.* at 43.

⁷⁸ *Id.* at 44.

⁷⁹ *Id.* at 44.

Fortescue's analysis of this point did not go unnoticed. For instance, in the context of discussing the origins of trial by jury, the very influential figure Sir Edward Coke said, in reference to *De Laudibus*:

"... for the excellencie ... of this kinde of triall, and why it is onely appropriated to the common lawes of England, reade Justice *Fortescue*, cap. 25. 26. 27. 28. 29. 30. 31. 32. &c. which being worthy to be written in letters of gold for the weight and worthines thereof, I will not abridge any part of the same, but referre the learned Reader to the fountaine it selfe."⁸⁰

VII. Fortescue on Types of Political Authority and the Legal Process

Fortescue touches on another important theme in contemporary comparative criminal procedure, that there is a relationship between types of political authority and the legal process. Commentators and policy-makers have assumed that the inquisitorial system is related to authoritarian or non-liberal conceptions of political authority and the adversarial system is related to democratic or liberal ones.⁸¹ These assumptions underlie adversarial criminal procedure reforms that states have introduced as part of post-authoritarian democratization processes.⁸²

Fortescue was not the first to write about the relationship between law and courts and different types of political authority.⁸³ His contribution was

⁸⁰ Sir Edward Coke, "Part Eight of the Reports. (Preface)", in I *The Selected Writings and Speeches of Sir Edward Coke* 244, at 250 (Steve Sheppard ed., Indianapolis: Liberty Fund, 2003).

⁸¹ See, e.g., Binder, *Justicia Penal*; Damaška, *Faces of Justice*; Goldstein, "Reflections on Two Models"; Kagan, *Adversarial Legalism*; Maier, *Derecho Procesal Penal*.

⁸² See, e.g., Langer, *Revolution in Latin American Criminal Procedure*.

⁸³ See, e.g., Aristotle, *Politics*, at 45-47 (criticizing Hippodamus of Miletus' proposed regulation on the jury); at 52 (criticizing the constitution of Sparta because drawing the overseers from the entire people leads to corruption); at 59-60 (analyzing different features of the Carthaginian constitution in terms of aristocracy and oligarchy, including how the rulers are chosen); at 61 (stating that by opening the courts to all, Solon made them democratic); 85 and 102-103 (laws must be established to suit the constitution); 112-113 (analyzing the role of law in different types of democracies and oligarchies); 123-124 (analyzing different regulations of the courts as democratic or oligarchic); 132-133 (analyzing courts as democratic, oligarchic, aristocratic or characteristic of a polity, depending on the ways courts are organized); 170 (tyrants should let punishments be administered by other officials and by the courts); 180 (in farming democracies, it is

articulating a specific connection between civil law and common law, types of political authority and the legal process that, in some fashion, survives to this day. To explain how Fortescue conceived of this relationship, it is necessary to explain first his distinction between a royal and a political *dominium*.⁸⁴ Fortescue analyzed these two types of political authorities first and more thoroughly in his book *De Natura Legis Naturae* [On the Nature of the Law of Nature].⁸⁵ Quoting St. Thomas, Fortescue writes:

“That he is the head of a regal government, who is so according to the laws which he himself lays down and according to his own will and pleasure, but he is the head of a political government, who governs the citizens according to the laws which they have established.”⁸⁶

The difference between a royal and a political *dominium* refers to the source of the law according to which the ruler exercises authority.⁸⁷ The royal ruler exercises authority under law that he himself has established, while the political ruler exercises authority under law that the citizens have established.

beneficial for all the citizens to elect and inspect officials and sit on juries, but is best for the holders of the most important offices to be elected from those with a certain amount of assessed property); 183 (discussing laws and court and lawsuit regulations that are necessary to preserve democracies).

⁸⁴ On different possible translations of the word “dominium” to modern English, see J.H. Burns, “Fortescue and the Political Theory of *Dominium*”, 28 *The Historical Journal* 777, 778 (1985) [hereinafter “Political Theory of *Dominium*”].

⁸⁵ Reprinted in Latin and English in I *The Works of Sir John Fortescue, Knight* 205 (collected and arranged by Thomas (Fortescue) Lord Clermon, London: Printed for Private Distribution, 1869) [hereinafter *De Natura*]. Unless otherwise indicated, I take the quotations of this book from this translation.

