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**A Survey of Comparative Criminal Procedure through Foreign
Films**

by

Samuel William Bettwy

PREFACE

My appreciation of comparative legal studies began thirty years ago when I studied Comparative Law under the late Professor John Wolff at Georgetown University Law Center in Washington, DC. Among many things, he taught me the difference between foreign laws as they appear in writing and as they are really applied in action.

Twenty years ago, I sought to follow in Professor Wolff's footsteps and began teaching the course, based on my notes of his lectures, at Thomas Jefferson School of Law (then Western State University College of Law) in San Diego, California.

During the early years of my teaching the course, I happened to travel as a Judge Advocate in the U.S. Army Reserve to Japan, Germany, and France where I seized the opportunity to observe courtroom proceedings. Those experiences reminded me of Professor Wolff's words and provoked me to consider how I could bring foreign legal systems to life for my students.

Being a long-time film buff, I experimented by showing clips from foreign films in class, with the reluctant approval of the law school administration. This approach to teaching comparative law took on a life of its own and after several years I had accumulated over 300 foreign law films and had developed a film-based syllabus.

Ten years ago, it occurred to me that the vast majority of films in my collection concerned criminal procedure, so I re-designed the course to focus on comparative criminal procedure.

Ten years of research and experimentation in the classroom have culminated in this textbook which is like no other. Through a combination of readings from the textbook and the viewing of films in preparation for class, students see in action, through the *mise-en-scène*, legal players, and narratives, the aspects of criminal procedure that matter, both consciously and subconsciously, to filmmakers and their audiences in other legal traditions. By applying the tools of comparative analysis that are taught in the course, they gain a better understanding of the policies and traditions that underlie their own legal system's criminal procedure.

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A SURVEY OF COMPARATIVE CRIMINAL PROCEDURE THROUGH FOREIGN FILMS

by

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Abstract:

Constructs of comparative legal analysis are described and then applied to examine the adjudicative process through foreign films, beginning with police contact with a crime suspect and ending either with a judge or jury's acquittal of an accused or with execution of sentence. The analytical constructs include the inquisitorial-adversarial dichotomy, role-specific constructs, and the Civil Law-Common Law dichotomy. In addition, differences in criminal procedure are examined through the Socialist, Islamic, and indigenous legal traditions. Role-specific constructs measure the degree to which a suspect is expected to cooperate, the degree of independence and neutrality of the prosecutor, and the degree of lay participation (jurors) in adjudication and sentencing. The author concludes that a survey of foreign films confirms that suspects and accused enjoy greater protection of the presumption of innocence in Common Law, adversarial justice systems, and that there are several aspects of U.S. criminal procedure that could be changed to further safeguard the presumption of innocence.

Keywords: Comparative Law, Criminal Procedure, Comparative Criminal Procedure, Constitutional Law, Film Studies

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I. INTRODUCTION

The greatest value of comparative legal studies is gaining insight into the strengths and weaknesses of one's own legal system. As explained in *Comparative Legal Traditions*, comparative legal analysis is also valuable because foreign legal systems (1) provide a "living laboratory" for law reformers to test their hypotheses, (2) open up a vast reference world of persuasive precedents for advocates and judges in cases of "first impression," and (3) illuminate the historical development of law and society.¹ In sum, comparative legal studies help us better understand *why* our laws exist so that we can apply or change them intelligently. It may be added that the study of foreign legal systems reveals the analytical approaches of jurists who have been trained in differing legal traditions, enabling us American lawyers to communicate with them, and even to borrow their ways of thinking.²

One drawback of comparative legal studies is the artificiality of observing a foreign legal system through books. As Rabel insisted, there is little use in comparing rules as they appear in books,³ and this is especially true when comparing criminal justice systems. Since, as Glendon et al. write, comparative legal analysis expands our "theater of observation," revealing the "stories" that foreign legal systems tell and the "visions that they project,"⁴ the benefits of studying comparative criminal procedure through film are apparent. Like the classical casebook approach, the filmic approach reveals how the law in theory is actually applied to a set of facts. If we want to see a criminal trial in action in our own countries, we go to the courtroom to observe one.⁵ Films have the advantage over books of transporting us to foreign legal systems in action. Because film is a visual medium, it provides a "You are there" dimension to learning.

Some films are better made and more critically acclaimed than others, and tastes in films differ. Many foreign films are an acquired taste. But to the extent that they accurately depict criminal procedure, all of the films described in this textbook are useful for the comparative study of criminal procedure because they depict criminal procedure in action. The films were selected on the basis of their accuracy,

¹ Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 80, 95-97 (3rd ed. 2008). The author uses this resource as a textbook in a traditional course on Comparative Law.

² Comparative law was an integral part of the United States' recent "rule of law" missions in Iraq and Afghanistan. See The Judge Advocate General's Legal Center and School, U.S. Army, Center for Law and Military Operations, *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates* 83-122 (2011), available at www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf (last visited Oct. 11, 2014); U.N. Dep't of Peacekeeping Operations, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* 6 (2006) ("Legal reforms will only take hold if they are . . . sensitive to the culture and legal tradition of the host country.").

³ Glendon, et al., *supra* note 1 at 2.

⁴ *Id.* at 7, 13. See also Suzanne Shale, *The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 *UNIV. SAN FRANCISCO L. REV.* 991 (summer 1996) ("I had a professor, when I went to New York University. . . . I asked him, 'What's the best way to study to become a writer, [playwright], write movies?' And he says, 'Become a lawyer. Because they are so meticulous on structure . . . [and] presenting a very dramatic thing.'").

⁵ Nicole Rafter, *SHOTS IN THE MIRROR: CRIME FILMS AND SOCIETY* 93 (2000) ("courts as places where fundamental social and moral issues are settled..")

historical significance, critical acclaim, popularity,⁶ and cinematic quality. Most of the films are fiction-based-on-fact or purely fictional, because a fictional narrative best reveals the “truth” of a society through the filmmaker’s subconscious and cultural background. Documentaries tend to be the product of a filmmaker’s conscious effort to build an argument,⁷ so we should read them with healthy cynicism.

Since the ultimate goal of studying foreign legal systems is to gain greater insight into one’s own legal system, and since films enable us to see foreign legal systems in action, the goal of this textbook is to enable you to “read” a foreign law film and recognize the distinguishing features of that foreign legal system’s criminal procedure. With the ability to read foreign law films, you will watch and analyze films to gain greater insight into your own legal system. You will gain or strengthen your ability to (1) recognize the distinguishing features of the world’s legal traditions in action, with a focus on criminal procedure, (2) distill and describe the legal narrative of a foreign film and the legal tradition that is reflected in the film, and (3) evaluate the strengths and weaknesses of the country’s criminal procedure, from the filmmaker’s point of view and from your point of view. With those abilities, you can achieve insight into your own system of criminal procedure by watching foreign law films.

Because of what is at stake in a criminal case -- property, liberty and sometimes even life -- filmmakers and their audiences take great interest in the adjudicative process. And they naturally take interest in only those aspects of criminal procedure that matter to them. Aspects of criminal procedure *that matter to* filmmakers and their audiences are played out and depicted in the *mise-en-scène*, the characters, and a narrative that provides even greater insight into the attitudes of filmmakers and audiences toward their own countries’ justice systems.⁸

With reference to filmic examples, the next section explains the tools of comparative legal analysis and how to apply them to the aspects of criminal procedure that matter to lawyers and their clients, namely aspects that affect the outcome of the adjudicative process. The traditional tools of comparative analysis include the inquisitorial-adversarial dichotomy, role-specific constructs, and the Civil Law-Common Law dichotomy. In addition, differences in criminal procedure can be examined through the Socialist, Islamic, and indigenous legal traditions and through the evolving international legal regimes.

⁶ Nearly all of the films rate well over 50% among critics and/or audiences on www.rottentomatoes.com.

⁷ Cynthia D. Bond, *Documenting Law: Reality and Representation on Trial*, 39 LINCOLN L. REV. 1 (2011-2012) (the viewer, especially a lay observer, may be tend to trust the truth or accuracy of a documentary over the narrative of a fiction film, and yet documentaries typically tend to present a competing view of really happened); Taunya Lovell Banks, *What Documentary Films Teach Us about the Criminal Justice System*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1 (2008). One notable exception is the French documentary *Tenth District Court* (France 2 Cinéma 2004) (Fr.) which contains no narration whatsoever.

⁸ Jessica Silbey, *Truth Tales and Trial Films*, 40 LOY. L.A. L. REV. 551 (2007) (analysis of films *Compulsion* and *Swoon*, using “the parameters of the ‘truth tale’ as a subgenre of courtroom drama that affects a particular kind of popular legal consciousness.”).

Role specific constructs are tools for analyzing the roles of the police, prosecutor, victim, suspect/accused, defense counsel, judge and jury (if any). Such constructs allow you to measure such things as the degree to which a suspect is expected to cooperate, the degree of independence and neutrality of the prosecutor, and the degree of lay participation (jurors) in adjudication and sentencing.

In Sections III through VI, the tools of comparative legal analysis are then applied to examine the adjudicative process through film, beginning with police contact with a crime suspect and ending either with a judge or jury's acquittal or with execution of sentence. This textbook then concludes that a survey of foreign films confirms that suspects and accused enjoy greater protection of their right to remain silent and to the presumption of innocence in adversarial justice systems.

II. ANALYTICAL CONSTRUCTS OF COMPARATIVE CRIMINAL PROCEDURE

A. Inquisitorial-Adversarial Dichotomy⁹

A law school course in comparative criminal procedure could simply proceed chronologically through the adjudicative phases, noting differences between domestic and foreign procedures along the way. However, such a tour would not be very insightful without analytical constructs. The inquisitorial-adversarial dichotomy is a useful analytical tool, because all criminal adjudicative systems of all countries in the world can be categorized according to whether they are inquisitorial, adversarial, or in the process of transforming from the former to the latter.

Traditionally, criminal procedure is inquisitorial in Civil Law, Socialist and Islamic countries, and it is adversarial in Common Law countries. But there are many exceptions to the rule in Civil Law countries which are gradually adopting aspects of the adversarial process. Civil Law countries primarily recognize that the adversarial process promotes judicial efficiency. They also realize that the adversarial process better protects the presumption of innocence, which is an evolving norm of international human rights law.

Poland for example is a Civil Law country, but films such as *Life Sentence*¹⁰ and *No End*¹¹ depict lively participation by the prosecutor and defense counsel before an independent jury. Likewise, France is a leading Civil Law country, but films such as *Law Breakers*¹² and *The Life of Emile Zola*¹³ show that courtroom action can become quite adversarial. A survey of foreign films reveals that proceedings in countries that use

⁹ See generally ERIKA Fairchild & Harry R. Dammer, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 140, 146 (Wadsworth/Thomson Learning 2001); Philip L. Reichel, Comparative Criminal Justice Systems: A Topical Approach 165-71 (5th ed. 2007).

¹⁰ *Life Sentence* (Blok-Muzafilm 1933) (Pl.).

¹¹ *No End* (P.P. Film Polski 1985) (Pl.).

¹² *Law Breakers* (Compagnie Franco Coloniale Cinématographique 1971) (Fr.).

¹³ *The Life of Emile Zola* (Range Life Entertainment 1937) (US).

independent juries tend to be more adversarial. Emile Zola was tried before an independent jury during the *Belle Époque*, and a handful of Civil Law countries currently use independent juries in criminal trials, including Austria, Brazil, Greece, Poland, Spain and Russia. Most Civil Law countries, however, use either no jurors or a “mixed” panel of judges and jurors.

There are several characteristics that define differences between inquisitorial and adversarial processes, and through film, you the educated viewer can recognize the differences in action. Countries with adversarial systems of justice believe that justice can best be achieved with minimal judicial participation and competition between opposing parties who have a real stake in the outcome. In such systems, the judiciary acts more as a referee, ensuring that the evidentiary and procedural rules and other safeguards of fairness are followed. The prosecutor carries the burden to prove guilt, and many times an accused prevails by default when the government has breached certain procedural rules or safeguards that have nothing to do with whether the accused is innocent.

Countries with non-adversarial or so-called inquisitorial systems of justice believe that justice is best achieved through a search for the truth in an investigative process that is controlled by a neutral judiciary. The lawyers play a minimal role during the presentation of evidence. In such systems, the suspect/accused is expected to cooperate first with the police (as a suspect) and then the judiciary (as an accused) in finding the truth, and evidentiary and procedural rules rarely determine the outcome of a case.

Foreign filmmakers faithfully depict these differing approaches of proving guilt (adversarial) and finding the truth (inquisitorial) in the narratives of their films. Hollywood dominates the international film market, so filmmakers worldwide tend to follow the Hollywood narrative structure. That structure is formulaic, especially in law films, so “reading” a law film is usually straightforward. The crime is likely the instigating event, and the arrest is the first turning point. Beyond that, the film’s story unfolds differently in adversarial and inquisitorial systems.

Given the “battle” of the typical adversarial, Common Law trial, the protagonist of a courtroom drama is usually either the prosecutor or defense counsel, driven by the desire to prove guilt or innocence. Notable examples of British films in which the barrister struggles against great odds to prove the innocence of his client are *Witness for the Prosecution*,¹⁴ *The Paradine Case*,¹⁵ *The Girl in the News*,¹⁶ and *In the Name of the Father*.¹⁷ Examples of Australian films are *Black and White*,¹⁸ *The Last Wave*,¹⁹ and *A Cry in the Dark*.²⁰

¹⁴ *Witness for the Prosecution* (Edward Small Productions 1957) (US).

¹⁵ *The Paradine Case* (Vanguard Films 1947) (GB).

¹⁶ *The Girl in the News* (Twentieth Century-Fox Productions 1947) (GB).

¹⁷ *In the Name of the Father* (Hell’s Kitchen Films 1993) (US).

¹⁸ *Black and White* (Duo Art Productions 2002) (Au.).

¹⁹ *The Last Wave* (Australian Film Commission 1977) (Au.).

Examples of Canadian films are *Johnny Belinda*²¹ and *I Confess*,²² and an example of a New Zealand film is *Mesmerized*.²³

Because of this natural tendency of filmmakers from Common Law countries to depict defense counsel as the protagonist, U.S. films about foreign trials in Civil Law systems, especially those that purely fictional, follow this tendency and are therefore culturally biased. As long as we recognize such bias in the narrative, and filter it out, such films are nonetheless useful in comparative legal studies. U.S. films that depict the accused and/or defense counsel as the protagonist include *Red Corner*²⁴ (China), *Brokedown Palace*²⁵ (Thailand), *Return to Paradise*²⁶ (Malaysia), *The Trial*²⁷ (Czechoslovakia and/or Austria), and *Paths of Glory*²⁸ (France). Well-researched U.S. films that are based on fact are naturally forced to depict foreign criminal procedure more accurately. Examples of such U.S. films are *Midnight Express*²⁹ (Turkey) and *The Life of Emile Zola*³⁰ (France).

In the typical inquisitorial, Civil Law courtroom drama, the protagonist is rarely the prosecutor or defense counsel, since lawyers play a relatively minor role in the inquisitorial adjudicative process. In a depiction of the inquisitorial process in action, the protagonist is usually either the victim, the investigating judge, or one of the judges. In the Dutch film *A Question of Silence*,³¹ the forensic psychiatrist appointed by the investigating judge is the protagonist, driven by the desire to prove that the accused are sane. In the French film *Rape of Love*,³² the victim, aided by her counsel and the investigating judge, is the protagonist, bent on achieving retributive justice against her attackers. In the French film *Law Breakers*,³³ the investigating judge seeks to prove that the accused are culpable. In the Italian film *Open Doors*,³⁴ the protagonist is one of the associate judges, determined to convince other members of the mixed panel to vote against the death penalty.

The criminal procedure of some Civil Law countries is, however, comparatively adversarial. Examples mentioned above are Poland and France. As one would therefore predict, many Polish films depict defense counsel as the protagonist, and many French films depict lively arguments between

²⁰ *A Cry in the Dark* (Cannon Entertainment 1988) (US).

²¹ *Johnny Belinda* (Warner Bros. 1948) (US).

²² *I Confess* (Warner Bros. 1953) (US).

²³ *Mesmerized* (Manchester Productions 1986) (GB).

²⁴ *Red Corner* (Metro-Goldwyn-Mayer 1997) (US).

²⁵ *Brokedown Palace* (Fox 2000 Pictures 1999) (US).

²⁶ *Return to Paradise* (Polygram Filmed Entertainment 1998) (US).

²⁷ *The Trial* (Paris-Europa Productions 1962) (Fr.).

²⁸ *Paths of Glory* (Bryna Productions 1957) (US).

²⁹ *Midnight Express* (Casablanca Filmworks 1978) (US).

³⁰ *The Life of Emile Zola*, *supra* note 13.

³¹ *A Question of Silence* (Sigma Film Productions 1982) (NL).

³² *Rape of Love* (Les Films de l'Équinoxe 1978) (Fr.).

³³ *Law Breakers*, *supra* note 12.

³⁴ *Open Doors* (Urania Film 1990) (It.).

opposing counsel during trial. Other countries with comparatively adversarial aspects of criminal procedure are Austria, Brazil, Greece, Spain and Russia. The films of those countries do not depict defense counsel as the protagonist, but they do depict strong, competitive players in the conduct of trial. The female presiding judge is the anti-hero in the Austrian film *Scorpion Woman*.³⁵ The prosecutor is the protagonist in the Greek films *Women with a Past*³⁶ and *Maria in Silence*.³⁷ And the investigating judge is the protagonist in the Greek films *The Highway of Hate*³⁸ and *With Fear and Passion*.³⁹

The *mise-en-scène*, including the courtroom layout, the props, and the courtroom attire, also reveals whether the trial is taking place in an inquisitorial or adversarial legal system. For example, the layout of a Common Law courtroom is symmetrical, resembling a playing field or battlefield. There is a bench with one chair for a single judge who referees the contest. The independent jury box is situated to one side, indicating their participation only as observers or spectators until the adjudicative phase of trial. The tables of the opposing lawyers, the prosecution and the defense, are side-by-side, facing the judge. The witness stand faces the lawyers, because it is the lawyers, not the judge, who present and challenge the witnesses through direct and cross-examination. Likewise, the lawyers, not the judge, determine the timing and sequence of the presentation of evidence and then argue how the evidence should be interpreted.

By contrast, the layout of a Civil Law courtroom tends to be less symmetrical, because the several participants are working together, not against each other. The witness chair faces the bench, because the presiding judge, and sometimes the associate judges and jurors, conduct the questioning. If there are jurors, they usually sit with the judges, not in a separate box. In such a so-called mixed panel, there is more participation and collaboration among the judges and jurors. The lawyers participate very little in the presentation of evidence, so cross-examination is an unknown art in inquisitorial proceedings. The prosecutor's and defense counsel's tables are not equidistant from the judge because the prosecutor is considered to be a non-voting, neutral member of the court. The prosecutor's table therefore usually sits higher than defense counsel's table and is usually closer to the bench or even an extension of the bench.

Noting the inquisitorial and adversarial aspects of a film therefore assists you the viewer in analyzing the dynamics of the participants and their roles in the adjudicative process. Role specific constructs allow you to analyze more specifically how and why the participants operate as they do.

³⁵ *Scorpion Woman* (1989) (At.).

³⁶ *Women with a Past* (Finos Film 1966) (Gr.).

³⁷ *Maria in Silence* (Finos Film 1973) (Gr.).

³⁸ *The Highway of Hate* (Finos Film 1968) (Gr.).

³⁹ *With Fear and Passion* (Finos Film 1972) (Gr.).

B. Role-Specific Analytical Constructs

There are differences among the legal traditions regarding the roles of victims, the suspect/accused, defense counsel, the prosecutor, and judges and jurors. These roles can be quantitatively or qualitatively compared in terms of the degree to which a suspect is expected to cooperate, the degree of independence and neutrality of the prosecutor, the extent of the victim's power to bring charges and to participate at trial, and the degree of lay participation (jurors) in adjudication and sentencing.

Generally, the expectation that a suspect/accused will cooperate is higher in inquisitorial systems, and the participation of defense counsel is lower. But the degree varies among the legal traditions. For example, China (Socialist legal tradition) and France (Civil Law tradition) have inquisitorial systems. But as revealed in films such as *Red Corner*,⁴⁰ the expectation of cooperation from a suspect/accused is much higher in China, and the participation of defense counsel is much lower.⁴¹

The difference in expectation of cooperation from the accused is also reflected in the *mise en scène* of the courtroom. In inquisitorial systems, there is a separate dock for the accused. Defense counsel does not sit with the accused, making communications difficult. By contrast, the U.S. courtroom has no separate dock for the defendant, because the defendant and his or her defense counsel sit together, indicating a greater respect for the right to remain silent and the assistance of counsel, both of which serve to safeguard the presumption of innocence.

You can compare the roles of prosecutors by considering their degrees of independence and neutrality. The inquisitorial-adversarial construct will usually predict the degree of independence and partiality of a prosecutor. Inquisitorial prosecutors tend to be less independent than adversarial prosecutors. Many inquisitorial systems apply the principle of legality which means that a prosecutor has little or no discretion on whether to bring formal charges once the evidence has established likely culpability. The films *Women with a Past*⁴² and *Maria in Silence*⁴³ show that the principle of legality is strictly applied in Greece.

Inquisitorial prosecutors also tend to be more neutral than adversarial prosecutors, and this difference is reflected in the *mise en scène*. In inquisitorial proceedings, the prosecution table usually sits closer to the bench than does the defense table, indicating that the prosecutor is a non-voting, neutral member of the court. In theory, the prosecutor is expected to present both incriminating and exculpatory

⁴⁰ *Red Corner*, *supra* note 24.

⁴¹ See Ira Belkin, *China*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 101 (Craig M. Bradley ed., 2d ed. 2007).

⁴² *Women with a Past*, *supra* note 36.

⁴³ *Maria in Silence*, *supra* note 37.

evidence to the adjudicators. It is not uncommon for an inquisitorial prosecutor to appeal from a conviction.

Victims play a greater role in inquisitorial criminal procedure. Their claims for relief are joined with the criminal proceeding, and they may participate in the trial through counsel. As revealed in the *mise en scène*, there is usually a separate table in the courtroom for victim's counsel. Although the United States is a pioneer of restorative justice, it has not adopted the practice of permitting victims to participate in the criminal adjudicative process as secondary prosecutors.

To compare the roles of judges and jurors, Reichel has developed an “adjudication continuum” to compare the degree of lay participation and judicial control in the adjudicative process.⁴⁴ The continuum helps to explain the relative degree to which a country relies on professional judges and lay people to adjudicate the guilt or innocence of an accused. The continuum reveals that inquisitorial systems rely more heavily on professional judges to adjudicate guilt or innocence. Quantitatively, the degree of lay participation in mixed panels can be measured by considering the ratio of judges to jurors and the number of votes needed to reach a verdict.

The degree of lay participation and judicial control is also reflected in the *mise en scène*. In inquisitorial courtrooms, the witness stand faces the presiding judge, not the lawyers, revealing much greater judicial participation in the evidence-presenting phase of the trial. The presiding judge controls the questioning of the witnesses and the order in which they are called. In adversarial courtrooms, the witness stand faces the lawyers, revealing a lesser degree of judicial control over the questioning of witnesses.

The degree and manner of lay participation and judicial control vary from country to country within each legal tradition. For example, among Civil Law countries, Germany uses a mixed panel of judges and jurors who deliberate together, whereas Austria, Brazil, Greece, Poland, Spain and Russia use independent juries. And the United States and England are Common Law countries, but English judges give jurors much more guidance than do American judges.

It is also important to note a film's historical context since criminal procedural rules are constantly changing in all countries. For example, *The Life of Emile Zola*⁴⁵ depicts a French trial using an independent jury of twelve lay jurors, similar to the jury used in Common Law countries today. The trial of Emile Zola took place in 1898 when France was still using an independent jury. Today, however, a mixed panel of three judges and nine lay jurors hears serious felony cases in France.

⁴⁴ See Reichel, *supra* note 9 AT 165, 253.

⁴⁵ *The Life of Emile Zola*, *supra* note 13.

In sum, then, the inquisitorial-adversarial, accused-cooperation, defense-participation, prosecutorial-independence-partiality, victim-participation, lay-participation and judicial-control constructs are analytical constructs that can be used to compare the treatment of a suspect/accused from one jurisdiction to the next.

After applying these analytical constructs, we can make better-informed value judgments about a country's criminal procedure. It is evident, for example, that the accused in an adversarial system enjoys more procedural advantages than an accused in a traditional inquisitorial system. The former enjoys, for example, the right to an attorney at an earlier stage of investigation, a better-respected right to remain silent, and a greater opportunity to call and question witnesses. Many of these differences can be explained by the underlying fact that the presumption of innocence is an inherent component of adversarial systems, but does not *traditionally* exist in inquisitorial systems.

The traditions of inquisitorial systems, insofar as they are inimical to the presumption of innocence, are giving way to universally accepted principles of criminal procedure. In Europe, these changes are occurring through the jurisprudence of the European Commission and the Court of Human Rights and their interpretations of the European Convention on Human Rights. Many countries with inquisitorial justice systems, notably Italy and Chile, are therefore adopting aspects of adversarial criminal procedure. As a practical result, for example, their advocates are developing cross-examination skills as they participate more in the questioning of witnesses.

C. The Civil Law-Common Law Dichotomy⁴⁶

The classic construct in the field of comparative law is the Civil Law-Common Law dichotomy. By way of brief background, Civil Law is “code law” that has been distilled over the centuries since 450 BCE, from Roman Law, Canon Law, the Napoleonic Code and German Law under the Bismarck. Common Law is “judge law” that began in twelfth century England, starting with King Henry II, the so-called “Father of Common Law.” The most notable developments of the Common Law tradition are the jury system and the adversarial (or accusatorial) process. The vast majority of countries in the world have adopted features of either Civil Law or Common Law traditions or both, so the Civil Law-Common Law analytical model helps to explain the reasons for distinctive features of their criminal procedure.

U.S. Supreme Court Justice Warren Burger recognized the difference between the two traditions, remarking that “if he were innocent, he would prefer to be tried in a civil law court, but . . . if he were

⁴⁶ See generally Glendon, et al., *supra* note 1.

guilty, he would prefer to be tried by a common law court.”⁴⁷ Justice Burger’s comment is probably based on the fact that Civil Law courts use an inquisitorial process that is aimed at determining the truth, whereas Common Law courts use an adversarial process that burdens the prosecutor with satisfying a high standard of proving guilt. Justice Berger may also have been expressing his lack of confidence in independent juries, which are found mostly in Common Law courts and rarely in Civil Law courts.

1. Common Law Traditions

Most U.S. rules of criminal procedure, including those that are indelibly etched in the Fourth, Fifth, Sixth and Eighth Amendments of the U.S. Constitution, derive from Common Law rules and English parliamentary decrees. In the view of foreign jurists, especially Civil Law jurists, the United States has gone too far with procedural rules designed to protect the suspect/accused.

Although U.S. law shares a close Common Law tradition with England,⁴⁸ several noteworthy differences in criminal procedure have evolved, and those differences are depicted in film. The differences can be attributed to a strong U.S. commitment to safeguards that ensure that the innocent are not convicted. Those safeguards include a suspect’s right to counsel, the right to remain silent, the *Miranda* warning and the Exclusionary Rule, the prosecutor’s burden and high standard of proof, and lay fact-finding. By contrast, in England, prosecutors exercise less prosecutorial discretion; juries are selected more quickly and therefore less carefully; defense counsel has much less communication with the accused during trial; the judge is allowed to comment on the evidence to the jury; and the jury verdict need not be unanimous.

In the United States, prosecutors enjoy and exercise broad prosecutorial discretion on whether and what to formally charge. Prosecutorial discretion is so highly protected that U.S. prosecutors are absolutely immune from tort liability for the mistakes that they make. By contrast, under the principle of legality, Civil Law prosecutors have little discretion. They are expected to pursue the prosecution of all crimes. This expectation is especially strong in Greece, as seen in the films *Women with a Past*⁴⁹ and *Maria in Silence*.⁵⁰

Perhaps the most distinctive feature of the adversarial process is the art of cross-examination. As the U.S. Supreme Court stated in 1992, cross-examination is “beyond any doubt the greatest legal engine

⁴⁷ Warren Burger, *Adversarial and Nonadversarial Systems*. Presented at a conference at the Center for the Study of Democratic Institutions, Washington, D.C. (November 1968), *quoted in* Fairchild & Dammer, *supra* note 9 at 146.

⁴⁸ *See generally* David J. Feldman, *England and Wales*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 149-200 (Craig M. Bradley ed., 2d ed. 2007).

⁴⁹ *Women with a Past*, *supra* note 36.

⁵⁰ *Maria in Silence*, *supra* note 37.

ever invented for the discovery of truth.”⁵¹ As depicted in countless films, however, an especially artful barrister can use searing cross-examination to discredit the testimony of a witness who is telling the truth. In the Indian film *Kasoor*,⁵² female defense counsel on cross-examination obliterates the direct testimony of the prosecutor’s witnesses, obtaining an acquittal for her guilty client. And in *In the Name of the Father*,⁵³ the prosecutor on cross-examination completely discredits the testimony of the accused Gerry Conlon who is, in reality, innocent. The prosecutor puts it to Conlon: “You expect this jury to believe that decorated police officers would risk their careers and their reputations by threatening your father?” And Conlon responds: “I don’t expect ‘em to believe that by the time you finish with ‘em, but it happens to be the truth.”

England and other Commonwealth countries are also distinctive in the manner in which a barrister, especially the prosecutor, may “put the question” to a witness during cross-examination, as depicted in *The Paradine Case*,⁵⁴ confronting a witness with an accusation or “submission.” Such an approach is objectionable in the United States for being argumentative, prejudicial and harassing.

The United States also stands apart with its procedure of allowing the prosecutor to speak last in rebuttal during summations.⁵⁵ In every other country in the world,⁵⁶ defense counsel speaks last in summation. At the same time, however, the English judge has greater authority to comment on the evidence, and it is said that this judicial prerogative serves to balance against an unduly persuasive summation by defense counsel.

For U.S. lawyers, it is unsettling to watch the English judge in summation as he or she advises the jury on how to interpret and weigh the evidence that has been presented by both sides. That would never happen in a U.S. courtroom where fact-finding is strictly the domain of the jury. U.S. judges give juries guidance only on the law, not the facts. As shown in films such as *Let Him Have It*⁵⁷ and *Provoked: A True Story*,⁵⁸ the English judge has the power to sway the jury to convict an innocent person. The power and sway of the judge over the jury is further enhanced by his or her exalted position in the courtroom. In the Crown Courts (felony courts), the judge wears a ceremonial red robe and long wig, sits much higher than all other participants, and the attorneys refer to him or her as “My Lord” or “My Lady.”⁵⁹

⁵¹ *United States v. Salerno*, 505 U.S. 317, 328-29 (1992).

⁵² *Kasoor* (Mukesh Bhatt’s Vishesh Entertainment Ltd. 2001) (In.).

⁵³ *In the Name of the Father*, *supra* note 17.

⁵⁴ *The Paradine Case*, *supra* note 15.

⁵⁵ See John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139 (Spring 2000).

⁵⁶ Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 424 n.24 (1992) (German prosecutors may reply to the defense’s summation, but rarely exercise that power).

⁵⁷ *Let Him Have It* (British Screen Productions 1991) (GB).

⁵⁸ *Provoked: A True Story* (Sunanda Murali Manohar 2006) (GB). See Jeannette Catsoulis, *Revisiting the True Story of a Battered Wife’s Revenge*, N.Y. Times, May 11, 2007 (film review), available at www.nytimes.com/2007/05/11/movies/11Prov.html?_r=0 (last visited Oct. 11, 2014).

⁵⁹ Many British films depict criminal trials in the Central Criminal Court of the Old Bailey in London. See generally *The*

Civil Law judges have even greater authority to guide jurors, as seen in the Austrian film *Scorpion Woman*⁶⁰ in which the judge gives such biased instructions to the independent jury that the prosecutor storms out in protest. On mixed panels in Civil Law countries, judges and jurors deliberate together, as shown in the Italian film *Open Doors*⁶¹ in which one of the jurors defies the presiding judge's instruction to apply the death penalty.

2. Civil Law Traditions

The history of *substantive* Civil Law can be found in any comparative law or comparative criminal justice textbook or online,⁶² but knowing that the substantive rules of Civil Law are derived from Roman law, canon law, the Napoleonic Code and German codifications explains little about the criminal procedure of modern Civil Law countries. To be sure, criminal procedural rules are codified, just as all Civil Law needs to be. However, criminal procedural rules in Civil Law countries exist for the purpose of establishing order and efficiency in a search for the truth, whereas they exist in Common Law countries for the express purpose of safeguarding the rights of suspects and accused at the expense, in many cases, of impunity for the culpable.

Civil Law jurists therefore find that Common Law criminal procedural rules, especially those found in the United States, unnecessarily impede efforts to find the truth.⁶³ Civil Law criminal trials can be characterized as fact-oriented, while Common Law criminal trials are more procedure-oriented. In Civil Law countries, judges are free to hear wide-ranging testimony with little lay participation, and there is no presumption of either guilt or innocence. In Common Law countries, the right to remain silent, strict rules of evidence, and lay participation by an independent jury limit the fact-finding process. Thus, in the United States, an accused is much more likely to be set free on emotional or technical procedural grounds that fly in the face of obvious culpability. Hence Justice Burger's remark that, if guilty, he would rather be tried in a Common Law court.

The two primary Civil law traditions are the French and German traditions. Both of these countries developed sophisticated legal codes which reflected their own unique customs, and neighboring countries adopted them. Neighboring countries that adopted the Napoleonic Code include Spain, Portugal and The Netherlands. Also, due to French and Spanish influence in Latin America, Argentina, Chile, and Mexico

Proceedings of the Old Bailey, 1674-1913, www.oldbaileyonline.org (last visited Oct. 11, 2014).

⁶⁰ *Scorpion Woman*, *supra* note 35.

⁶¹ *Open Doors*, *supra* note 34.

⁶² See, e.g., Glendon, et al., *supra* note 1; LSU Law Center, Civil Law Online, <https://www.law.lsu.edu/index.cfm?geaux=clo.whatis> (last visited Oct. 11, 2014).

⁶³ SEE Fairchild & Dammer, *supra* note 9 at 53 ("The concern in U.S. courts with criminal procedure . . . often seems excessive to people in Civil Law countries.")

adopted the Napoleonic Code. Neighboring countries that adopted the German code include Austria, Poland, Greece and Italy.

a. French Civil Law Traditions⁶⁴

France has a relatively adversarial adjudicative process compared with other Civil Law countries that follow the French tradition, but its procedures are otherwise classically inquisitorial. In general, crimes are investigated by the police or the investigating judge, and the prosecutor supervises their work. Although French prosecutors tend to be adversarial in their approach, they are supposed to be guided by the principle of fairness, searching for and presenting all evidence, exculpatory as well as incriminating, so they are less adversarial than U.S. prosecutors. Because the prosecutor plays a role that is secondary to the judges, French films do not feature the prosecutor as a main character.

France follows the principle that the investigation must be thoroughly documented in reports (*proces-verbal*) that are maintained in a *dossier*.⁶⁵ The *dossier* is always available for examination by defense counsel, and it will be presented to the judge and jury at trial. For particularly serious crimes, the neutral investigating judge (*juge d'instruction*) often plays a central role in the development of the *dossier*. The investigating judge is therefore often a main character in French films. Examples of the French investigating judge in action are *Law Breakers*,⁶⁶ *Rape of Love*⁶⁷ and *The Judge and the Assassin*.⁶⁸

Before recent changes in French criminal procedure, the suspects depicted in many French films described in this textbook could be held in investigatory detention (*garde à vue*) for up to forty-eight hours without probable cause, judicial approval, or a mandatory court appearance. And the accused could not even consult an attorney.⁶⁹ The risk that this procedure can result in unreliable confessions is depicted in the film *Garde à vue*.⁷⁰ Today, a suspect has a right to see a lawyer for 30 minutes within the first hour, for 30 minutes after 20 hours, and another 30 minutes after 36 hours.⁷¹

⁶⁴ See generally Richard S. Frase, *France*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 201-42 (Craig M. Bradley ed., 2d ed. 2007); New Zealand Law Commission, *French Criminal Procedure*, in Alternative Pre-Trial and Trial Processes: Possible Reforms 109 (NZLC IP30, Wellington, 2012), available at www.lawcom.govt.nz/sites/default/files/publications/2012/02/alternative_trial_processes_nzlc_ip30_-1.pdf (last visited Oct. 11, 2014); Henri de Larosière de Champfeu, *Some Aspects of French Penal Procedure* 59-67, The Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Resource Material Series No. 53 (1998), available at www.unafei.or.jp/english/pdf/RS_No53/No53_00All.pdf (last visited Oct. 11, 2014).

⁶⁵ The *dossier* is also called an *expediente* or *el sumario* in Spanish. It is referred to generically in this textbook as the dossier since most countries use the French word.

⁶⁶ *Law Breakers*, *supra* note 12.

⁶⁷ *Rape of Love*, *supra* note 32.

⁶⁸ *The Judge and the Assassin* (Lira Films 1976) (Fr.).

⁶⁹ C. pr. pén. arts. 63-65 (describing *garde à vue* procedures), available at www.legifrance.gouv.fr/content/download/1958/13719/.../Code_34.pdf (last visited Oct. 11, 2014).

⁷⁰ *Garde à vue* (Les Films Ariane 1981) (Fr.).

⁷¹ See C. pr. pén., *supra* note 69, art. 63-4.

In the French Civil Law tradition, there is no presumption of innocence or guilt. The French Constitution provides that there shall be a presumption of innocence, but the safeguards are weak. There is no right against self-incrimination, and the right to remain silent is not respected. The primary goal of a French investigator is to obtain a confession, which is difficult to obtain without free access to a suspect. Although a suspect must be informed of the right to remain silent and has a limited right during *garde à vue* to the presence of counsel during questioning, he or she is expected to respond to questioning, as depicted in *Law Breakers*.⁷² After a suspect is formally charged and becomes an accused, all questioning must be done in the presence of the accused's counsel, but the accused is still expected to respond to questioning in so-called "confrontation" sessions before the investigating judge, as depicted in the film *Rape of Love*.⁷³

There are three levels of crimes and corresponding levels of courts. *Délits* are punishable by imprisonment of up to ten years, so they include many crimes that are classified as felonies in the United States. The correctional courts (*tribunal correctionnel*) decide *délit* cases, as seen in the documentary *Tenth District Court*.⁷⁴ A correctional court is composed of one or three judges. *Crimes* are punishable by imprisonment for more than ten years and are decided by mixed panels of the assize courts (*cour d'assises*). The mixed panel is composed of three judges and nine lay jurors as depicted in *Law Breakers*⁷⁵ and *Two Men in Town*.⁷⁶

After the 1789 revolution, France instituted many criminal procedure reforms, most notably introduction of a jury system. Initially, as seen in the films *Violette*⁷⁷ and *The Life of Emile Zola*,⁷⁸ three judges presided over an independent jury of twelve. Then, during the German occupation of World War II, the jury was converted to a mixed panel, composed of three judges and nine jurors who deliberate together, thus eliminating the risk of a "runaway" or nullifying jury. After World War II, France did not return to the concept of an independent jury.