⁸⁶ Fortescue, *De Natura*, at 205. Fortescue took these concepts from Thomas Aquinas, *On Princely Government*; and Giles de Rome, *On Princely Government*. See Burns, “Political Theory of *Dominium*”, at 779-780; and Lockwood’s notes to *On the Laws and Governance of England* (Shelley Lockwood ed., 1997) [hereinafter *Notes*], at 128. He elaborated further on these concepts in a third book, *The Governance of England*, originally written in English. See Sir John Fortescue, *The Governance of England* (Charles Plummer ed., 1885). For a recent edition of this book, see Sir John Fortescue, *On the Laws and Governance of England* 83 (Lockwood ed., Cambridge University Press, 1997).

⁸⁷ Burns, “Political Theory of *Dominium*”, at 778.

Fortescue argued repeatedly that political and royal kings are of equal power,⁸⁸ even if “... their authority over their subjects is different.”⁸⁹ In royal kingdoms, “... men excelling in power, greedy of dignity and glory, subjugated neighbouring peoples to themselves, often by force, and compelled them to serve them, and to submit to their commands, to which in time they themselves gave sanction as laws for those people.”⁹⁰ In such royal kingdoms, the “... kingdom ... is incorporated solely by the authority and power of the king, because such a people is subjected to him by no sort of agreement other than to obey and be ruled by his laws, which are the pleasure of him by the pleasure of whose will the people is made into a realm.”⁹¹

In contrast, in political kingdoms, a “... king who is head of the body politic is unable to change the laws of that body, or to deprive that same people of their own substance uninvited or against their wills.”⁹² A political king “is set of the protection of the law, the subjects, and their bodies and goods, and he has power to this end issuing from the people, so that it is not permissible for him to rule his people with any other power.”⁹³

Fortescue explains that the political *dominium* is preferable to the royal one because it leads to better results for the governed and for the rulers:

“... a king is free and powerful who is able to defend his own people against enemies alien and native, and also their goods and property, not only against the rapine of their neighbours and fellow-citizens, but against his own oppression and plunder, even though his own passions and necessities struggle for the contrary. For who can be freer and more powerful than he who is able to vanquish not only others but also himself? The king ruling his people politically can and always does do this. Hence, Prince, it is evident to you, from the practical effects, that your ancestors, who sought to cast aside political government, not only could not have obtained, as they wished, a greater power than they had, but would have exposed their own welfare, and the welfare of their realm, to greater risk and danger.”⁹⁴

⁸⁸ See, e.g., Fortescue, *In Praise of the Laws of England*, at 18, 23.

⁸⁹ *Id.* at 18-19.

⁹⁰ *Id.* at 19.

⁹¹ *Id.* at 23.

⁹² *Id.* at 21.

⁹³ *Id.* at 22.

⁹⁴ *Id.* at 53-54.

In *De Natura*, Fortescue explains that the kingdom of England is both political and royal,⁹⁵ for “... the kings make not laws, nor impose subsidies on their subjects, without the consent of the Three Estates of the realm.... May not ... this form of government be called *political*, that is to say, regulated by the administration of many, and may it not also deserve to be named *royal* government, seeing that the subjects themselves cannot make laws without the authority of the sovereign, and the kingdom, being subject to the king’s dignity, is possessed by the kings and their heirs successively by hereditary right, in such a manner as no dominions are possessed which are only politically ruled.”⁹⁶

Fortescue describes several legal consequences of the distinction between a political and a royal *dominium*.⁹⁷ One consequence is that, as we have seen, the English king could not replace common law with civil law. Since England was a mixed political and royal government, the king of England “... is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political.... (and) he himself is not able to change the laws without the assent of his subjects nor to burden an unwilling people with strange impositions, so that, ruled by laws that they themselves desire, they freely enjoy their goods, and are despoiled neither by their own king nor any other.”⁹⁸

⁹⁵ On the debate about the origin of this third category, “political and royal *dominium*”, see, e.g., Burns, “Political Theory of *Dominium*”, at 779-780; S.B. Chrimes, *Introduction*, Sir John Fortescue, *De Laudibus Legal Angliae* xciv-xcv (S.B. Chrimes ed. and trans., Cambridge at the University Press, 1949) [hereinafter *Introduction*]; Felix Gilbert, “Sir John Fortescue’s ‘dominium regale et politicum’”, 11 *Medievalia et Humanistica* 88 (1944) [hereinafter “*Dominium regale et politicum*”].