In the French Civil Law tradition, an alleged victim (*partie civile*) may initiate a prosecution or join in one that has already commenced and may demand an award of damages, as depicted in *Law Breakers*.⁷⁹ The *partie civile* may sit with counsel at a separate table at trial. If the case ends in dismissal or acquittal, the court may assess a fine and order payment of damages to the accused.

⁷² *Law Breakers*, *supra* note 12.

⁷³ *Rape of Love*, *supra* note 32.

⁷⁴ *Tenth District Court* (France 2 Cinéma 2004) (Fr.).

⁷⁵ *Law Breakers*, *supra* note 12.

⁷⁶ *Two Men in Town* (Adel Productions 1973) (Fr.).

⁷⁷ *Violette* (Filmel 1978) (Fr.).

⁷⁸ *The Life of Emile Zola*, *supra* note 13.

⁷⁹ *Law Breakers*, *supra* note 12.

As depicted in all modern French courtroom dramas, the presiding judge, who controls the conduct of the proceedings, wears a traditional red and black robe, and the other two judges (*assesseurs*) and the lawyers all wear black robes with the appropriate accessories, including a white pleated jabot (*rabat*) and a black epitoga or tail (*épitoge*) that is buttoned at the left shoulder of the robe and flows down the back. When appearing before the *cour d'assises*, the epitoga must be trimmed with ermine fur. Also, in some jurisdictions, such as Paris, the epitoga must always be ermine-trimmed.

The presiding judge begins the courtroom proceedings by questioning the accused who is not placed under oath and cannot be compelled to respond. The accused must take the stand, however, and adverse inferences may be drawn from the failure to respond. During trial, the accused sits in a dock either behind or in front of defense counsel, which makes communicating awkward, but not as difficult as in Italian or British courts.

Since the presiding judge controls the proceeding, there is no need for rules of evidence. Most notably, in the United States, character evidence of the defendant is generally inadmissible, but in France, “one judges the man, not the acts.”⁸⁰ Therefore the accused’s criminal record is always admissible.

Then witnesses are called and questioned by the presiding judge. Witnesses may not assert a right against self-incrimination. The lawyers may pose questions, with the court’s permission, but they usually play a passive role during the presentation of evidence. As depicted in many films, inquisitorial Civil Law courts have a long tradition of relying on affidavits of previously obtained testimony and police reports that are contained in the *dossier*. This tradition of relying on the *dossier* is at odds with Article 6.3.d of the European Convention on Human Rights which provides that the accused has a right to call live witnesses for questioning.⁸¹ Such a right is consistent with the Common Law “principle of orality” which means that all evidence against an accused should be presented in open court.

In most Civil Law countries, the trial is really an inquest comprised of a series of hearings, culminating with a courtroom hearing, so the adjudicative process can last several months. In France, the final, courtroom phase, once started, must continue until completed (the principle of immediacy). After all evidence has been presented, the attorneys make their closing statements, as depicted in several French films, including *Law Breakers*⁸² and *Tenth District Court*.⁸³ The victim’s attorney speaks first, followed by the prosecutor who presents the indictment (*réquisitoire*), namely observations and sentencing recommendations. Defense counsel then presents a plea (*plaidoirie*) for acquittal or leniency. In jury trials,

⁸⁰ See Pugh, *The Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L.R. 1, 10 (1962).

⁸¹ Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221 (1955) (as amended by protocols), *available at* www.echr.coe.int/Documents/Convention_ENG.pdf (last visited Oct. 11, 2014).

⁸² *Law Breakers*, *supra* note 12.

⁸³ *Tenth District Court*, *supra* note 74.

French lawyers are less flamboyant than American lawyers and British barristers, probably because French juries are tightly controlled by the judges throughout trial, including deliberation. Defense counsel is, however, portrayed as exceptionally animated in the film *Law Breakers*.

After the lawyers argue, the presiding judge then gives the defendant a chance to have the final word as seen in *The Life of Emile Zola*.⁸⁴ The judges and jurors (if any) then depart to deliberate together and return for announcement by the presiding judge of the verdict and, if guilty, the sentence. Sentencing is not a separate phase, so the accused is compelled not to remain silent during trial.

As films depict, there has been little progress toward safeguarding the presumption of innocence in France, as well as countries that follow its tradition. Mexico is an example of a Latin American country that adopted the French Civil Law tradition. Its criminal adjudicative process⁸⁵ suffers most from a lack of transparency that has evolved into a number of incongruous practices, some of which ignore written requirements and others of which follow the rules too rigidly. Its 1917 Constitution provides for an adversarial model, but its 1934 criminal code is derived from the 1808 Napoleonic *Code d'instruction criminelle* which provides for a largely inquisitorial approach to criminal trials. The primary distinguishing feature of the Mexican criminal justice system is the expansive roles of the prosecutor and the trial judge, as shown in the films *Esmeralda Comes by Night*⁸⁶ and *Presumed Guilty*.⁸⁷

When the attorneys who narrate the documentary *Presumed Guilty* are retained to represent José Antonio Zúñiga Rodríguez, he has already been convicted and sentenced to 20 years in prison, and he has exhausted his appeals. He has served 182 days of his sentence. As a documentary, *Presumed Guilty* is edited to present an argument against the Mexican criminal justice system, and all indications are that the system is in significant need of reform. Ironically, the documentarists end up proving that justice prevails in the end, when the case is properly defended. Rodríguez gets a re-trial due to ineffective assistance of defense counsel, and he prevails after winning his case on re-trial and appeal, thanks to the relentless efforts of his new, much more capable defense counsel. There are ongoing efforts in Mexico to transform its inquisitorial justice systems to an adversarial one, but there is no current effort to institute a jury system.⁸⁸

The Netherlands is another example of a country that follows the French Civil Law tradition. It was one of the first countries to adopt France's Napoleonic Code. In 1838, the Netherlands adopted the

⁸⁴ *The Life of Emile Zola*, *supra* note 13.

⁸⁵ See generally Miguel Sarré & Jan Perlin, *Mexico*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 351-96 (Craig M. Bradley ed., 2d ed. 2007); William Hine-Ramsberger, *Drug Violence and Constitutional Revisions: Mexico's 2008 Criminal Justice Reform and the Formation of Rule of Law*, 37 *Brook. J. Int'l L.* 291 (2008).

⁸⁶ *Esmeralda Comes by Night* (Esmeralda Producciones 1997) (Mx.).

⁸⁷ *Presumed Guilty* (Abogados con cámara 2008) (Mx.).

⁸⁸ Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 *AM. J. COMP. L.* 617 (2007).

French Code of Criminal Procedure and then tailored it to reflect Dutch custom. Dutch trials are heard by three-judge panels, and the presiding judge conducts the questioning. The attorneys are allowed to ask only supplementary questions. Cross-examination does not exist.

The Dutch film *A Question of Silence*⁸⁹ depicts both the investigative and adjudicative phases of Dutch criminal procedure. While the film is ostensibly a feminist attack on male chauvinism in the Netherlands in the early 1980s, it reflects the view of Dutch society that a Dutch trial is a mere formality at which the accused and defense counsel are not expected to participate. Everything that the judges need to decide the case is contained in the *dossier*.

In sum, the presumption of innocence is not well-protected in countries that follow the French Civil Law tradition. In France, the police procedure of *garde à vue* still gives a suspect inadequate access to defense counsel, the suspect is expected to cooperate with the police, and the triers of fact continue to rely heavily on the *dossier* which is compiled by the police, the prosecutor and/or an investigating judge. This failure to adequately protect the presumption of innocence is present as well in other countries that have adopted the French Civil Law tradition, as depicted in film.

b. German Civil Law Traditions⁹⁰

Germany exemplifies a unitary Civil Law system. This presents no real difference regarding criminal procedure, however, because federal law governs criminal procedure throughout Germany, even though all criminal trials occur in the state (Laender) courts. Nearly 100 years after France led the modern Civil Law tradition with its Napoleonic Code, Germany under the Bismarck implemented its own version of codified law in 1877.

Legal periods of German criminal procedure depicted in film include the constitutional democracy of the Weimar Republic after World War I,⁹¹ the breakdown of justice under the Third Reich after 1933,⁹² the post-World War II democracy of the Basic Law after 1949,⁹³ and reunified Germany.⁹⁴ German law films reveal a number of distinguishing features of the German justice system. Unlike the French legal tradition, the investigating judge (*untersuchungsrichter*) has been eliminated, and the police have de facto power to interrogate a suspect without counsel present.

⁸⁹ *A Question of Silence*, *supra* note 31.

⁹⁰ See generally Thomas Weigend, *Germany*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 243-72 (Craig M. Bradley ed., 2d ed. 2007).

⁹¹ *Love in Thoughts* (X-Filme Creative Pool 2004) (De.); *M* (Nero-Film AG 1931) (De.).

⁹² *Sophie Scholl - The Final Days* (Broth Film 2005) (De.).

⁹³ *The Reader* (The Weinstein Co. 2008); *Devil in Silk* (Fono Film 1956) (De.); *The Baader Meinhof Complex* (Constantin Film Produktion 2008) (De.).

⁹⁴ *After the Truth* (Edward R. Pressman Film 1999) (US-De.).

Suspects in police custody may, however, assert a right to remain silent and may, in effect, negotiate with police, offering to answer questions if defense counsel is allowed to be present. If counsel is not readily available, the police are not prohibited from “encouraging” the suspect to waive the right to remain silent. They may engage in lengthy “informal” interviews before informing suspects of their rights. And they may detain a suspect until the end of the following day before either release or presentation before a judge to determine whether further detention is warranted. On the other hand, unlike American police, Germany police are discouraged from using deception (*täuschung*) to trick suspects into confessing.

Pursuant to the equal rights provisions of the German Basic Law, once a suspect becomes an accused, prosecution is mandatory, and the prosecutor is regarded as a neutral officer of the court. This requirement is known as the “legality principle” in the Civil Law tradition, and it is followed more strictly in the German tradition than it is in the French tradition. German prosecutors therefore generally err in favor of bringing charges since there is no shame attached to “losing” a case. At trial, however, the German prosecutor tends to behave in an adversarial manner, especially if the accused is represented by counsel. Still, it is not uncommon for a prosecutor to ask the court to acquit an accused after presentation of the evidence at trial. And the prosecutor may even appeal from a panel’s decision to convict.

Among Civil Law systems, Germany’s is the most heavily code-based, which is a reflection of the German mind-set that all problems can be rationally contemplated in a set of rules. Following this way of thinking, German lawyers have earned a reputation for being especially rigid and methodical in their legal reasoning. Although their presentations at trial may be just as flamboyant as those of American trial lawyers, they appeal more to rational thinking and less to sympathy. An excellent depiction can be found in the hard-to-find film *Devil in Silk*⁹⁵ when the accused’s lawyer (played by Helmuth Rudolph) delivers his closing argument with inescapable German logic to convince a mixed panel to acquit his client (played by Curt Jergens) of a murder charge.

Germany instituted a jury system in the middle of the nineteenth century, but lay participation has fluctuated, and decreased overall, over the years.⁹⁶ German jurors are educated citizens who are specially selected to serve on the bench for extended periods of time to hear cases. They sit at the bench with the judges, and they deliberate with the judges who hold considerable sway.

The German ratio of jurors to judges is low compared with panels of the French legal tradition, and verdicts require a two-thirds super-majority. The composition of the mixed panel of judges and jurors

⁹⁵ *Devil in Silk*, *supra* note 93.

⁹⁶ Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 228 (1995); Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 136-41 (1972).

varies, however, depending on the seriousness of the crime. In murder trials, for example, the panel consists of two judges and two lay jurors, thereby giving lay jurors greater say over the fate of the accused.

In the Civil Law tradition, German trials are managed by the presiding judge who controls the sequence of presentation of the evidence and the questioning of witnesses. The German prosecutor and defense counsel ask more questions than lawyers do in courts of the French legal tradition, but their primary role is making speeches in summation for the panel members.

The managing role of the presiding judge-turned-tyrant under the Nazis is dramatically depicted in *Sophie Scholl-The Final Days*.⁹⁷ The managing role is also depicted (pre-WWII) in Fritz Lang's *M*⁹⁸ and Werner Herzog's *Invincible*⁹⁹ and (post-WWII) in the *Council of the Gods*¹⁰⁰ and *The Reader*.¹⁰¹ *The Baader Meinhof Complex*¹⁰² shows the chaos that ensues if the presiding judge is not an effective manager of accused who are intent on derailing a trial.

Germany also has many characteristics of adversarial legal systems. With Germany's defeat in World War II and the ensuing American occupation and military tribunals, it took on some of the characteristics of the U.S. legal system. For example, it is experimenting with plea bargaining, and the lawyers participate increasingly in the questioning of witnesses. This tendency to gravitate toward an adversarial model is present as well in other countries that have adopted the German Civil Law tradition, as depicted in film.

In 1989, Italian criminal procedure was significantly changed with enactment of a new Code of Penal Procedure which transforms the inquisitorial system to an adversarial one.¹⁰³ Rather than having the judges rely on written summaries of testimony or live testimony that is directed by the presiding judge, the prosecutor, defense counsel and victim's counsel are expected to present oral testimony (the principle of orality), and the trial is supposed to continue over consecutive days until completed (the principle of immediacy). Consistent with reliance on oral testimony instead of a *dossier* of summarized testimony, the investigating judge has been eliminated. As experienced in Germany, adversarial trials are more time-consuming, so Italy has also begun the formerly unheard of practice of plea-bargaining to resolve cases more quickly.

⁹⁷ Sophie Scholl - The Final Days, *supra* note 92.

⁹⁸ M, *supra* note 91.

⁹⁹ *Invincible* (Werner Herzog Filmproduktion 2001) (De.).

¹⁰⁰ *Council of the Gods* (Deutsche Film 1950) (De.).

¹⁰¹ *The Reader*, *supra* note 93.

¹⁰² *The Baader Meinhof Complex*, *supra* note 93.

¹⁰³ President of the Republic Decree, Sept. 22, 1988 n. 447, in ordinary supplement no.1 to the Official Gazette of the State, general series no. 250, Oct. 24, 1988. *See generally* Rachel A. Van Cleave, *Italy*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 303 (Craig M. Bradley ed., 2d ed. 2007); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 *AM. J. COMP. L.* 227 (2000); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *YALE J. INT'L L.* 1 (1992).

*The Sicilian Girl*¹⁰⁴ is based on the true story of seventeen-year-old Rita Atria (played by Veronica D'Agostino) who was a key witness against the mafia in a 1992 trial in Palermo, Sicily, and of Paolo Borsellino (played by Gérard Jugnot), the anti-Mafia crusader. The film provides a close look at the criminal justice system at the time, including Borsellino's investigation, first as an investigating judge and then as a lead prosecutor, and several authentic courtroom scenes in the maximum security court in Palermo which is also depicted in the film *Il Divo*.¹⁰⁵

The trial took place only a few years after Italy's enactment, in 1989, of a new Code of Penal Procedure which transformed the inquisitorial system to an adversarial one. Consistent with this transformation, Borsellino made the transition from investigating judge to prosecutor with the elimination of the position of investigating judge. The courtroom scenes depict a mixture of inquisitorial and adversarial processes. The presiding judge controls the questioning, but defense counsel is very participatory, often raising objections to evidence proffered by the prosecutor. The witness chair still faces the judges, but now at a 45-degree angle, allowing a view of the attorneys as well.

Austrian criminal procedure is also based on the German model,¹⁰⁶ but it has retained the position of investigating judge which is featured prominently in Kafka's novel *The Trial*,¹⁰⁷ which Orson Welles adapted to film. More remarkable, however, is Austria's independent jury system which is depicted in the film *Scorpion Woman*.¹⁰⁸ The presiding judge of a three-member panel in the trial of a serious crime directs the questioning of witnesses while an independent jury of eight members listens.¹⁰⁹

Austria first established its jury system in 1848, emulating the then-existing French revolutionary system of a separate, independent jury. During the "Austrofascist" dictatorship, which began in 1933, the jury was first changed from an independent jury to a mixed panel and then abolished altogether and not restored until after the war,¹¹⁰ despite strong governmental and professional opposition which continues to this day.

¹⁰⁴ *The Sicilian Girl* (R&C Produzioni 2008) (It.).

¹⁰⁵ *Il Divo* (Indigo Film 2008) (It.).

¹⁰⁶ See generally Herbert Hausmaninger, THE AUSTRIAN LEGAL SYSTEM (2d ed. 2000); Greg Taylor, *Jury Trial in Austria*, 14 NEW CRIM. L. REV. 281 (2011); New Zealand Law Commission, *Austrian Criminal Procedure*, in *Alternative Pre-Trial and Trial Processes: Possible Reforms 71* (NZLC IP30, Wellington, 2012), available at www.lawcom.govt.nz/sites/default/files/publications/2012/02/alternative_trial_processes_nzlc_ip30_-1.pdf (last visited Oct. 11, 2014).

¹⁰⁷ Franz Kafka, *The Trial* (Edwin Muir & Willa Muir trans., Vintage Classics 2001).

¹⁰⁸ *Scorpion Woman*, *supra* note 35.

¹⁰⁹ Less serious crimes are heard by a mixed panel of one judge and two jurors or by judge alone.

¹¹⁰ Article 91(2) of Austria's Constitution of 1920, restored in 1945, provides: "In cases of felonies inclining heavy punishment, which are to be prescribed by law, and in all political felonies and misdemeanors, jurors must determine the guilt of the accused."

Remarkably, Austrian jurors are permitted to question witnesses.¹¹¹ Also, the judge also has authority to discuss the facts of the case with the jury in a private session, outside the hearing of the attorneys, and no record is made of that discussion. This unique aspect of Austrian criminal procedure gives the presiding judge considerable sway over the jury, nearly as much as a presiding judge has during deliberation with a German mixed panel. Also, sentencing is a collaborative process in which jurors and judges decide the sentence together.

Greek criminal procedure is also based on the German model, but has developed its own unique features.¹¹² For one, it is among a small minority of Civil Law countries, including Austria, with an independent jury system. Many people believe that the jury system was invented by the English, but the notion of a jury began in ancient Greece with the *dikasteria* under Solon in 700 B.C. The Romans borrowed the idea and called their jury the *judice*, which was a group of senators that resolved important disputes and decided criminal cases.¹¹³

The composition of the Greek panel of judges and the independent jury fluctuates as seen in *The Highway of Hate* (1950)¹¹⁴ (fives judges and twelve jurors decide a manslaughter case), *Women with a Past* (1966)¹¹⁵ (three judges and ten jurors decide a murder case) and *With Fear and Passion* (1972)¹¹⁶ (four judges and ten jurors decide a murder case). Today the Greek felony trial court consists of three judges and four independent jurors.¹¹⁷

The unique role of Greek prosecutors is also depicted in film. Even more than their Italian and German counterparts, Greek prosecutors have no discretion to drop the prosecution of a case,¹¹⁸ as dramatized in *Women with a Past*¹¹⁹ and *Maria in Silence*.¹²⁰

¹¹¹ Nigel Foster, *Austrian Legal System and Laws* 97 (2003).

¹¹² The Greek civil code of 1946 replaced the Byzantine-Roman Civil Law that had been in effect since Greece's independence. The Penal Code and the Code of Penal Procedure were enacted in 1950 and have remained in force. All of the codes were much influenced by the German civil code of 1900 (*Bürgerliches Gesetzbuch*). Simply stated, Byzantine Law was canon-law-flavored Roman law. See generally Introduction to Greek Law (Konstantinos D. Kerameus & P. John Kozyris eds., Kluwer Law and Taxation Publishers, 2d ed. 1993).

¹¹³ During the late 19th and early 20th centuries, several European countries adopted a jury system (following France's lead): Rhenish Germany (1798); Luxembourg (1814); Spain (1820); Belgium (1831); Portugal (1832); Greece (1834); Portugal (1841); Geneva (1844); Bavaria and Hesse (1948); Prussia, Wurtemberg and Baden (1849); Austria (1850); Russian Empire (1864); Italy (1865); Romania (1866); Hungary (1869); Norway (1887); Serbia (1892); Denmark (1919); and Poland (1921). However, most of the jury systems were abolished or modified during anti-democratic reforms of the 20th century in Europe. The following Civil Law countries still have a jury system that is modeled on the classic Common Law jury: Austria; Belgium; Denmark; Malta; Norway; Russia; Spain; Sweden; and some Swiss cantons. See John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 Colum. J. Eur. L. 83 (2006-2007).

¹¹⁴ *The Highway of Hate*, *supra* note 38.

¹¹⁵ *Women with a Past*, *supra* note 36.

¹¹⁶ *With Fear and Passion*, *supra* note 39.

¹¹⁷ Francis Pakes, *Comparative Criminal Justice* 115 (2d ed. 2010).

¹¹⁸ Dionysios D. Spinellis, *Recent Trends in the Greek Criminal Proceedings: Limiting or Expanding the Rights of the Accused?*, 62 TEMP. L. REV. 1261, 1262 (1989) ("The criminal proceedings begin when the public prosecutor presses charges. From this moment the prosecution cannot be dismissed or disposed of in any way other than by the decision of a court or a judicial council").

By contrast, consider Polish criminal procedure which began in the German legal tradition and then borrowed from other legal traditions, including the French and Socialist legal traditions. As a result, there is relatively less judicial participation in the adjudicative process. The Polish mixed panel consists of only one judge and two jurors, and a simple majority decides the verdict, so the adjudicative power of jurors (lay participation) is especially high.¹²¹

Also, Poland is unique among Civil Law countries in that it follows the principle of orality, relying on live oral testimony rather than a written *dossier*.¹²² Courtroom action is therefore remarkably adversarial. Although the presiding judge controls the questioning, and the prosecution and defense do not present their evidence separately,¹²³ the lawyers engage in lively cross-examination as shown in the film *Ghetto Queen*.¹²⁴

Because Polish criminal procedure is remarkably adversarial, Polish criminal law films often portray defense counsel as the hero. For example, in *Life Sentence* (1933),¹²⁵ a female defense attorney successfully defends a naïve female who is seduced, abandoned and wrongly accused of murder, and in *Ghetto Queen* (1937), a humble female barmaid is acquitted of murder and escapes the ghetto. *No End* (1985)¹²⁶ provides a behind-the-scenes view of defense counsel's litigation strategy to save a political criminal from a long prison sentence, and *A Short Film About Killing* (1989)¹²⁷ depicts defense counsel's anguish over his inability to save his client from the death penalty.

As listed above, Polish law films cover the 1930s (inter-war), 1980s (post-Solidarity) and 1990s (post-Cold War). It is remarkable to see that, throughout, the layout of the courtroom and courtroom procedure have remained the same despite tumultuous times in Poland, including German and Soviet occupation in 1939 and Soviet domination until 1980s Solidarity and the eventual fall of communism in Poland in 1989. It is also remarkable that, throughout Polish law film history, females have been depicted as equals to men in the criminal justice system,¹²⁸ and judges have been depicted as fair arbiters of criminal justice.

¹¹⁹ Women with a Past, *supra* note 36.

¹²⁰ Maria in Silence, *supra* note 37.

¹²¹ Shannan C. Krasnokutski, *Human Rights in Transition: The Success and Failure of Polish and Russian Criminal Justice Reform*, 33 CASE W. RES. J. INT'L L. 13, 25-28 (2001) (citing Kodeks Postępowania Karnego (Code of Criminal Procedure) art. 28, § 1 (Pol.)).

¹²² Stephen M. Ryan, *Out from under Soviet Rule: With Help of Ceeli, Former Satellites Rebuild a Legal System*, 11 CRIM. JUST. 11, 17-18 (fall 1996).

¹²³ Andrzej Adamski, *Poland*, WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS, available at bjs.ojp.usdoj.gov/content/pub/ascii/WFBCJPOL.TXT (last visited Oct. 11, 2014).

¹²⁴ *Ghetto Queen* (Eksplo-Film 1937) (Pl.).

¹²⁵ *Life Sentence*, *supra* note 10.

¹²⁶ *No End*, *supra* note 11.

¹²⁷ *A Short Film About Killing* (Zespol Filmowy "Tor" 1988) (Pl.).

¹²⁸ Ewa Mazierska, Elzbieta Ostrowska and Joanna Szwejowska, *WOMEN IN POLISH CINEMA* 117 (Berghahn Books 2006).

*Coup d'État*¹²⁹ (1980) is a thorough history lesson of Poland under Marshall Pilsudski from 1926 to 1932. Nearly one hour of the film is devoted to a thorough re-enactment of the open trial before the district court in Warsaw, which lasted about two and one-half months, from October 26, 1931, until January 13, 1932. *Coup d'État* also provides a rare behind-the-scenes view of the judges' deliberation.

In sum, films show distinctive features of the German Civil Law tradition compared to the French Civil Law tradition. In the German Civil Law tradition, the right of the suspect to remain silent is better respected, the prosecutor enjoys less discretion, courtroom action is more adversarial, and there is more lay participation in adjudication. It is therefore arguable that the German Civil Law tradition better protects the presumption of innocence.

3. Other Legal Traditions: Socialist, Islamic and Indigenous

The Civil Law-Common Law dichotomy is a classical analytical construct of comparative law studies, but it should be supplemented by consideration of the distinctive features of the Socialist, Islamic and indigenous legal traditions. In the Socialist legal tradition, which began in the former Soviet Union, law is merely a policy tool of the state, used to educate the populace. In the Islamic legal tradition, all aspects of life are governed by the writings of the holy book of Islam (Qur'an) and the statements and deeds of the prophet Muhammad (Sunna). And indigenous legal traditions can be found in isolated areas, such as the South Pacific Islands, the African bush, the Mexican mountains, the reservations of American Indian tribes and aboriginal lands in Australia. The criminal procedure of many of these traditions has also been depicted in film.

a. Socialist Legal Traditions¹³⁰

Socialist law is historically grounded in Civil Law. However, when Joseph Stalin rose to power in the late 1920s, he decided to use the law to consolidate his power. During a period of Socialist legalism in the Soviet Union, rules were adopted to govern all aspects of citizens' home and work life. The legal system became a policy tool of a huge Soviet bureaucratic apparatus designed to control the populace. Under Soviet influence, Socialist law was adopted in Soviet bloc countries such as East Germany, Poland and Czechoslovakia. Today, Socialist law is still practiced in China which was directly influenced by the Soviet Union under Vladimir Lenin.

Because the function of Socialist law as a policy tool is to educate the public, judges have very little power, and it is the procurator, as agent of the state, who has very broad authority. For example, the

¹²⁹ *Coup d'État* (Film Polski 1981) (Pl.)

¹³⁰ See generally, Reichel, *supra* note 9 at 115, 140, 187; Fairchild & Dammer, *supra* note 9 at 54.

Chinese procurator has the power to investigate crimes, prosecute violators, and supervise the entire criminal justice system.¹³¹ As such, the procurator is responsible for ensuring that all citizens adhere to the laws and policies of the state, and he or she has broad authority to carry out that responsibility. Because the well-being of the collective and primacy of the Communist state are more important than the needs of the individual, “prerogative law” or “political justice” may supersede normal rules of criminal procedural in Socialist law countries. Given the primacy of the Communist state over the needs of the individual, judges have little power and independence. A judge who makes a decision that is not in the best interest of the state can easily be replaced.

*The Confession*¹³² exposes the behind-the-scenes making of a Soviet-styled “show” trial. The trial of Gerard Ludvik (played by Yves Montand), a high-ranking civil servant, is fully-scripted and rehearsed to show the public that espionage and treason do not go unnoticed or unpunished, while at the same time giving the appearance of affording due process to the accused. This is a film that demonstrates the disparity between law on the books and the “law in action.” Although the defendants of this legal story are entitled to a state-appointed attorney and an open trial, those rights are provided only in form, not in substance. This occurs when the political ends of those in power trump the law. The result is politicized justice, which is a perversion of the criminal justice system, in this case to punish the perceived enemies of the regime in power and deter others from committing treasonous acts.

The Confession takes place in Prague, Czechoslovakia, from 1951 to 1952.¹³³ The film is based on the autobiography¹³⁴ of Czech Communist Artur London who was the Czechoslovakian Under Secretary for Foreign Affairs in the Communist Government of President Klement Gottwaldof. He was prosecuted in the so-called “Slansky trial”¹³⁵ for treason and espionage under Czech criminal codes which were modeled after Soviet criminal codes. London, like Gerard in the film, was one of three defendants sentenced to life imprisonment and later released. The other 11 accused were hanged.

Although *Red Corner*¹³⁶ is U.S.-made, it does accurately reflect many aspects of Chinese criminal procedure.¹³⁷ China’s legal system exemplifies the Socialist law tradition. Independence of the judiciary is

¹³¹ See Guan Fujin, *The Position and Role of Chinese Procuratorial Organs in Criminal Justice* 29, in *The Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Resource Material Series No. 53* (1998), available at www.unafei.or.jp/english/pdf/RS_No53/No53_00All.pdf (last visited Oct. 11, 2014).

¹³² *The Confession* (Les Films Corona 1970) (Fr.). See Vincent Canby, *Costa-Gavras Depicts a Believer’s Betrayal by His Belief: Montand and Signoret Star in “Confession,”* N.Y. TIMES, Dec. 10, 1970 (film review), available at www.nytimes.com/movie/review?res=9B06E1D6143BEE34BC4852DFB467838B669EDE (last visited Oct. 11, 2014).

¹³³ In the opening scene, “Prague 1951” appears on the screen as Gerard exits the building where he works. Otherwise, there is no indication of the location of the story.

¹³⁴ Artur London, *The Confession* (Alastair Hamilton trans., William Morrow & Co. 1970).

¹³⁵ One of the defendants was Rudolf Slánský, one of the founders of the communist party in Czechoslovakia and secretary general of the party at the time that he was arrested.

¹³⁶ *Red Corner*, *supra* note 24.

not valued, and Chinese political culture encourages behavior that satisfies the needs of the collective and discourages independent individual action. The police, procurators and courts are obliged to exercise their discretion subject to political guidance.

In *Red Corner*, a U.S. businessman (played by Richard Gere) on a business trip to China is framed for murder. He stands trial in the People's Court where he is represented by appointed counsel, a young female Chinese lawyer Shen Yuelin (played by Bai Ling) who advises him to plead guilty to avoid the death penalty. He eventually convinces her of his innocence, and she decides to defend him despite pressure from the judiciary and, especially, from the procurator general.

b. Islamic Legal Traditions¹³⁸

In its purest form, Islamic law (or the *Shari'a*) originates only from divine revelation, and it governs all aspects of a legal system, including private transactions, criminal law, commercial law and international law. Islam governs all rules regarding appropriate behavior in any sphere of life. The most important source of Islamic law is the Muslim holy book, the Qur'an. Other sources include the Sunnah (or Hadith) which contains decisions of the prophet Muhammad. Islamic law may be further amplified by recognized Islamic jurists such as Abu Hanafi, Shafi'a, Hanbal and Malik. The consensus of jurists is known as *ijma* and the use of analogical reasoning is *qiyas*.

Islamic law distinguishes between crimes against God (Hudud), which are punishable by the state, and wrongs against others (Qesas and Tesar) for which damages or "blood money" must be paid to the victim or the victim's family. The state prosecutes Hudud, and the victim prosecutes Qesas and Tesar. This distinction is analogous to the distinction between crimes and torts in Common Law systems. However, in Islamic law both are criminal proceedings brought before the *quadi*.

Under Islamic criminal procedure, justice is dispensed on a case-by-case basis by a single Islamic judge (*quadi*), without a jury, so Islamic justice has been referred to as "*quadi* justice."¹³⁹ The mediating role of the *quadi* is realistically depicted in the Iranian films *Close Up*¹⁴⁰ and *A Separation*.¹⁴¹ *Close Up* is based on a real petty theft trial and contains footage from the actual trial. The crime itself is re-created using the actual victims and accused, and the filmmakers obtain permission from the *quadi* to film the actual trial proceedings. *A Separation* provides a close look at the resolution of a victim's prosecution of the alleged

¹³⁷ See Belkin, *supra* note 41.

¹³⁸ See generally Reichel, *supra* note 9 at 123, 142, 170; Fairchild & Dammer, *supra* note 9 at 60.

¹³⁹ Max Weber, RECHTSSOZIOLOGIE (Hermann Luchterhand Verlag 1985).

¹⁴⁰ *Close Up* (Kanoon 1990) (Ir.).

¹⁴¹ *A Separation* (Asghar Farhadi 2011) (Ir.).

crime of murdering her fetus. Both the petty theft in *Close Up* and the murder in *A Separation* are classified as Qesas or Tesar, not Hudud.

The *quadi* is bound to follow the Qur'an and Islamic jurisprudence. The concept of individual rights of the accused is not highly developed in Islamic law, and criminal procedure differs from jurisdiction to jurisdiction. The presumption of innocence is protected by a high standard of proving guilt which varies depending on the nature of the crime. In general the standard of proving Hudud is higher than the standard of proving Qesas and Tesar. For example, the standard of proving the Hudud of adultery requires a confession or the testimony of four male Muslims. Proving apostasy or theft requires a confession or the testimony of two witnesses.

A confession is not heavily weighted in Islamic law, and it can be easily retracted. A confession has less meaning because a trial is more like a negotiation in Islamic law. A confession is therefore regarded more like an offer that tests the waters. The accused is not required or even expected to tell the truth, and he or she is not placed under oath before testifying. Likewise, witnesses are not required to take an oath before testifying, and perjury is not a crime. Given the negotiating nature of the trial, and given that an oath carries much greater significance in Islamic culture, it is not lightly administered. In fact, the oath is taken so seriously in Islamic law and culture that charges against an accused will be dismissed if he or she denies allegations under oath.

Consistent with the Islamic tradition, the accused in *A Separation* is not placed under oath before testifying before the *quadi*. Both the accused and the alleged victim lie to the *quadi* who never places them under oath. The film reaches a climax when the accused offers to pay damages to the alleged victim in exchange for her oath that he caused her miscarriage. She refuses to take the oath out of fear that her daughter will somehow suffer for her sin.

Under Islamic evidentiary rules, the testimony of the accused's family members and hearsay are not reliable, so they are not admissible. Furthermore, the testimony of women is either inadmissible or given half the weight of a male testimony, depending upon the nature of the crime. This evidentiary rule of Islamic law exemplifies the inequality of women in Islamic societies, as harshly depicted in the U.S. film *The Stoning of Soraya M.*¹⁴² Director Cyrus Nowrasteh's drama, which is set in 1986 Iran at the start of Khomeini's post-revolutionary reign, tells the true story of Soraya Manutchehri (played by Mozhan Marnò), whose husband Ali plots to have her falsely accused of adultery so he can divorce her and marry a fourteen-year-old girl.¹⁴³

¹⁴² THE STONING OF SORAYA M. (Roadside Attractions 2008) (US). See also the documentary DISHONORED (Icarus Films 2007) regarding Pakistani criminal justice.

¹⁴³ The film is based on the book Freidoune Sahebjam, *The Stoning of Soraya M.: A Story of Injustice in Iran* (2013).

Because of the dominant role of the *quadi* and the minimal role of defense counsel, Islamic criminal procedure is more inquisitorial than adversarial. Yet, the mediating role of the *quadi* and the process of negotiating with the truth defy the inquisitorial goal of finding the truth.

c. Indigenous Legal Traditions - Aboriginal Australians¹⁴⁴

Indigenous cultures, including indigenous legal traditions, by their very nature are found in isolated areas and are generally misunderstood by the host country, specifically in the context of the host country's legal system. Most systems of indigenous customary laws include customs and principles which may seem more like "rules of etiquette or religious beliefs" to an outside observer.¹⁴⁵ This is especially true of the indigenous people of Australia known as Aboriginal Australians, as portrayed in *The Last Wave*.¹⁴⁶

The Law of the Ancestral Beings governs all aspects of Aboriginal life.¹⁴⁷ While there are common threads that unite Aboriginal laws across Australia, there is "no single system of customary law that applies to all Aboriginal people."¹⁴⁸ As anthropologist Elizabeth Eggleston describes, "Law and religion are intimately bound up in Aboriginal society . . . and any attempt to identify certain segments of Aboriginal life as 'legal' involves the imposition of alien categories of thought on the tribal society."¹⁴⁹

The Last Wave shows the clash between Aboriginal and Australian criminal procedure when five Aboriginal men are charged with murdering another Aboriginal man. Sydney-based lawyer, David Burton (played by Richard Chamberlain) takes on the *pro bono* defense of five Aboriginal Australians and eventually discovers that the victim's death was a tribal killing, based on customary law and rituals. One of the defendants explains to David that the victim stole a sacred tribal object in a desire to become a member of the tribe. The victim was therefore executed pursuant to the law of the tribe. It is a valid defense if he can prove the Aboriginal men were meting out tribal law in a tribal area.

As depicted in *The Last Wave*, the mere observation of sacred objects, places or ceremonies by an individual who is restricted from such observation is a "gravely serious offense" and one that is "committed even if the viewing was wholly unintended."¹⁵⁰ Likewise, divulging sacred secrets to another

¹⁴⁴ Former Thomas Jefferson School of Law student Lauren Hebl is recognized for her contribution to this section.

¹⁴⁵ Australian Law Reform Commission, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS (ALRC Rep. No. 31) (1986) [hereinafter ALRC 31], available at www.alrc.gov.au/publications/report-31 (last visited Oct. 11, 2014).

¹⁴⁶ *The Last Wave*, *supra* note 19.

¹⁴⁷ Stephanie Fryer-Smith, AUSTRALIAN ABORIGINAL BENCHBOOK FOR WESTERN AUSTRALIAN COURTS, Ch. 2, §2.2.1 (2002), available at www.aija.org.au/online/ICABenchbook.htm (last visited Oct. 11, 2014).

¹⁴⁸ Kathryn Trees, *Contemporary issues facing customary law and the general legal system: Rebourne – a case study* 65, in LAW REFORM COMMISSION OF WESTERN AUSTRALIA, ABORIGINAL CUSTOMARY LAWS (2006).

¹⁴⁹ ELIZABETH M. EGGLESTON, FEAR, FAVOUR, OR AFFECTION: ABORIGINES IN THE CRIMINAL LAW IN VICTORIA, SOUTH AUSTRALIA AND WESTERN AUSTRALIA 278 (1976).

¹⁵⁰ Fryer-Smith, *supra* note 147 at §2.7.3.

who is not permitted by customary law to know such secrets is punishable by death.¹⁵¹ A customary form of punishment is death by “sorcery” or incantation with a “pointing-bone,” as depicted in *The Last Wave*.¹⁵² Such punishment is generally used where “physical vengeance is appropriate but not practicable.”¹⁵³ “The offender will be identified during a ritual ceremony and a sorcery rite performed . . . [If] the identified person becomes ill, insane, or dies, the sorcery has succeeded.”¹⁵⁴

For minor offenses, traditional Aboriginal communities mediate a resolution between the perpetrator and the victim.¹⁵⁵ The punishment depends on “locality, the sex, status and previous history of the wrongdoer, the sex, status and conduct of the victim and of the person(s) required or expected to respond, the community’s perceptions of the seriousness of the offense and the surrounding circumstances, and the extent of (and concern about) external intervention.”¹⁵⁶

David, the defense attorney in *The Last Wave*, it turns out, has spiritual powers and sees the sacred object in one of his dreams. He later finds it among the victim’s belongings. The spiritual worldview known as “Dreamtime” is the basis of Aboriginal spirituality and is the source of sacred traditional Aboriginal rules of human social life and culture.¹⁵⁷ Aboriginal law is passed on to future generations through the oral tradition of Dreaming Stories through which Ancestral Beings hand down the Law to the Aboriginal people through Dreaming Tracks.¹⁵⁸

D. International Criminal Procedure¹⁵⁹

Criminal procedure is a fast-growing subject of international human rights law, culminating with the International Criminal Court,¹⁶⁰ established in 2002. Instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights lay out some basic principles of criminal procedure for governments to follow, most notably the presumption of innocence.¹⁶¹ More

¹⁵¹ *Id.* (citing *Traditional Aboriginal Society and Its Law* in Australian Law Reform Commission, TRADITIONAL ABORIGINAL SOCIETY 189, 195 (WH Edwards ed., 1987)) [hereinafter ALRC].