⁹⁶ Fortescue, *De Natura*, at 205-206. On the advantage or necessity of ruling both politically and royally, see *id.* at 214-216. On the possible evolution of Fortescue’s use of the term “dominium regale et politicum” from *De Natura* to *De Laudibus* and *The Governance of England*, see Gilbert, “*Dominium regale et politicum*”.

⁹⁷ On the relationship between law and *dominium* in Fortescue, see, e.g., Burns, “Political Theory of *Dominium*”. On Fortescue’s conception of the law, see Norman Doe, “Fifteenth-Century Concepts of Law: Fortescue and Pecock”, X *History of Political Thought* 257 (1989). For an assessment of Fortescue’s work within a broader exploration about conceptions of common law, see J.W. Tubbs, *The Common Law Mind. Medieval and Early Modern Conceptions* (The John Hopkinds University Press, 2000).

⁹⁸ Fortescue, *In Praise of the Laws of England*, at 17.

Fortescue also infers from the distinction between royal and political and royal authorities that law is necessary to prevent tyranny. Fortescue says that the “people rejoice in the same way under a king ruling only royally, provided he does not degenerate into a tyrant. Of such a king, the Philosopher said ... that ‘It is better for a city to be ruled by the best man than by the best law.’ But, because it does not always happen that the man presiding over a people is of this sort, St Thomas ... is considered to have desired that a kingdom be constituted such that the king may not be free to govern his people tyrannically, which only comes to pass when the royal power is restrained by political law. Rejoice, therefore, good Prince, that such is the law of the kingdom to which you are to succeed, because it will provide no small security and comfort for you and for the people.”⁹⁹

Fortescue explains that in political and royal kingdoms like England, “... even the judges of realm are all bound by their oaths not to render judgement against the laws of the land (*leges terre*), even if they should have the commands of the prince to the contrary.”¹⁰⁰

A third consequence is that royal governments may enact statutes in the interest of the ruler, while political governments enact statutes in the interest of the people. This is true because in kingdoms in which statutes emanate from the will of the prince alone, “... so often statutes secure the advantage of their maker only, thereby redounding to the loss and undoing of the subjects.”¹⁰¹

In contrast, statutes in England “... are made not only by the prince’s will, but also by the assent of the whole realm, so they cannot be injurious to the people nor fail to secure their advantage. Furthermore, it must be supposed that they are necessarily replete with prudence and wisdom, since they are promulgated by the prudence not of one counsellor nor of a hundred only, but of more than three hundred chosen men And if statutes ordained with such solemnity and care happen not to give full effect to the intention of the makers, they can speedily be revised, and yet not without the

⁹⁹ *Id.* at 17-18.

¹⁰⁰ Fortescue, *On the Nature of the Law of Nature*, in *On the Laws and Governance of England* 128 (Lockwood ed., Cambridge University Press, 1997). I choose Lockwood’s slightly modified version here over the text of Fortescue, *De Natura*, at 205.

¹⁰¹ Fortescue, *In Praise of the Laws of England*, at 27.

assent of the commons and nobles of the realm, in the manner in which they first originated.”¹⁰²

A final legal consequence is that the different types of *dominium* would have different legal processes because, in royal governments, due process¹⁰³ is often not respected. Fortescue says in relation to the royal government of France:

“(I)f any one ... is accused of crime, even by his enemies, he is not always called before an ordinary judge. But it often appears that he is examined in the prince’s chamber or other private place, indeed sometimes only by messengers, and as soon as he is adjudged to be guilty, on the information of others and according to the king’s conscience, he is thrust into a sack without any form of trial, and is thrown by the ministers of the provosts of the marshalls into the river at night and drowned. You have heard that a great many more men die in this way than stand convicted by due process of law. But still, what pleases the prince has the force of law, according to the civil laws.”¹⁰⁴

In contrast, in England, a mixed political and royal government, inhabitants “... are not brought to trial except before the ordinary judges, where they are treated justly according to the law of the land. Nor are they examined or impleaded in respect of their chattels, or possessions, nor arrested for crime of whatever magnitude and enormity, except according to the laws of that land and before the aforesaid judges.”¹⁰⁵

In other words, according to Fortescue, the English political and legal *dominium* did not circumvent due process, whereas royal governments

¹⁰² *Id.* at 27-28.