¹⁵² *Id.*

¹⁵³ Fryer-Smith, *supra* note 147 at §2.7.4.

¹⁵⁴ *Id.* (citing ALRC, *supra* note 151 at 199).

¹⁵⁵ *Id.*

¹⁵⁶ ALRC 31, *supra* note 145 at ¶ 500.

¹⁵⁷ Fryer-Smith, *supra* note 147 at Ch. 2, § 2.2 (2002).

¹⁵⁸ *Id.* at § 2.2.1

¹⁵⁹ See generally Robert Cryer, Håkan Friman, Darryl Robinson & Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2d ed. 2010).

¹⁶⁰ International Criminal Court, Rules of Procedure and Evidence, www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf (last visited Oct. 11, 2014).

¹⁶¹ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, art. 11(1), U.N.Doc. A/811 (1948); International

detailed procedures have been established by modern-era ad hoc international war crimes tribunals, starting with the Nuremberg trials.¹⁶² Films that depict these tribunals in action include *Judgment at Nuremberg*¹⁶³ (Germany), *Council of the Gods*¹⁶⁴ (Germany), *Best Wishes for Tomorrow*¹⁶⁵ (Japan) and *Pride*¹⁶⁶ (Japan).¹⁶⁷

Recent war crimes tribunals include the International Criminal Tribunal for the former Yugoslavia,¹⁶⁸ the International Criminal Tribunal for Rwanda,¹⁶⁹ and the Special Court for Sierra Leone.¹⁷⁰ The work of the latter is depicted in the documentary *War Don Don*.¹⁷¹ The documentary *Rule of Law: Justiz im Kosovo*¹⁷² depicts a national tribunal in which criminal procedure has been borrowed from international tribunals.

*Judgment at Nuremberg*¹⁷³ is based on the actual prosecution of German judges and prosecutors for furthering Hitler's program of racial purity in the courts of Nazi Germany. In the real trial, seven judges and prosecutors were tried in 1947 in the case of *The United States of America v. Josef Altstötter, et al.*¹⁷⁴ *Judgment at Nuremberg* is U.S.-made and concerns a U.S.-styled prosecution before a U.S. military tribunal consisting of three American judges (presiding judge played by Spencer Tracy).¹⁷⁵

The Nuremberg court was an international tribunal established by the victors of World War II and nine of the formerly occupied countries. Judges and prosecutors were provided by the French, Soviets, British and Americans. Most of the defense counsel were German. The tribunal heard twelve trials which

Covenant on Civil and Political Rights, Mar. 23, 1976, 14(2), 999 U.N.T.S. 172.

¹⁶² Yale Law School, The Avalon Project, Nuremberg Trial Proceedings Vol. 1 Rules of Procedure, avalon.law.yale.edu/imt/imtrules.asp (last visited Mar. 22, 2014).

¹⁶³ *Judgment at Nuremberg* (Roxlom Films Inc. 1961) (US).

¹⁶⁴ *Council of the Gods*, *supra* note 100.

¹⁶⁵ *Best Wishes for Tomorrow* (Ace Productions 2007) (Jp.).

¹⁶⁶ *Pride* (Toei Company 1998) (Jp.).

¹⁶⁷ These are not to be confused with war crimes trials before military tribunals and domestic courts. For trials before domestic courts, *see* The Reader, *supra* note 93 (based on the 1963-1965 Frankfurt Auschwitz Trials of 22 defendants under German penal law for their roles in the Holocaust); The Specialist (Amythos Productions 1999) (Il.) (documentary) (Israeli Mossad members capture Adolf Eichmann in Argentina and try him in Israel in 1961 for war crimes and crimes against humanity). For trials before military war crimes tribunals, *see* Breaker Morant (South Australian Film Corp. 1980) (Au.) (1902 British court-martial of three Australian officers of the special forces unit during the Second Boer War (1899-1902)); Prisoners of the Sun (Blood Oath Productions 1990) (Au.) (Australian war crimes trial of three Japanese naval officers for the murder 800 Australian prisoners of war between 1942 and 1945 at the Tan Toey camp on the Indonesian island of Ambon).

¹⁶⁸ United Nations, International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, www.icty.org/sid/136 (last visited Oct. 11, 2014).

¹⁶⁹ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, www.unictr.org/Portals/0/English/Legal/ROP/100209.pdf (last visited Oct. 11, 2014).

¹⁷⁰ Statute of the Special Court for Sierra Leone (adopting the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda), www1.umn.edu/humanrts/instree/SCSL/statute-sierraleone.html (last visited Oct. 11, 2014).

¹⁷¹ *War Don Don* (Naked Edge Films 2010) (US).

¹⁷² *Rule of Law: Justiz im Kosovo* (Josef Aichholzer Filmproduktion 2006) (At.).

¹⁷³ *Judgment at Nuremberg*, *supra* note 163. *See* Shale, *supra* note 4; Bosley Crowther, *Judgment at Nuremberg*, N.Y. TIMES, Dec. 20, 1961 (film review); *The 12 Best Trial Movies*, 75 ABA J. 96 (Nov. 1, 1989).

¹⁷⁴ *The United States of America v. Josef Altstotter, et al.*, 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

¹⁷⁵ Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851 (1999).

were collectively known as the “Subsequent Nuremberg Trials.” The so-called Judges’ Trial, which is depicted in the film, was the third of twelve trials held in the U.S.-occupied zone.¹⁷⁶

The judges in the Judges’ Trial were American civilians Carrington T. Marshall from Ohio (presiding judge), James T. Brand from Oregon, Mallory B. Blair from Texas and Justin Woodward Harding from Alaska (alternate judge). The Chief of Counsel for the Prosecution was Telford Taylor; his deputy was Charles M. LaFollette. The indictment was presented on January 4, 1947, and the trial lasted from March 5, 1947, to December 4, 1947. Ten of the defendants were found guilty, four received sentences for lifetime imprisonment, and the rest received prison sentences of varying lengths. Four persons were acquitted of all charges.

Council of the Gods depicts the I.G. Farben or “chemical” trial which was the sixth of the twelve war crimes trials heard by the Nuremberg tribunal.¹⁷⁷ I.G. Farben was a colossal German industrial corporation that helped supply Hitler’s war effort and manufactured the gas used in the Nazi death chambers.¹⁷⁸ The indictment against the former I.G. Farben directors was filed on May 3, 1947, and the trial lasted nearly a year, from August 1947 until July 1948. Thirteen of the 24 defendants were convicted, but they received light sentences and early release from prison. In the film, the directors of the company call themselves the “Council of the Gods” in reference to a painting that is displayed in the room where they meet. The painting depicts Greek gods who give counsel to Zeus in the clouds as a violent battle ensues among the mortals below them on Earth.

This German film, which is based on the 1947 book *I.G. Farben* by American author Richard Sasuly¹⁷⁹ and records from the Nuremberg trial, is a Cold War, anti-American, propaganda film, depicting collaboration between the Nazi regime and international corporations to produce the poisonous gases that were used to murder millions in the Holocaust. Sasuly had chaired the Kilgore Committee, which investigated I.G. Farben on behalf of the American military, and his book was based largely on his own experiences.

Best Wishes for Tomorrow,¹⁸⁰ adapted from Shohei Ooka’s novel *Nagai Tabi*, depicts the real-life Yokohama war crimes trial of Lieutenant General Tasuku Okada (played by Makoto Fujita) who commanded the Tokai Army in defense of Honshu. General Okada ordered the execution of 38 captured

¹⁷⁶ U.S. Holocaust Memorial Museum, Holocaust Encyclopedia, *Subsequent Nuremberg Proceedings, Case #3, The Justice Case*, www.ushmm.org/wlc/en/article.php?ModuleId=10007073 (last visited Oct. 11, 2014).

¹⁷⁷ See Doreen Lustig, *The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann’s Concept of Behemoth at The Industrialist Trials*, 43 N.Y.U. J. Int’l L. & Pol. 965 (2011).

¹⁷⁸ Zyklon-B was produced by I.G. Farben subsidiary German Pesticide Systems (DEGESCH), based in Frankfurt.

¹⁷⁹ Richard Sasuly, *IG Farben* (1947).

¹⁸⁰ *Best Wishes for Tomorrow*, *supra* note 165.

American fliers a few weeks before World War II ended on August 15, 1945. General Okada and 19 of his subordinates are charged with summarily executing the American airmen without a fair trial.

At his trial before the International Military Tribunal for the Far East, Okada and his American defense counsel argue that the Americans were executed as war criminals for the indiscriminate bombing of Japan that killed hundreds of thousands of innocent civilians. Okada is sentenced to death, and his subordinates are sentenced to ten years to life. The filmmaker argues that all participants in WWII engaged in war crimes, so it is hypocritical for the victors to try and punish the vanquished for war crimes. General Okada asks: “Why should the losing side be held solely responsible for crimes committed?”

Okada’s trial is one of the so-called Yokohama war crimes trials which ended in 1948. His trial is conducted by a panel of five military officers, whereas the Nuremberg trials were conducted by three civilian judges as depicted in *Judgment at Nuremberg*. The war crimes tribunals were convened after WWII under U.S. occupation by General MacArthur’s forces. The accused were divided into classes, A, B and C. The class-A war criminals were tried in Tokyo in widely publicized trials. The class-B and class-C defendants were tried in the Yokohama trials, which is the setting of this film.

*Pride*¹⁸¹ is about one of the Tokyo war crimes trials of class-A defendants in which American prosecutor Joseph Keenen seeks the convictions of Japanese General Hideki Tojo and 27 of his subordinates. Tojo is the main defendant because as former Prime Minister, he was instrumental in designing Japanese national strategy which began with the bombing of Pearl Harbor. *Pride* is told through Tojo’s wife Katsuko. The defense argues that the Allied court lacks jurisdiction to prosecute Japanese officials and that the Allies are even more culpable for dropping the atomic bomb over Hiroshima.

*War Don Don*¹⁸² documents the prosecution of Issa Sesay, the commander and subsequent interim leader of the Revolutionary United Front (RUF) during the 1991-2002 armed conflict in Sierra Leone.¹⁸³ The RUF, led by Foday Sankoh, sought to overthrow the Joseph Momoh government. The RUF fought under the auspices of Charles Taylor’s National Patriotic Front of Liberia, committing gross human rights violations and leaving over 50,000 dead.¹⁸⁴ In 2002, the Special Court for Sierra Leone (SCSL) was established to prosecute those responsible.¹⁸⁵

¹⁸¹ *Pride*, *supra* note 166.

¹⁸² *War Don Don*, *supra* note 171. Former Thomas Jefferson School of Law student Bradley Sorrentino is recognized for his contribution to this section.

¹⁸³ Rebecca Richman Cohen, *War Don Don*, New Day Digital (March 2010), www.newdaydigital.com/War-Don-Don.html (last visited Oct. 11, 2014) (contains footage of the SCSL trial of Sesay).

¹⁸⁴ Lansana Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (2005).

¹⁸⁵ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), S.C. Res. 246, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/246, appended to Letter dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council, app. II (2002).

Unlike *ad hoc* international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the SCSL is a hybrid tribunal, created pursuant to a treaty between the United Nations and Sierra Leone.¹⁸⁶ It consists of a mixed panel of both local and international judges,¹⁸⁷ and it sits in Freetown, Sierra Leone.¹⁸⁸ The participation of local judges is intended to promote the legitimacy of the tribunal, which Sierra Leoneans tend to perceive as an imposition of Western dominance.¹⁸⁹

The documentary *War Don Don* depicts an adversarial proceeding in which the judges are referees, and the attorneys engage in lively direct and cross-examination. Still, inquisitorial aspects are present. First, the principle of opportunity (prosecutorial discretion) was compromised by the political purpose of satisfying victims and their families.¹⁹⁰ In addition, the accused's right to confront prosecution witnesses was limited by protective measures,¹⁹¹ and out-of-court statements were admissible against Sesay.

The documentary *Rule of Law: Justiz im Kosovo*¹⁹² depicts footage of a Kosovo murder trial overseen by Austrian U.N. Judge Claudia Fenz. She and two associate judges hear a murder case in which a group of ethnic Albanian men are accused of killing a Serbian woman. In contrast to the procedure depicted in the films described above, the film shows a procedure that is more inquisitorial than adversarial. In 2008, Kosovo became the seventh new nation to emerge from the break-up of Yugoslavia after the ethnic wars of the 1990s. In 1996, the United Nations took administrative control of Kosovo,¹⁹³ and in early 2000, international judges and prosecutors began handling criminal cases that involved war crimes and ethnic violence.

International jurists assisted local judges and prosecutors with reform of Kosovo's criminal justice system¹⁹⁴ which culminated with Kosovo's declaration of independence on February 17, 2008, and ratification of its constitution on June 15, 2008. Although much of Kosovo's criminal procedure has been adopted in the spirit of international conventions, distinctive features of Kosovo's criminal procedure

¹⁸⁶ William R. Slomanson, *Fundamental Perspectives on International Law* 426 (Carolyn Merrill, 6th ed. 2011)

¹⁸⁷ The judicial composition at the ICTY, ICTR, and the SCSL consists of a three-judge panel. None of the judges are nationals of the former Yugoslavia or Rwanda, respectively.

¹⁸⁸ *Id.*

¹⁸⁹ Rebecca Cohen, *supra* note 183.

¹⁹⁰ Julie Simeone & Rebecca Richman Cohen, *War Don Don Teaching Resources* (2011), www.wardondonfilm.com/media/WarDonDon_Teaching_Materials_2011Jan10.pdf (last visited Oct. 11, 2014).

¹⁹¹ Under Rule 69, the court "may [choose not to disclose] the identity of a victim or witness who may be in danger or at risk..." SCSL R. Crim. P. 69. Additionally, Rule 75 provides several methods of preventing identity disclosures.

¹⁹² *Rule of Law: Justiz im Kosovo*, *supra* note 172.

¹⁹³ S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999); U.N. Mission in Kosovo, On the Appointment and Removal from Office of International Judges and International Prosecutors, U.N. Doc. UNMIK/REG/2000/6 (Feb. 15, 2000), available at www.unmikonline.org/regulations/2000/re2000_06.htm (last visited Oct. 11, 2014); U.N. Mission in Kosovo, On Assignment of International Judges/Prosecutors and/or Change of Venue, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000), available at www.unmikonline.org/regulations/2000/reg64-00.htm (last visited Oct. 11, 2014).

¹⁹⁴ Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 *YALE J. INT'L L.* 1 (2007).

remain. The result is a hybrid adversarial-inquisitorial system. As found in adversarial systems, prosecutors have discretion to decide whether to prosecute or mediate a resolution of minor crimes (punishable by fine or imprisonment up to three years),¹⁹⁵ and the accused has a right to question witnesses. As found in inquisitorial systems, prosecutors are required to prosecute when reasonable grounds exist to believe that a crime has been committed, and an investigating judge may be appointed. The presiding judge conducts most of the questioning of witnesses, the accused are expected to testify, and there is no separate sentencing hearing.

All of these films that depict international tribunals in action reveal that, apart from the lack of jurors,¹⁹⁶ international criminal procedure has been mostly adversarial.¹⁹⁷ This is due in great part to the influence of the United States and the United Kingdom in the formation and conduct of ad hoc international criminal tribunals. It also happens to jibe with developing international norms of human rights which call for recognition and protection of the presumption of innocence.¹⁹⁸ As explained further in the next section, the adversarial process more naturally protects a suspect's and an accused's right to due process and the presumption of innocence.

III. FILMIC DEPICTIONS OF THE INVESTIGATIVE PHASE

Americans commonly complain that obviously culpable defendants are set free due to legal technicalities. Such legal technicalities are purposefully designed to protect the wrongly accused, not the culpable. Although Americans complain about the social cost, their strong tradition holds that it is better to free a culpable person than it is to punish an innocent one. This tradition is especially needed in a country that applies the death penalty. Indeed, U.S. criminal procedure may be the most liberal in the world, with an over-abundance of safeguards to prevent wrongful prosecutions and, worst of all, wrongful executions. As the investigating judge Fanariotis states in the Greek film *With Fear and Passion*,¹⁹⁹ recalling advice that was given to him when he first became an investigating judge: “Better to have 100 guilty set free than to

¹⁹⁵ Provisional Criminal Code of Kosovo, art. 3(1), U.N. Doc. UNMIK/REG/2003/26 (July 6, 2003), *available at* www.unmikonline.org/regulations/2003/RE2003_25_criminal_code.pdf (last visited Oct. 11, 2014).

¹⁹⁶ Given the passionate post-war desire of victims and their families to obtain retributive justice, it would not be feasible to impanel an unbiased jury whose verdict would be regarded as legitimate.

¹⁹⁷ *See* Hague Institute for the Internationalisation of Law, General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework (Oct. 2011), *available at* www.hiil.org/data/sitesmanagement/media/IEF_Brochure_241011.pdf (last visited Oct. 11, 2014).

¹⁹⁸ *Id.* at 59; International Covenant on Civil and Political Rights, *supra* note 161, art. 14(2); Universal Declaration of Human Rights, *supra* note 161, art. 11(1).

¹⁹⁹ *With Fear and Passion*, *supra* note 39.

have one innocent in jail.” It should therefore come as no surprise to learn that the Greek system of justice is one of the most adversarial of the Civil Law countries.

A. Police, Suspects and the Right to Remain Silent

At the investigative phase of criminal procedure, the competition begins between the power of the government and the rights of the suspect. During this phase, the unrepresented suspect is most vulnerable, not only because he or she has not yet been advised by counsel, but also because at this phase, he or she has no right to the presumption of innocence and has no right to counsel at the government’s expense. Such rights do not come into play until after the filing of formal charges.

Since the suspect has no right to a presumption of innocence during the investigative phase, police and prosecutors have the freedom to follow their tendency or bias to investigate by seeking incriminating rather than exculpatory evidence. Although the police will rule out suspects in a genuine attempt to find the true perpetrator, they expect “persons of interest,” otherwise known as suspects, to provide exculpatory evidence. The failure to offer up exculpatory evidence tends to increase police suspicions.

The police tend to confront anyone who is the least bit suspicious, hoping to elicit an incriminating statement or, better yet, a confession. The police are therefore on the low end of the scale of neutrality in the United States and in most other countries. From their point of view, the most direct, accessible and inexpensive evidence of guilt is the perpetrator’s confession. Many aspects of criminal procedure during the investigative phase are therefore directly or indirectly related to the efforts of the police to obtain a confession. From the point of view of the suspect, regardless of culpability, the most valuable right is the right to remain silent and to consult legal counsel.

To the inquisitorial mindset, culpable persons have a natural motivation to remain silent, whereas innocent persons have a natural incentive to speak up and provide the police with exculpatory information. Innocent suspects are expected to *cooperate*, so the right to remain silent and the right to consult counsel are relatively weak compared to adversarial systems of justice.

Today, there is an internationally recognized right to remain silent, as expressed in Article 14.3.(g) of the International Covenant on Civil and Political Rights (“everyone shall be entitled. . . [n]ot to be compelled to testify against himself or to confess guilt.”).²⁰⁰ The right to remain silent in the United States derives from the Self-Incrimination Clause of the Fifth Amendment which provides that “no person . . .

²⁰⁰ International Covenant on Civil and Political Rights, *supra* note 161, art. 14.3.(g).

shall be compelled in any criminal case to be a witness against himself.”²⁰¹ This right means nothing, however, without safeguards such as the *Miranda* warning²⁰² and the Exclusionary Rule,²⁰³ which are U.S. inventions.

The right of a suspect to remain silent is a Common Law invention that initially had little to do with the presumption of innocence. It derives from a distrust of government that dates back to religious conflicts in England in the sixteenth and seventeenth centuries. The right to remain silent evolved in response to the use of torture and other severe punishment to obtain the cooperation of suspects and accused. The right protects the individual against abusive, intrusive governmental tactics. For example, the films *The Passion of Joan of Arc*,²⁰⁴ *Anne of the Thousand Days*,²⁰⁵ and *Artemisia*²⁰⁶ depict torture as an accepted procedure of eliciting confessions in medieval investigative and trial procedure.

The Passion of Joan of Arc closely follows the actual transcript of the trial of Joan of Arc (1412-1431), a French heroine who led the French army to key battle victories during the Hundred Years’ War against English occupation forces (1337-1453). In a trial that follows canon law procedures, Joan of Arc is interrogated by a panel of several judges. The trial takes place in a series of four hearings convened in a single day: in a chapel, her cell, a torture chamber, and back in her cell. In actuality, Joan of Arc was subjected to 22 interrogations, some of which included torture, by over fifty judges over several weeks.

Anne of the Thousand Days depicts the brief (approximately 1000-day) marriage, from 1532 to 1536, of Anne Boleyn to King Henry VIII of England. After Anne fails to give birth to a son, Henry VIII pursues Jane Seymour. To dispose of Anne, Henry VIII’s chief minister Thomas Cromwell obtains evidence of Anne’s adultery with several others including her own brother and her daughter’s music teacher. The music teacher is tortured with a cranium-wrenching device to elicit his confession.

Artemisia is about Italian Baroque painter Artemisia Gentileschi (1593-1653), one of the first well-known female painters.²⁰⁷ She is depicted as the victim of statutory rape by Agostino Tassi.²⁰⁸ Her father brings charges against him, but during the trial Artemisia remains loyal to Tassi and refuses to testify against him. She is therefore tortured with a finger-wrenching device, which elicits a confession from Tassi

²⁰¹ U.S. Const. amend. V.

²⁰² *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966).

²⁰³ *Weeks v. United States*, 232 U.S. 383 (1914) (applicable in federal prosecutions); *Mapp v. Ohio*, 367 U.S. 643 (1941) (applicable to states).

²⁰⁴ *The Passion of Joan of Arc* (Société générale des films 1928) (Fr.).

²⁰⁵ *Anne of the Thousand Days* (Hal Wallis Productions 1969) (US).

²⁰⁶ *Artemisia* (3 Emme Cinematografica 1997) (It.).

²⁰⁷ See Stephen Holden, *Artemisia: Agony and Ecstasy, Especially Ecstasy*, N.Y. TIMES, May 8, 1998 (film review) (Critic’s Pick).

²⁰⁸ On statutory rape, see Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273 (2007).

who has been forced to watch the ordeal. The real Artemisia testified against Tassi, and she was tortured with thumbscrews to verify her testimony.²⁰⁹

In inquisitorial systems of criminal justice, a suspect is expected to cooperate, so such systems do not cater to a suspect who wishes to remain silent. Devices of criminal procedure that promote cooperation, and hopefully confessions, in inquisitorial systems include little or no warning of the right to remain silent or the right to counsel, delayed access to legal counsel, confrontations, reenactments at the scene of the crime, and offers of leniency. All of these devices work together to coax a suspect into speaking up and, hopefully, confessing. And all of these devices are depicted in film.

1. Warnings

A suspect's decision to remain silent often depends on whether counsel is present to ensure that he or she is not tricked into speaking. In *The Paradine Case*,²¹⁰ an adaptation of the novel by Robert Hichens, the hauntingly beautiful Mrs. Paradine (played by Alida Valli) is accused of poisoning her much older, blind husband. The film opens with Mrs. Paradine's arrest by the chief inspector of police. He arrests her at her home pursuant to an arrest warrant and warns her that she need not say anything. She is taken to the police station where her solicitor (played by Charles Coburn) is waiting. Privately, he advises her to say nothing. In the "charge room," in the presence of her solicitor, the police formally charge her with murder and ask if she has anything to say in response to the charge. According to her solicitor's advice, she replies that she has nothing to say. Her solicitor then helps her to retain barrister (trial lawyer) Anthony Keane (played by Gregory Peck) as her trial defense counsel.

Strict U.S. safeguards include the *Miranda* warning which the police give to a suspect to ensure a knowing waiver of the right to remain silent and the early right to counsel.²¹¹ The Fifth Amendment of the U.S. Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."²¹² As the U.S. Supreme Court stated in the *Miranda* case, the "current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself."²¹³ The rule of *Miranda* therefore derives from the due process clause of the Fifth Amendment and not from the Sixth Amendment right to counsel, which is a right that is enjoyed by an accused, not a suspect.

²⁰⁹ Valeria Finucci, *A Portrait of the Artist as a Female Painter: The Kunsterroman Tradition in A. Banti's Artemisia*, 8 QUADERMI D'ITALIANISTICA 170 (1987).

²¹⁰ *The Paradine Case*, *supra* note 15.

²¹¹ *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966).

²¹² U.S. Const. amend. V, § 2.

²¹³ *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966).

The U.S. exclusionary rule has helped to ensure that the police give the warning as required.²¹⁴ Under the exclusionary rule, evidence obtained in violation of a suspect's constitutional rights may not be used (is inadmissible) for criminal prosecution. There are a few exceptions, such as the narrow "public safety"²¹⁵ and the "English warning"²¹⁶ exceptions. Under the English warning exception, the failure to raise an alibi or other exculpatory information while in custody, after being warned of the consequences of such failure, can be used against the suspect in court.

There is no general *Miranda* rule and no exclusionary rule in traditional inquisitorial systems. Even in Civil Law countries where the police are now required to advise a suspect of the right to remain silent, it is not followed very closely in practice. It is therefore common to hear the *Miranda* warning read to a suspect in U.S. films, but such a warning is only occasionally uttered in the films of other countries.

When counsel is present in a U.S. film, he or she will normally tell the client not to talk to the police.²¹⁷ In many films of Civil Law countries, however, the police are shown freely questioning suspects, even with their defense counsel present. The usefulness of a warning is therefore of little use in a legal tradition where the police and even the suspect's attorney expect the suspect to cooperate. Even in the United States, statistics show that a majority of suspects agree to talk to the police, even after being warned of the right to have counsel present. The suspect may believe that he or she can provide exculpatory evidence that will satisfy the police or the suspect may wish to avoid the cost of hiring an attorney. A suspect is not entitled to government-provided counsel.

2. Delayed Legal Representation and Coercion

Informing a suspect of the right to remain silent is a hollow safeguard if the suspect is unaware of his or her right to consult counsel or if the right to consult counsel is limited or non-existent. *Miranda* therefore provides that, in the United States, suspects *in custody* shall be informed of their right to remain silent and the correlative right to have an attorney present. If not so informed, elicited confessions shall automatically be inadmissible in criminal prosecutions under the so-called "Exclusionary Rule."

²¹⁴ See *Weeks v. United States*, 232 U.S. 383 (1914) (applicable in federal prosecutions); *Mapp v. Ohio*, 367 U.S. 643 (1941) (applicable to states).

²¹⁵ See *New York v. Quarles*, 476 U.S. 649 (1984). See also Charlie Savage, *Holder Backing Law to Restrict Miranda Rights*, N.Y. TIMES, May 10, 2010, at A1, available at www.nytimes.com/2010/05/10/us/politics/10holder.html (last visited Oct. 11, 2014); Micah Cohen, *Small Majority Approved of Miranda Rights for Terror Suspects*, N.Y. TIMES, Apr. 21, 2013, available at fivethirtyeight.blogs.nytimes.com/2013/04/21/small-majority-approved-of-miranda-rights-for-terror-suspects/ (Boston Marathon bombers) (last visited Mar. 22, 2014).

²¹⁶ See *South Dakota v. Neville*, 459 U.S. 553 (1983) (admissibility of a suspected drunk driver's failure to submit to a blood-alcohol test).

²¹⁷ As the character Saul Goodman advises his client in the U.S. television series *Breaking Bad*: "What'd you say to [the police detective]? Huh? Did you say anything stupid? By anything stupid, I mean anything at all." *Breaking Bad* (Season 2, Episode 8.1, Apr. 26, 2009).

As mentioned above, the U.S. Supreme Court recognized in 1984 a narrow “public safety” exception to the right to early counsel.²¹⁸ Since 9/11, there have been efforts to expand the exception in investigations of suspected terrorists.²¹⁹ Also, in reaction to 9/11, Congress and the President enacted the USA PATRIOT Act of 2001 which authorized the detention of suspected terrorists for up to seven days without filing formal charges.²²⁰

The U.K. film *In the Name of the Father*²²¹ shows explicitly how seven days of relentless interrogation and psychological torture caused Gerry Conlon (played by Daniel Day-Lewis) to confess to crimes that he did not commit. His confession and the confessions of three others result in the conviction of eleven members of the Conlon family, and Gerry Conlon is sentenced to a minimum of thirty years in prison. The film is loosely based on the real-life prosecution of the “Guildford Four” and seven others for the October 5, 1974 IRA terrorist bombing of a pub in Guildford, England.²²²

In the film, Gerry Conlon, his friend Paul Hill, and two roommates in a squatter house are arrested by the police as suspects in the bombing of the pub. The police use prolonged detention and psychological torture to extract confessions from all four. The coerced confessions also implicate Conlon’s father and members of the Maguire family. All eleven are tried and convicted as co-defendants.

The film’s story is primarily an indictment of the Prevention of Terrorism Act of 1974 which had just been adopted by the British Parliament.²²³ The Act gave the police power to detain and interrogate suspects for up to seven days without a criminal charge and without an appearance before a judge. That police power, plus public pressure to find and punish the perpetrators, led to overzealous efforts to convict the first suspects that were found.

As *In the Name of the Father* depicts, the heightened motivation of the police to extract confessions during national security crises, combined with the relaxation of safeguards to protect the rights of suspects, can easily lead to unjust results. As Carolyn Blum wrote: “British horror at the IRA’s bombing campaign outweighed concerns for the protection of the rights of those accused of the bombings.”²²⁴ The film serves as a cautionary tale to Americans who have seen their civil liberties compromised in the USA PATRIOT

²¹⁸ See *New York v. Quarles*, 476 U.S. 649 (1984).

²¹⁹ See *Savage*, *supra* note 215; *Cohen*, *supra* note 215.

²²⁰ 8 U.S.C. § 1226a(a)(5).

²²¹ *In the Name of the Father*, *supra* note 17.

²²² For criticism about the accuracy of the film, see Alastair Logan, *In the Name of the Father*, *NEW L. J.* 294 (Feb. 25, 1994). The film is also based on Gerry Conlon’s autobiography *Gerry Conlon & David Pallister, Proved Innocent: The Story of Gerry Conlon of the Guildford Four* (Hamish Hamilton, 1st ed. 1990).

²²³ James T. Kelly, *The Empire Strikes Back: the Taking of Joe Doherty*, 361 *FORDHAM L. REV.* 217 (Nov. 1992). See also President Lincoln’s suspension of the writ of habeas corpus during the American Civil War, see *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and the internment of Japanese-Americans during World War II. See *Korematsu v. United States*, 323 U.S. 214 (1944).

²²⁴ Carolyn Patty Blum, *Images of Lanyering and Political Activism in In the Name of the Father*, 30 *UNIV. SAN FRANCISCO L. REV.* 1065 (summer 1996).

Act which permits the detention of suspected non-citizen terrorists for up to seven days without being formally charged²²⁵ and in proposals to expand usage of the “public safety” exception²²⁶ to the *Miranda* doctrine.²²⁷

Apart from national security crises, there has been a historical tendency in traditional inquisitorial systems to delay a suspect’s access to professional legal counsel to give the police more license to extract information. In all countries, public order and survival of the state are highest priorities. So governments that are charged with protecting the community and national security would naturally prefer the cooperation of all citizens, even at the expense of their right to remain silent.

One way to ensure such cooperation during interrogation of a suspect is to deprive the suspect of professional counsel for as long as possible. The job of the defense attorney is to protect the suspect from any trickery or coercion that the police might employ to elicit a confession.²²⁸ In France, suspects may be held in investigatory detention for up to forty-eight hours without probable cause, judicial approval, or mandatory court appearance. And before recent statutory changes, the accused could not even consult an attorney. The danger of eliciting an unreliable confession during French investigatory detention (*garde à vue*) was depicted in the 1971 French film *Two Men in Town*²²⁹ and in the 1981 French film *Garde à vue*.²³⁰

Two Men in Town is a compelling anti-death-penalty film that was released about eight years before the death penalty was finally abolished in France, and only four years before France’s last execution by guillotine. In *Two Men in Town*, everything seems to work against ex-convict Strabliggi (played by Alain Delon) and his sincere actions to give up crime and live a normal life when he is released from prison on parole. As Strabliggi struggles to re-enter society, Goitreau, the detective who put Strabliggi behind bars, is convinced that Strabliggi is up to no good and is determined to find evidence of a parole violation. Goitreau relentlessly hounds Strabliggi by tailing him everywhere, holding him for forty-eight hours under *garde à vue* to force him to sign a statement, searching his house, and repeatedly interviewing his boss and girlfriend.

In the French film *Garde à vue*, Inspector Gallien (played by Lino Ventura) investigates the rape and murder of two little girls and targets attorney Jerome Martinaud (played by Michel Serrault), slowly breaking him down psychologically until he confesses to the crimes, even though he did not commit them. Unfortunately, *Garde à vue* is available only in French. But fortunately the film was re-made in 2000 as *Under*

²²⁵ 8 U.S.C § 1226a(a)(5) (“The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. . .”).

²²⁶ See *New York v. Quarles*, 476 U.S. 649 (1984).

²²⁷ See *Savage*, *supra* note 215; *Cohen*, *supra* note 215.

²²⁸ For a description of various tricks that are used, see Edward J. Sackman, *False Confessions: Rethinking a Contemporary Problem*, 16-WTR KAN. J.L. & PUB. POL’Y 208, 221-22 (2007).

²²⁹ *Two Men in Town*, *supra* note 76.

²³⁰ *Garde à vue*, *supra* note 70.

Suspicion. In *Under Suspicion*, set in Puerto Rico, American lawyer Henry Hearst (played by Gene Hackman) is interrogated at length by police Captain Benezet (played by Morgan Freeman) about the rape and murder of a 12-year-old girl. Hearst confesses, as did Martinaud in *Garde à vue*, even though he did not commit the crimes.

In 2001, French procedures were modified to require police to notify a detained suspect of his or her right to counsel. Today, a suspect in France has a right to see a lawyer for 30 minutes within the first hour, for 30 minutes after 20 hours, and another 30 minutes after 36 hours.²³¹

Totalitarian regimes such as Nazi Germany, fascist Italy, and the Soviet Union recognized the importance of obtaining a confession as early as possible, which necessarily meant that the accused had no right to counsel during custodial interrogation. Coerced confessions in totalitarian systems are depicted in numerous films including *The Confession*²³² in which Gerard Ludvik (played by Yves Montand) is whisked away to the Ministry of Justice for interrogation and is not afforded access to counsel until after he confesses.

3. Coercion to Obtain Confessions

A survey of films worldwide reveals a pattern of police practice to elicit confessions by psychological or physical coercion. Films demonstrate that when the police are unsupervised by a neutral party such as a prosecutor or an investigating judge or by an advocate such as the suspect's attorney, their unfettered instinct to obtain a confession easily leads to abuse of a suspect's right to remain silent.

As mentioned above, historical examples of the accepted use of torture to elicit a confession include *The Passion of Joan of Arc*²³³ (France), *Anne of the Thousand Days*²³⁴ (England), and *Artemisia* (Italy).²³⁵ Coercion by the police is also state-sanctioned in modern-day totalitarian states, as depicted in *The Confession* (Czechoslovakia)²³⁶ in which the police torture suspects during prolonged detention to elicit false confessions.

In *The Confession*, Ludvik is told early in his brutal interrogation that, if he confesses, he will receive an open (public) trial. If he does not confess, he will receive a "closed" trial at which 20 prosecution witnesses will testify against him, certain to result in his conviction and execution by hanging. It matters not to the authorities whether the confessions are reliable. In the Socialist legal tradition, the justice system

²³¹ See C. pr. pén., *supra* note 69, art. 63-4.

²³² *The Confession*, *supra* note 132.

²³³ *The Passion of Joan of Arc*, *supra* note 204.

²³⁴ *Anne of the Thousand Days*, *supra* note 205.

²³⁵ *Artemisia*, *supra* note 206.

²³⁶ *The Confession*, *supra* note 132.

is an educational tool.²³⁷ The suspects in *The Confession* are broken down and then, after they confess, carefully trained to deliver their scripted confessions in a public trial that is broadcast over the radio as an example for citizens at large.

Democratic systems of government normally recognize the right of suspects to remain silent. But when the internal security of a democratic country is threatened by terrorists or other types of subversives, civil liberties are compromised, and the actions of the police tend to resemble those employed in totalitarian states. In the film *In the Name of the Father*,²³⁸ British police investigators, who are under public and political pressure to locate terrorist bombers, obtain unreliable confessions from suspects after depriving them of sleep over several days and threatening harm against their family members. Consider also the depiction of torture by the South African police to elicit confessions in the 1989 U.S. film *A Dry White Season*.²³⁹

A Dry White Season, based on the novel by André Brink,²⁴⁰ was directed by Euzhan Palcy, the first black woman to direct a mainstream Hollywood film.²⁴¹ Set in June 1976 South Africa, the film focuses on a White Afrikaner Ben du Toit (played by Donald Sutherland) who comes to realize the injustices of Apartheid. When the police brutally beat his gardener's son, du Toit finds it difficult to believe. Then, when they torture to death the gardener himself, du Toit retains an attorney (played by Marlon Brando) to initiate an inquest.

As discussed above, the films *Garde à vue*²⁴² (France) and its re-make *Under Suspicion* (Puerto Rico) concern the use of psychological coercion to obtain an unreliable confession. In *Law Breakers*,²⁴³ French police detectives physically torture to death a detainee during *garde à vue* in an unsuccessful attempt to coerce a confession. And in the film *Two Men in Town*,²⁴⁴ French police detective Goitreau holds the anti-hero Strabliggi for forty-eight hours under *garde à vue*, without benefit of legal counsel, and coerces him to sign a statement.

In the United States, the courts have an inherent distrust of confessions obtained by the police. As Justice Frankfurter stated in *Rochin v. California*,²⁴⁵ the use of coerced confessions “is constitutionally obnoxious not only because of their unreliability,” but because they “offend the community’s sense of fair

²³⁷ See Reichel, *supra* note 9 at 118-22.

²³⁸ *In the Name of the Father*, *supra* note 17.

²³⁹ *A Dry White Season* (Davros Films 1989) (US).

²⁴⁰ Rita Kempley, *A Dry White Season*, WASH. POST, Sept. 22, 1989 (film review), available at www.washingtonpost.com/wp-srv/style/longterm/movies/videos/adrywhiteseasonrkempley_a09fdd.htm (last visited Oct. 11, 2014).

²⁴¹ Peter Travers, ROLLING STONE MAG., Feb. 6, 2001 (film review).

²⁴² *Garde à vue*, *supra* note 70.

²⁴³ *Law Breakers*, *supra* note 12.

²⁴⁴ *Two Men in Town*, *supra* note 76.