¹⁰³ The original sentence in Latin that includes the phrase that both Chrimes and Lockwood translated as “due process” says: “... ; qualiter et mori audivisti majorem multo numerum hominum quam qui *legitimo processu juris* convicti extiterunt...” [italics added to the original]. See Chancellor Sir John Fortescue, *De Laudibus Legum Angliae. A Treatise in Commendation of the Laws of England* 266 (with translation by Francis Gregor and notes by Andrew Amos, Cincinnati: Robert Clarke and Co., 1874).

¹⁰⁴ Fortescue, *In Praise of the Laws of England*, at 51.

¹⁰⁵ *Id.* at 52-53.

applying civil law, like France's, did. Later generations of attorneys, policy-makers, and scholars would build upon Fortescue's ideas on this issue.¹⁰⁶

VIII. Making Use of Fortescue: Some Preliminary Leads

The intellectual history or genealogy of the adversarial and inquisitorial systems and of comparative criminal procedure, and Sir John Fortescue's role in it, may be captivating in its own right for anyone interested in these systems and this field or in intellectual legal history more generally.

Writing this intellectual history or genealogy may also open new avenues for comparative criminal procedure because it shows the historical and contingent character of the predominant contemporary way people conceptualize comparing criminal processes. This historicization of the field suggests that there may be as yet unexplored or underexplored alternative ways to think about this area.

Bringing to light the work of a figure like Fortescue also pushes us to pause and reflect on contemporary comparative criminal procedure. Given the limits of this paper, I can only briefly articulate some of the possible ways to reflect on Fortescue's work based on the previous sections.

First, though it would be inaccurate to characterize *De Laudibus* as merely propaganda, Fortescue's work may illustrate the risks of merging descriptive and normative comparative analyses of the criminal process.¹⁰⁷

¹⁰⁶ See, e.g., Paul Christianson, "John Selden, the Five Knights' Case, and Discretionary Imprisonment in Early Stuart England", 6 *Criminal Justice History* 65, 67 (1985) (explaining how John Selden, John Bramston and Henry Calthorp built upon Fortescue's interpretation of the English monarchy as a *dominium politicum et regale* to question discretionary imprisonment by the King).

¹⁰⁷ The works by Fortescue about the succession controversy between the Lancastrian and Yorkist houses has been characterized as political propaganda. Gill characterized six of Fortescue's works this way because Gill argued that "Fortescue was not unaware of the weakness of his defense of the Lancastrian hereditary claims; and ..., therefore, he had few hopes of convincing the scholars of his day, but rather was aiming his polemical writings at the 'people'." See Paul E. Gill, "Politics and Propaganda in Fifteenth Century England: The Polemical Writings of Sir John Fortescue", 46 *Speculum* 333, 338 (1971). After the death of Henry VI and his son, Edward IV forced Fortescue to refute his previous arguments in favor of the Lancastrian house and Fortescue did so in *Declaracion Upon Certayn Wrytinges Sent Oute of Scotteland Ayenst the Kinges Title to*

As we saw, his work can be interpreted as an attempt to provide a nationalistic normative argument for the superiority of English common law over civil law. There is a question, then, as to whether this normative drive distorted his descriptive comparison of the two systems. Was trial by witnesses versus trial by jury the best or only way to describe the differences between civil law and common law legal process at his time? Or was it a simplified caricature that enabled him to easily make his normative argument? Were there any attractive aspects of the legal process in civil law in Fortescue's time? Why did Fortescue not analyze other differences in the civil and common law of his time, such as public versus private prosecution or professional versus lay judges? What about the commonalities in legal process across the systems? Did Fortescue exclude them because he was trying to make his normative case in favor of common law?