²⁴⁵ 342 U.S. 165 (1952).

play and decency.” Such distrust has culminated in the Exclusionary Rule of evidence which deters the police from obtaining a confession without first “Mirandizing” a suspect, namely informing the suspect of his or her right to remain silent and to the presence of legal counsel.

An even more protective exclusionary rule is applied in India where confessions made to the police are never admissible in court.²⁴⁶ The Indian evidentiary rule virtually eliminates the incentive of police detectives to use coercion against a suspect. As a result, Indian films rarely depict the use of torture by the police to elicit a confession or other information. Instead, Indian movies such as *Damini-Lightning*²⁴⁷ depict conspiracies between the police and overzealous prosecutors to fabricate evidence and to suborn perjury from false witnesses.

4. Confrontation and Reenactments at the Scene of the Crime

In the United States, the police might get lucky and obtain a voluntary incriminating statement from a suspect in the very early phases of an investigation. But when the suspect/accused retains counsel, the police and the prosecutor have no further contact with the suspect/accused until trial. Not so in inquisitorial systems. A device that is often employed in inquisitorial systems to encourage a suspect to confess is confrontation with the victim.

Although a suspect in France must be informed of the right to remain silent and has a right to the presence of counsel during questioning, he or she is expected to respond to questioning in so-called “confrontation” sessions. This explains why, in films such as *Rape of Love*,²⁴⁸ French defense attorneys do not stop their clients from speaking freely, even confessing, to an investigating judge -- or why defense counsel allows his client to be interviewed in private by the investigating judge in the German film *Devil in Silk*²⁴⁹ or by the Dutch forensic psychiatrist in *A Question of Silence*.²⁵⁰ Also, as discussed below, an accused in inquisitorial systems is expected to take the stand at trial and face questioning by the presiding judge.

The preferred setting for confrontation is the scene of the crime, where the investigator will have the victim, the suspect and eyewitnesses act out their versions of what happened. Although reenactments have the benefit of refreshing the memories of the witnesses and refining their testimony,²⁵¹ the primary purpose is to create conditions for psychologically pressuring the suspect into confessing.

²⁴⁶ See Madan Lal Sharma, *The Role and Function of Prosecution in [Indian] Criminal Justice* 193, in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Resource Material Series No. 53 (1998), available at www.unafei.or.jp/english/pdf/RS_No53/No53_00All.pdf (last visited Oct. 11, 2014).

²⁴⁷ *Damini-Lightning* (Cineyugg Entertainment 1993) (In.).

²⁴⁸ *Rape of Love*, *supra* note 32.

²⁴⁹ *Devil in Silk*, *supra* note 93.

²⁵⁰ *A Question of Silence*, *supra* note 31.

²⁵¹ Ross M. Gardner, *Practical Crime Scene Processing and Investigation* 416 (2D ED. 2012).

The suspect is expected to participate in the crime scene reenactment. In the French film *Rape of Love*, the suspects are transported by the police to the scene of the crime where the investigating judge has the victim recount what happened.²⁵² With defense counsel present, the investigating judge has the victim and the suspects act out their parts according to their versions of what happened. As the reenactment unfolds, and inconsistencies arise, the suspects make self-incriminating statements and then outright confessions. This technique is also portrayed in *Law Breakers*²⁵³ in which the investigating judge conducts a reenactment at the scene of the crime with the suspects and eyewitnesses.

In U.S. trials, so-called “reconstructions” and “reenactments” are presented in the courtroom, but actual visits to the scene of the crime are rare. And reenactments at the scene of the crime, especially with the participation of the suspect or defendant, virtually never occur. No American defense attorney would allow it to occur, invoking the suspect’s or defendant’s right to remain silent.

B. Prosecutor as Investigator and Charging Authority

The U.S. prosecutor is in a position to safeguard against investigative abuses by the police, and prosecutors are, in theory, more neutral than the police. In *reactive* cases, meaning cases in which a crime has already been committed, the police do not consult with the prosecutor before interviewing the victim, witnesses and suspects. If the police do not handle such cases correctly, however, the prosecutor will likely decline prosecution. Apart from their professional duty and pride, prosecutors must appear before the same judges day after day, so they are much more effective advocates if they develop reputations of trustworthiness. When the police understand that the prosecutor will not accept questionable cases, especially unreliable or inadmissible confessions, they have an incentive to follow the rules, especially rules that are designed to respect the rights of a suspect.

Proactive investigations, which concern ongoing or anticipated crimes, more often involve supervision or advice from the prosecutor’s office. Such investigations tend to be more intrusive, because the police use surveillance, informants, undercover officers, searches and seizures. In the proactive mode, the police have the luxury of time to obtain search and arrest warrants and to consult with the prosecutor’s office to ensure that the product of an investigation will be accepted for prosecution.

When the police lack probable cause to obtain warrants, they might turn to the prosecutor to conduct a grand jury investigation. A grand jury investigation is somewhat analogous to an investigation

²⁵² See C. pr. pén., *supra* note 69, art. 92 (the investigating judge may reconstruct the crime scene with the accused, the witnesses, the victim, and all attorneys present).

²⁵³ *Law Breakers*, *supra* note 12.

conducted by an investigating judge in Civil Law legal systems, which is discussed in the next section. The grand jury investigation is typically used to investigate sophisticated and organized crimes.

Although a suspect has rights in theory, those rights will be abused in practice if there are no safeguards from overzealous police. In England, the prosecutor's office tends to let the police develop investigations and to dictate when suspects shall be charged with crimes. The danger of such a relationship is depicted in the film *In the Name of the Father*²⁵⁴ in which police investigators blatantly abuse the rights of the suspects to coerce confessions and then retain forensics experts who use questionable science to make the charges stick, all without any supervision or critical scrutiny by the prosecutor's office.

A similar relationship between the police and the prosecutor's office exists in other Commonwealth countries with similar results. In *A Cry in the Dark*,²⁵⁵ the overzealous police retain forensics experts to build a phony case against Lindy Chamberlain and her husband, again without any supervision or question by the prosecutor's office. The same detachment of the prosecutor from an overzealous police investigation of a crime is seen in *I Confess* (Quebec).²⁵⁶ The prosecutors simply take what the police give them and employ their advocacy skills in the courtroom. In England and other Commonwealth countries, the prosecuting barrister might not even review the case until the day before trial.

The role of the prosecutor in a criminal justice system varies depending on the amount of power he or she is given to investigate a case and how much discretion to decide whether to bring formal charges. In the Civil Law tradition, the prosecutor is a non-voting member of the judiciary and is expected to play a neutral role. Under the principle of legality, that neutral role is ensured by giving the prosecutor little discretion on whether to bring charges once sufficient evidence of culpability has been obtained.

The French and German Civil Law traditions are also responsible for the invention of the investigating judge whose role is to act as an additional buffer between the suspect and the prosecutor. The investigating judge decides whether charges should be brought and has a great deal of discretion. Germany and Italy have eliminated the position of investigating judge, but it still exists in France, Spain, Portugal and some Latin American countries.

1. Probable Cause for Trial (the Screen)

In the United States, the presumption of innocence is protected at the pretrial phase by the broad discretion of a prosecutor to decline prosecution and the requirement that, if a prosecutor decides to

²⁵⁴ *In the Name of the Father*, *supra* note 17.

²⁵⁵ *A Cry in the Dark*, *supra* note 20.

²⁵⁶ *I Confess*, *supra* note 221.

pursue prosecution, probable cause must first be established in felony cases before a grand jury. The Fifth Amendment of the U.S. Constitution provides that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”²⁵⁷ This constitutional requirement applies in federal courts and not state courts.²⁵⁸ Less than half of states require a grand jury indictment for the prosecution of felonies.²⁵⁹

The grand jury is considered both a shield and a sword in criminal procedure. As a sword, a grand jury investigation is somewhat analogous to an investigation conducted by an investigating judge in Civil Law legal systems. It enables the police, through the prosecutor, to ferret out sophisticated and organized crimes. As a shield, the grand jury decides whether there exists probable cause to issue an indictment.

In reality the latter, “screening” role becomes more of a “rubber stamp” role because the prosecutor is in a position to exert a lot of influence over the grand jury, especially since there is no judge or defense counsel present. The Sixth Amendment right to counsel does not apply in grand jury proceedings, and the suspect has no right to present exculpatory evidence to the grand jury. The grand jury is required in all federal felony cases, but the suspect may waive the right. The waiver must be made in open court after the suspect has been advised of the nature of the charge and of his or her rights.

The other form of screening is the preliminary hearing. This is an adversarial hearing at which a magistrate judge decides whether the prosecutor has probable cause to try the case. The prosecutor begins the process by filing an “information.”²⁶⁰ If a grand jury has already issued an indictment, then there will be no need for a preliminary hearing.²⁶¹ But the results of a preliminary hearing do not avoid the need to convene a grand jury.²⁶² Every felony prosecution must therefore be preceded by a grand jury’s issuance of an indictment. Some prosecutions will be preceded by both a preliminary hearing and a grand jury, but only if the preliminary hearing is convened first. The prosecutor therefore has the option of bringing formal charges (a criminal complaint) either with a grand jury indictment or with a preliminary hearing ruling, followed by a grand jury indictment.

Many other Common Law countries provide for a similar screening process. In *A Fish Called Wanda*,²⁶³ the magistrate judge announces that the charge is armed robbery, and the prosecution presents his evidence in the form of documents. The magistrate judge then tells the accused that he will stand trial at the Central Criminal Court at the Old Bailey. Other films of Common Law countries that depict a

²⁵⁷ U.S. Const. amend. V.

²⁵⁸ See *Hurtado v. California*, 110 U.S. 516 (1884).

²⁵⁹ Craig Hemmens, David. C. Brody & Cassia C. Spohn, *Criminal Courts: A Contemporary Perspective* 212 (2010).

²⁶⁰ Fed. R. Crim. Proc., tit. III.

²⁶¹ Fed. R. Crim. P. 5.1.

²⁶² Fed. R. Crim. P. 6.

²⁶³ *A Fish Called Wanda* (Metro-Goldwyn-Mayer 1988) (US-GB).

preliminary hearing include *The General*²⁶⁴ (Ireland), *Black and White*²⁶⁵ (Australia), *I Just Didn't Do It*²⁶⁶ (Japan), *A Dry White Season*²⁶⁷ (South Africa), *Cry Freedom*²⁶⁸ (South Africa), *A Cry in the Dark*²⁶⁹ (Australia), and *Bardaasht*²⁷⁰ (India).

Based on the book by Paul Williams, *The General* is the real-life story of Dublin crime boss and folk hero Martin Cahill (played by Brendan Gleeson). After Cahill's gang successfully robs a jewelry store and a local art gallery, the police become suspicious and monitor him around the clock. While they are monitoring Cahill from a neighbor's yard, he threatens the neighbor. The police charge him with assault, and he is taken before a judge of the superior court for a preliminary hearing where the judge determines that there is enough evidence to sustain the charge for trial.

In *Bardaasht*, three corrupt police officers senselessly murder law student Anuj. Anuj's brother Aditya (played by Bobby Deol) hires his former girlfriend, valiant female prosecutor Payal (played by Lara Dutta), to prosecute the three police officers. At a preliminary hearing, she and defense counsel present their arguments to the judge. The judge is convinced that the physical evidence and the police report are inconsistent, so he allows the case to go to trial.

Such a screening process is rare in Civil Law countries and other countries with inquisitorial systems because the trial is, in effect, a protracted inquest. One exception is Mexico where trial must be preceded by a preliminary hearing (*plazo constitucional*) at which the accused is represented and gives a statement to the judge.

2. Prosecutorial Discretion (Buffer I)

The presumption of innocence is protected at the pretrial phase in the United States by the broad discretion of a prosecutor to decline prosecution. In most Common Law countries and in France, the prosecutor has broad prosecutorial discretion not to file formal charges, even where there is sufficient evidence to obtain a conviction. The discretion not to prosecute is known as the "opportunity principle" in Civil Law countries.²⁷¹ The American Bar Association standards for prosecutors specifically suggest that a

²⁶⁴ *The General* (Irish Film Board 1998) (Ie.).

²⁶⁵ *Black and White*, *supra* note 18.

²⁶⁶ *I Just Didn't Do It* (Altamira Pictures Inc. 2006) (Jp.).

²⁶⁷ *A Dry White Season*, *supra* note 239.

²⁶⁸ *Cry Freedom* (Universal Pictures 1987).

²⁶⁹ *A Cry in the Dark*, *supra* note 20.

²⁷⁰ *Bardaasht* (Film Folks 2004) (In.).

²⁷¹ Oren Gazal-Ayal & Limor Riza, *Plea Bargaining and Prosecution* 146, in 3 *Criminal Law and Economics* (Nuno Garoupa ed., 2d ed. 2009).

prosecutor consider “noncriminal disposition” in appropriate cases such as those involving first offenders, even though there is probable cause to take the case to trial.²⁷²

Under the opportunity principle, prosecutors are in a position to act as a buffer between the police and courts to protect against the use of prosecutions for political or other unjust purposes. In totalitarian and racist regimes, depicted in *The Confession*²⁷³ and *Sophie Scholl-The Final Days*,²⁷⁴ prosecutors are creatures of the state and powerless to protect against political prosecutions. Politicized justice can occur, however, in any country where national security or public security is under serious threat, as depicted in *A Dry White Season*²⁷⁵ (South Africa), *In the Name of the Father*²⁷⁶ (U.K.), and *Danton*²⁷⁷ (revolutionary France).

In England, there unfortunately remains a strong tradition of allowing the police to investigate crimes and decide whether charges should be brought, as seen in *The Paradine Case*.²⁷⁸ Until 1985, British police would hire their own solicitors and barristers to pursue prosecutions. In 1985, an independent Crown Prosecution Service (CPS) was established, but rather than spearheading investigations and prosecutions, CPS assumes a more advisory role to the police.²⁷⁹

Although U.S. prosecutors are highly independent, they are also highly adversarial. They therefore tend to think and act like the police, striving to prove guilt more than to protect the innocent from improvident prosecution. For this reason, criminal defense attorneys in some jurisdictions jokingly or derisively refer to U.S. prosecutors as “cops with law degrees.” In other U.S. jurisdictions, it is not uncommon to hear criticism of U.S. prosecutors for “playing it safe” by pursuing only cases that are likely to result in a conviction. Although this latter tendency might be criticized as laziness or timidity, it can be praised for focusing only on suspects who are most probably culpable.

By contrast, under the “legality principle,” found in most Civil Law countries, especially in the German tradition, prosecutors have much less independence than do U.S. prosecutors. Greek prosecutors, for example, have little or no discretion to decline prosecution. The frustration of Greek prosecutors, powerless to prevent improvident prosecutions, is depicted in the Greek films *Women with a Past*²⁸⁰ and

²⁷² ABA Criminal Justice Section, Standards, Prosecution Function, Sec. 3-3.38 (Discretion as to Noncriminal Disposition) (1993), available at www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_tocold.html (last visited Oct. 11, 2014).

²⁷³ *The Confession*, *supra* note 132.

²⁷⁴ *Sophie Scholl - The Final Days*, *supra* note 92.

²⁷⁵ *A Dry White Season*, *supra* note 239.

²⁷⁶ *In the Name of the Father*, *supra* note 17.

²⁷⁷ *Danton* (Gaumont 1983) (Fr.)

²⁷⁸ *The Paradine Case*, *supra* note 15.

²⁷⁹ Fairchild & Dammer, *supra* note 9 at 17, 194; Julia Fionda, *The Crown Prosecution Service and the Police: A Loveless Marriage?*, 110 *Law Q. Rev.* 376, 376-79 (1994) (describing tensions between Crown Prosecution Service and police over prosecutorial discretion).

²⁸⁰ *Women with a Past*, *supra* note 36.

Maria in Silence.²⁸¹ The prosecutor's frustration is also depicted in the Mexican film *Esmeralda Comes by Night*²⁸² and the Italian film *The Conviction*.²⁸³

In *Women with a Past*, a young prosecutor discovers, during the course of a murder trial, that his own wife, and not the female accused on trial, is the real murderer. In the film's climax, he announces during his summation in open court that the accused is innocent and that his wife is guilty. As a result, his wife is convicted and faces the possibility of the death penalty.

In *Maria in Silence*, Maria Lambros (played by Alikì Vougiouglaki) is an adult deaf mute in a small village who is raped by the club owner Vournas. Maria has the baby and then murders Vournas and his wife when they try to kidnap the baby from her. During the murder trial, testimony reveals that Vournas raped Maria, but the prosecutor presses on, noting in his summation that he is strictly bound to ask for a conviction. The prosecutor nonetheless expresses sympathy for Maria, concluding that "it was Providence who pulled the trigger" and proposes "full discharge of the accusations." A U.S. prosecutor would have the authority to bring a motion for dismissal of the charges, but in Greece, as shown in *Maria in Silence*, the panel of judges retires to deliberate and decide whether to accept the prosecutor's recommendation of acquittal.

In *Esmeralda Comes by Night*, Esmeralda Loyden (played by María Rojo) is tried and convicted of bigamy. When her husband Pedro discovers that she is married to four other husbands, he lodges a victim's criminal complaint, and she is arrested and detained at the Mexico City police station for questioning by a prosecutor of the Public Ministry (*ministerio público*). In the course of his investigation, the prosecutor falls in love with Esmeralda, and the other four husbands convince Pedro to drop the charges. The prosecutor has no discretion, however, to drop the prosecution. Esmeralda is tried, convicted and sentenced to prison, and the prosecutor promises to wait for her.

In *The Conviction*, the public prosecutor (*pubblico ministero*) allows his own personal torment over his sexual inadequacies to interfere with his duty to prosecute an accused rapist.²⁸⁴ The young victim Sandra (played by Claire Nebout) strays from her art class group during a tour of an art museum in Rome at closing time to look for something she misplaced and then finds herself locked inside the museum for the night. Another man is also in the museum, and he pretends that he is locked in as well. He seduces Sandra and then reveals the next morning that he had keys to the museum all along. Sandra brings criminal and

²⁸¹ *Maria in Silence*, *supra* note 37.

²⁸² *Esmeralda Comes by Night*, *supra* note 86.

²⁸³ *The Conviction* (Cineuropa 92 1991) (It.)

²⁸⁴ See Art. 112 Costituzione [Cost.] (It.) (public prosecutor's duty to adhere to legal principles), available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited Oct. 11, 2014).

civil charges against him for rape.²⁸⁵ Because of his own sexual difficulties with his wife, the prosecutor envies the virility of the accused and delivers a weak summation to the court. During the party after the trial, the prosecutor's supervisor chides the prosecutor, and Sandra throws a piece of cake in his face.

Under the legality principle, prosecutors therefore tend to err on the side of bringing charges since there is little pressure to win the case. It is arguable that the opportunity principle is more compatible with the presumption of innocence than the legality principle, because the prosecutor has greater discretion to prevent the unjust prosecution and conviction of an innocent person, even though guilty people might go unpunished.

Prosecutorial discretion (and arguably the presumption of innocence) is further compromised in Civil Law countries by the typical power that a victim has to initiate a prosecution or to challenge a prosecutor's decision not to prosecute. In Germany, for example, the prosecution of certain misdemeanors such as disturbing the peace, defamation, battery and destruction of property *must* be initiated by a private complaint.²⁸⁶ Such private prosecutors must post a bond which will be forfeited in part or whole if the accused is acquitted.²⁸⁷ For more serious crimes, a victim may appeal a prosecutor's decision not to bring formal charges.²⁸⁸ In Finland, if the prosecutor decides not to prosecute, the victim may bring criminal charges with no participation by the prosecutor.²⁸⁹ In the Chinese film *The Story of Qiu Ju*,²⁹⁰ the heroine pursues a civil tort claim which, against her wishes, automatically ends up as a criminal action that lands the tortfeasor-turned-accused in jail.