Since normatively-driven comparative descriptions of the criminal process are still very much used by judges, policy-makers, and some scholars, these questions interrogate not only Fortescue, but also contemporary actors. For instance, have normatively driven analyses led to problematic simplifications or omissions in the descriptive analysis of contemporary comparative criminal procedure? What is the descriptive and normative value, if any, of the adversarial and inquisitorial systems as categories aimed at capturing the differences between civil law and common law? What features do these categories fail to capture? What are alternative ways to think about differences between the criminal processes of different jurisdictions? What are the important commonalities missing from comparative criminal procedure analyses and how we should think about these commonalities?¹⁰⁸

Second, Fortescue argued that the English legal process reached more accurate verdicts than the civil law legal process because it had more flexible rules of evidence and its decision-makers were more educated and

the Roialme of England. Gill argues that “the ease with which he could refute his former arguments as he did in the unsophisticated *Declaracion* gives a reader the impression that he anticipated the obverse of each of his arguments as he wrote them.” *Id.* at 338. However, *De Laudibus* was not one of these works; its subject was not the succession controversy and it did not have the instrumental character of the work on this succession controversy. It would thus be inaccurate to consider it simply a work of propaganda, even if it was normatively and nationalistically driven.

¹⁰⁸ For brief attempts to answer some of these questions, see Langer, “Strength, Weakness or Both?”; and Langer, “The Long Shadow”.

less corruptible. Putting aside questions about the accuracy of Fortescue's description, could his analysis give helpful insight into contemporary analysis of wrongful convictions? Does the background and mode of selection of investigators and decision-makers affect the accuracy of their criminal verdicts? What variables or theoretical tools beyond the adversarial and inquisitorial systems would be necessary to compare the quality of investigators and decision-makers in different criminal justice systems?

Third, while contemporary analyses of transplanting legal systems tend to concentrate in the institutional environment in which legal rules and practices operate, Fortescue's analysis of the issue concentrated on societal and environmental differences between different jurisdictions. Should contemporary analyses pay more attention to these broader societal and environmental differences? Could these types of differences help explain, for instance, the challenges for successful criminal procedure reforms in the developing world?

Finally, while majoritarian democracy and due process are often thought to be in tension with each other, Fortescue suggested that government by consent and due process reinforce each other.¹⁰⁹ How should we interpret Fortescue's claim? Whatever our interpretation, would his claim be true from an empirical perspective? Could his analysis provide a starting point to rethink the relationship between democracy and due process from a theoretical perspective, or at least insight into how to rethink it? Though there have been some comparative criminal procedure analyses on the effect of human rights on the criminal process,¹¹⁰ these types of questions are

¹⁰⁹ I am not suggesting that Fortescue was a theorist of democracy or even of constitutional monarchy. In the literature on Fortescue, both McIlwain and Chrimes disputed Plummer's interpretation of Fortescue as a theorist of constitutional monarchy. See Charles Plummer, "Introduction", in Sir John Fortescue, *The Governance of England* (Charles Plummer ed., 1885); Stanley B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge, 1936); McIlwain, *Political Thought*. I cannot get into this debate in this piece. However, whatever position one takes on it, there is no question that consent by the people played an important role in Fortescue's account of England as a political and royal *dominium*. For a critical analysis of the debate on how to best characterize Fortescue's political theory and the role of consent in it, including possible misuse of Fortescue's work by Whig historians and other scholars, see Sobecki, *Unwritten Verities*, at 70-101.

¹¹⁰ Jackson, "The Effect of Human Rights"; *Criminal Evidence and Human Rights* (Paul Roberts and Jill Hunter eds., 2012) (exploring the impact of human rights on a wide range of common law jurisdictions).

largely unexplored. Fortescue was not a theorist of democracy or human rights. But his work could provide insights as we assess these questions.

IX. Conclusion

This chapter argues that the *De Laudibus Legum Angliae* by Sir John Fortescue is one of the intellectual origins of modern comparative criminal procedure and its central opposition between the adversarial system/common law and the inquisitorial system/civil law. Like a substantial number of contemporary comparative analyses of the criminal process, *De Laudibus* relied on the distinction between civil law and common law, proposed categories to capture differences in their criminal process, associated these differences with specific features of English and Continental societies, analyzed the feasibility of transplanting legal institutions, advocated for the superiority of one legal tradition by claiming its criminal process was more accurate and humane, and argued that there is a link between types of political authority and criminal process in civil law and common law.

Unearthing these intellectual origins and writing a genealogy of comparative criminal procedure make apparent that this field is a historical and contingent construction and may open new ways to think about the criminal process from a global perspective.