3. The Neutral Investigating Judge (Buffer II)

The risk of overzealous investigations by the police or prosecutors and the drawbacks of the principle of legality (little or no prosecutorial discretion) are mitigated in traditional inquisitorial systems by the invention of the investigating judge, also known as an "examining magistrate" who acts as a neutral buffer between the police and the prosecutor. The investigating judge is an exceptionally neutral and independent investigator who is under little or no legal or political pressure to charge a suspect. He or she

²⁸⁵ Italian law requires rape victims to make a formal request (the *querela*) that the state prosecute the alleged rapist. Most likely, the accused in *The Conviction* was charged with abduction of a female for lustful purposes according to Art. 523 Codice penale (C.p.) (It.) (crimes against sexual freedom).

²⁸⁶ Sec. 374 Strafprozessordnung [StPO] [Code of Criminal Procedure], APR. 7, 1987, Bundesgesetzblatt, Teil I [BGBl I] 1074, 1319, AS AMENDED BY ART. 5(4), ACT OF 10 OCT. 2013 (BGBl 2013 I p. 3799) (GER.) available at www.gesetze-im-internet.de/englisch_stpo/ (last visited Oct. 11, 2014).

²⁸⁷ *Id.*, Sec. 379.

²⁸⁸ *Id.*, Sec. 172.

²⁸⁹ Ministry of Justice, Judicial System in Finland, available at oikeusministerio.fi/en/index/theministry/thejudicialsystemoffinland.html (last visited Oct. 11, 2014).

²⁹⁰ *The Story of Qiu Ju* (Sil-Metropole Organisation 1992) (HK).

is usually depicted in film as an ethically upright player, or even the protagonist. Notable examples are *Law Breakers*²⁹¹ in which the French investigating judge (played by Jacques Brel) stands up to a powerful, corrupt police inspector, and *The Judge and the General*,²⁹² a documentary about the courageous investigation of investigating judge Juan Guzmán Tapia against the Pinochet regime in Chile.²⁹³

The position of investigating judge does not exist in adversarial systems of justice. However, in the United States, an analogous persona would be the fictional police detective Columbo (played by Peter Falk) who establishes a personal relationship with the suspect for the ulterior purpose of eliciting an incriminating statement or confession.²⁹⁴ Other American analogies are the grand jury²⁹⁵ and the investigating officer in military boards of inquiry,²⁹⁶ but neither is a career position and neither is well-known to the average American, not even to the average American lawyer. Grand juries are criticized in the United States for being overly influenced by the prosecutors who oversee them. Investigating judges, by contrast, are legally trained and act under little or no supervision.

Unfortunately, use of the investigating judge is waning in Civil Law jurisdictions including Germany and Italy, as they adopt adversarial criminal procedures.²⁹⁷ As a result, the police are gaining power over investigations of major cases. The position may even be headed toward extinction in France as the police increasingly assume the role of eliciting confessions.²⁹⁸ Still, the investigating judge remains a defining feature of the inquisitorial system, and it has been depicted in many films both favorably and unfavorably.

Just as juries are the grist of courtroom dramas in the United States and the United Kingdom, the investigating judge is a subject of great interest in French literature²⁹⁹ and film. In France and other countries of the French Civil Law tradition, the investigating judge (*juge d'instruction*) is regarded as a fair-minded, independent inquisitor who is simply looking for the truth by using complex, non-coercive psychological methods to wheedle confessions from the real perpetrators.

²⁹¹ *Law Breakers*, *supra* note 12.

²⁹² *The Judge and the General* (West Wind Productions 2008) (US).

²⁹³ See *Missing* (PolyGram Filmed Entertainment 1982) (GB), based on the true story of American journalist Charles Horman, who disappeared after the 1973 U.S.-backed coup that led to Pinochet's dictatorship.

²⁹⁴ *Columbo* (NBC Universal Television 1968-2003).

²⁹⁵ The Hon. Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: a Judge's Perspective and Commentary*, 13 TEMP. INT'L & COMP. L.J. 87 (1999).

²⁹⁶ See UCMJ, art. 32.

²⁹⁷ See Cristián Riego, *Oral Procedures and Case Management: The Innovations of Chile's Reform*, 14 SW. J. L. & TRADE AM. 339, 340 (2008); James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501, 525 (2008) ("In the 1990s, [with] a focus on new criminal procedures that promoted transparency, participation, and efficiency, Chile began its reform process to bring about more access to justice.").

²⁹⁸ See Stewart Field & Andrew West, *A Tale of Two Reforms: French Defense Rights and Police Powers in Transition*, 6 CRIM. L. FORUM 473 (1995); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983).

²⁹⁹ See, e.g., Albert Camus, *The Stranger* (Matthew Ward trans., Vintage Int'l 1989).

In the Argentinean film *The Secret in Their Eyes*,³⁰⁰ Benjamín Espósito (played by Ricardo Darín) is an investigator on the staff of an investigating judge (*juez de instrucción*). Espósito becomes obsessed with solving a brutal rape-murder case. In a pivotal scene, his supervisor Irene Menéndez Hastings (played by Soledad Villamil) who is a judge-in-training, confronts a suspect during the first official interrogation (*declaración indagatoria*) and tricks him into confessing to the murder.

The French film *Rape of Love*³⁰¹ is a good portrayal of the unique investigatory techniques used by the investigating judge in France. A rape victim (played by Nathalie Nell) is convinced by her friends to break her silence and step forward to bring a criminal complaint against the rapists. Justice is ultimately achieved due to the methodical investigation of the investigating judge who, incidentally, is played by a female. Female director Yannick Bellon presents a detailed account of the methodical progression of the investigating judge's techniques such as bringing both the victim and her alleged attackers together, first in a meeting so that the victim can confront them and then at the scene of the crime where they end up confessing their crime in the course of acting out their versions of what happened.³⁰²

Confrontation, preferably at the scene of the crime, is a method that the investigating judge typically uses in France to elicit a confession. In the United States, the accused and the victim would not be interviewed together. American defense lawyers usually advise their clients to say nothing to anyone about the case, not even at trial. In *Rape of Love*, the four accused are represented by attorneys at each meeting, but they speak freely. Other portrayals of confrontation can be seen in *Presumed Guilty*³⁰³ (Mexico) and *Lion's Den* (Argentina).³⁰⁴

The method of re-enacting the crime at the scene of the crime in the hope of eliciting a confession is almost never used in the United States, again because an American defense attorney would not allow it, so it is rarely seen in American crime dramas. In *Rape of Love*, the accused are transported by police to the scene of the crime where the investigating judge has the victim Nicole and the accused act out their parts,³⁰⁵ which causes the accused to make self-incriminating statements and then outright confessions. This technique of re-enacting the crime at the scene of the crime is also portrayed in *Law Breakers*.³⁰⁶ Based on the testimony of an eyewitness to police brutality, Judge Level (played by Jacque Brel) conducts a re-

³⁰⁰ *The Secret in Their Eyes* (Tornasol Films 2009) (Es.), based on Eduardo Sacheri, *La pregunta de sus ojos* (Galerna 2005), is set in Buenos Aires, alternating in time between 1974 and 1999.

³⁰¹ *Rape of Love*, *supra* note 32.

³⁰² See also *Devil in Silk*, *supra* note 93 (scene of the German investigating judge interviewing a suspect).

³⁰³ *Presumed Guilty*, *supra* note 87.

³⁰⁴ *Lion's Den* (Matanza Cine 2008) (Ar.).

³⁰⁵ See C. pr. pén., *supra* note 69, art. 92 (the investigating judge may reconstruct the crime scene with the accused, the witnesses, the victim, and all attorneys present).

³⁰⁶ *Law Breakers*, *supra* note 12.

enactment at the scene of the crime, but none of the other eyewitnesses will corroborate the one eyewitness' version of what happened.

Because so much independence and power is entrusted to the investigating judge, it is essential that he or she strictly adhere to high ethical standards. The French film *Law Breakers* portrays the investigating judge as a scrupulous protagonist, depicting his heroic yet unsuccessful quest to uncover the truth in a case of police brutality. Director Marcel Carné's film presents a strong argument for preserving the institution of the investigating judge to protect against abuses of power by the police. Investigating Judge Bernard Level risks his reputation and his career to prove that the suspected police detectives are culpable. And even though the culprits are acquitted at trial, he remains true to his profession, telling the victorious defense counsel Graziani (played by Charles Denner) as they descend the steps of the courthouse after the trial, "There are no lost causes . . . One thing counts, to make a small step, even if a small step."

Although the film depicts the investigating judge as a hero, it also shows the temptation of an overzealous investigating judge to cross the ethical line. In one scene, Judge Level becomes aggressive with a reluctant witness at the police station where the homicide occurred, and his faithful *greffier* (clerk) remarks afterward, "It's maybe because of the décor [the police station], but you questioned him like a cop, not a judge." The *greffier's* remark captures the French public's perception of the persona of an investigating judge in contrast to the persona of a police detective.

The independence and impeccable ethics of the investigating judge are also portrayed in the Greek film *The Highway of Hate*³⁰⁷ in which the investigating judge turns himself in when he discovers evidence that implicates himself as the one whose car hit the victim in question. And in the Greek film *With Fear and Passion*,³⁰⁸ the prosecutor chides the protagonist investigating judge for his failure to avoid a conflict of interest in one of his investigations.

The Italian comedy *Seduced and Abandoned*³⁰⁹ also portrays an independent investigating judge who has the wide-ranging authority of both a police detective and a prosecutor, able to compel witnesses to appear before him and to bring formal criminal charges on the spot. In the United States, a detective may pretend to make deals with a suspect in order to elicit a confession, but the power to drop or bring formal charges lies with the prosecutor, not with the police. The Italian investigating judge in *Seduced and Abandoned* is appointed by the prosecutor, so he has the combined power of police investigator and prosecutor.

³⁰⁷ *The Highway of Hate*, *supra* note 38.

³⁰⁸ *With Fear and Passion*, *supra* note 39.

³⁰⁹ *Seduced and Abandoned* (Lux Film 1964) (It.).

The French film *The Judge and the Assassin*,³¹⁰ set in the 1890s, is unusual because it portrays the investigating judge in a negative light. Investigating judge Rousseau (played by Philippe Noiret) is arrogant and overly ambitious, contrary to his sworn selfless and loyal duty to uphold justice. He is driven by the promise of national recognition if he obtains a confession from a drifter named Bouvier who has undoubtedly raped and killed two dozen children in the countryside of France. During the course of obtaining a confession from Bouvier, Judge Rousseau realizes that Bouvier is probably insane. If judicially found to be insane, he will not be executed, and Rousseau will not get the recognition he seeks. Rousseau therefore appoints an examining doctor who is likely to declare Bouvier to be sane.³¹¹

Other films that do not portray a flattering image of the investigating judge include Orson Welles' 1962 film version of Franz Kafka's *The Trial* which portrays the investigating judge as a bureaucratic tyrant. In *The Trial*,³¹² Josef K. (played by Anthony Perkins) is a 30-year-old bank clerk who awakens one morning to be arrested and prosecuted, but never charged, for an unspecified crime. While being questioned by an imperious investigating judge in a surreal scene which includes a large audience, the tragic hero proclaims to all present, "Can there be any doubt that behind my arrest is a vast organization at work, an establishment which contains a retinue of civil servants, officers, police and others, perhaps even hangmen."

Although the setting is not identified in either the film or the novel, Kafka was trained in the law at the Karl-Ferdinand German University in Prague, and he worked as a lawyer for the Workers Accident Institute of the Kingdom of Bohemia in Prague from 1908 to 1922. The law in Prague at the time was based on the Austrian codes.³¹³ He was therefore most familiar with the Czech and Austro-Hungarian legal systems.³¹⁴

Ingmar Bergman's 1969 Swedish made-for-television film *The Rite*³¹⁵ portrays the investigating judge as a psychologically abusive, petty and prurient busybody. Although Bergman intended *The Rite* to be his personal criticism of the Swedish government, he does not identify the setting or the nationalities of the characters, and the investigating judge did not exist in Sweden at the time. Therefore, Bergman employed the investigating judge character as a personification of Sweden's inquisitorial system of justice, just as

³¹⁰ *The Judge and the Assassin*, *supra* note 68.

³¹¹ See also *A Question of Silence*, *supra* note 31 (psychologist, chosen by the investigating judge, investigates the sanity of four women who are accused of murdering a shopkeeper).

³¹² *The Trial*, *supra* note 27. Former Thomas Jefferson School of Law student Chris Biagioli is acknowledged for his contribution to this section. See *The 12 Best Trial Movies*, 75 ABA JOURNAL 96 (1989). See also *The Trial* (British Broadcasting Corp. 1993) (GB) (based on Harold Painter's screenplay which is more faithful to Kafka's novel).

³¹³ Douglas E. Litowitz, *Franz Kafka's Outsider Jurisprudence*, 27 LAW & SOC. INQUIRY 103, 112 (Winter 2002).

³¹⁴ Kafka was born in Prague in 1883. Until 1918, Prague was part of Austria-Hungary, also called the Austro-Hungarian Empire. After World War I, Austria, Hungary and Czechoslovakia (with Prague as its capital) became separate republics.

³¹⁵ *The Rite* (Svensk Filmindustri 1969) (Se.).

Kafka did of inquisitorial systems in his novel *The Trial*. Still, Bergman's treatment of the character shows his disdain for the intrusive psychological methods used by investigating judges.

And finally, Pedro Almodóvar's 1991 Spanish Film *High Heels*³¹⁶ depicts the investigating judge (*juez instructor*) as unprofessional and corrupt. It must be concluded that Almodóvar was targeting Spain's inquisitorial justice system and used an investigating judge as a personification of his disdain for the system in general. In reality, Spanish investigating judges are known for their aggressive enforcement of the law and as a result are often the targets of terrorist threats and attacks.³¹⁷

The foreign films referenced above provide you a first-hand look at the work of investigating judges in action, revealing their unique roles, techniques and ethical standards. The role exists only in inquisitorial systems of criminal justice, and it is being phased out as the police do more evidence-gathering and confession-eliciting and the prosecutor takes over the neutral investigative function. Although inquisitorial systems are becoming more like adversarial ones, the prosecutor is still expected to play a relatively neutral role.³¹⁸

4. Offers of Leniency and Plea Bargaining

Although the police are authorized to lie to suspects to confuse them and to pressure them into confessing, they do not have prosecutorial discretion, and the U.S. Supreme Court has ruled that confessions may not be considered when they are made in exchange for an "explicit" offer of leniency *by the police* to a suspect.³¹⁹ On the other hand, the practice of negotiated pleas, also known as "plea bargaining," between *the prosecutor* and a defendant, is permissible. Plea bargaining is an American invention which implicitly or indirectly involves the government's offer of leniency in exchange for a confession (guilty plea).

In the United States, approximately 90% of criminal cases are settled by plea bargaining in lieu of trial.³²⁰ U.S. defense counsel, often appointed by the government, negotiates with the prosecutor to obtain a virtually guaranteed sentence or range of sentencing in exchange for the defendant's guilty plea. The negotiated plea and sentence is a compromise that lies somewhere between what the prosecutor and

³¹⁶ *High Heels* (Canal+ 1991) (Fr.).

³¹⁷ See Baltasar Garçon: *Spain's best-known investigating judge has enemies, of sundry sorts. Perhaps including himself*, THE ECONOMIST, May 31, 2001 (describing Garçon as having an "indisputable record in serving the rule of law.?).

³¹⁸ See Despina Kyprianou, *Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies*, 7 CYPRUS & EUR. L. REV. (2008).

³¹⁹ See *Williamson v. United States*, 512 U.S. 594, 620 (1994); Lawrence S. Wrightsham & Saul M. Kassin, *Confessions in the Courtroom* 81 (1993). Offers of leniency should not be confused with the "rule of lenity," also called the "rule of leniency," which is a canon of Common Law statutory construction that applies in criminal cases. According to the rule lenity, ambiguous statutes should be construed in a defendant's favor.

³²⁰ See Fed. R. Crim. P. 11(c)(1)(B) (not binding on the court) & 11(c)(1)(C) (binding on the court).

defense counsel would hope to achieve at trial. After weighing the known evidence and the risks of losing, the two arrive at a compromise charge and sentence which they will then propose to the judge for approval.

But to seal the proposed deal, defense counsel must usually first persuade the defendant to plead guilty, namely confess, to a crime in exchange for the negotiated sentence. Defense counsel has a “duty to communicate to a client not only the terms of a plea bargain offer, but also its relative merits compared to the client’s chances of success at trial.”³²¹

U.S. defendants and their defense counsel understand, through custom and practice, that they are likely to receive a lower sentence if they plead guilty than they will receive if they plead not guilty and are convicted by a jury.³²² Otherwise, they would not participate in the practice. For that reason, plea-bargaining has long been criticized as a threat to the presumption of innocence and the fundamental right to remain silent.³²³ The risks of coercing an unreliable confession with an offer of leniency is heightened when the accused is facing a long prison sentence or the death sentence, and the practice raises a concern that prosecutors will raise the stakes and enhance their bargaining position by over-charging defendants.³²⁴

The right to remain silent in all countries, adversarial and inquisitorial alike, is compromised by the practice of rewarding suspects and accused who confess and of punishing those who do not. The practice raises the concern that an innocent person will confess, as depicted in the Japanese film *I Just Didn't Do It*.³²⁵

In *I Just Didn't Do It*, a young man, Teppei (played by Ryo Kase), is falsely accused of molesting a 15-year-old school girl on a crowded commuter train. He is arrested, harshly interrogated and then prosecuted in a grueling series of court sessions, all the while insisting that he is innocent. Given the high conviction rate (99%), Teppei’s own defense counsel recommends that he confess and pay a modest fine. Teppei refuses to follow that course of action and ends up spending several months in jail during an arduous trial at the end of which he is found guilty and sentenced to three more months in jail. *I Just Didn't Do It* is filmmaker Masayuki Suo’s indictment of the Japanese justice system which is weighted heavily against a suspect or accused. The film opened the eyes of many Japanese who learned that their justice

³²¹ State v. Bristol, 618 A.2d 1290 (Vt. 1992).

³²² *Imposition of Death Penalty by Jury*, 82 HARV. L. REV. 156, 161 (1968) (“Empirical studies have amply demonstrated that, as a class, those who plead not guilty before a jury receive higher sentences than those who confess their guilt.”).

³²³ See, e.g., Eli Paul Mazur, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor’s Role as a Minister of Justice*, 51 DUKE L.J. 1333 (2002).

³²⁴ See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (prosecutor sought a guilty plea on the charge of uttering a forged instrument in the amount of \$88.30, threatening to bring an indictment under the recidivist (“three strikes”) law which would carry a life sentence).

³²⁵ *I Just Didn't Do It*, *supra* note 266.

system is designed to coerce confessions from suspects and that those who do not confess bear a heavy burden to prove their innocence at trial.

In the Civil Law tradition, offers of leniency are consistent with the cultural expectation of cooperation from a suspect/accused. And yet Civil Law countries have been slow to accept the practice of plea bargaining, preferring to find the truth by using psychological maneuvers to elicit confessions from suspects and defendants. Under the Civil Law “principle of legality” (also known as the rule of compulsory prosecution), prosecutors are bound to prosecute all crimes that are supported by the evidence, and plea bargaining is therefore frowned upon if not outright forbidden as it is in Switzerland. Some Civil Law countries such as Germany, France, Italy, and Poland, however, have come to realize that plea bargaining speeds up the adjudicative process and is therefore much more efficient. Plea bargaining is depicted in the Polish film *No End*.³²⁶

Against the backdrop of post-Solidarity Poland under martial law in the early 1980s,³²⁷ the legal story of *No End* is a study of the difference between a lawyer who is cause-oriented and one who is client-oriented. Darek Stach (played by Artur Barcis) is a strike organizer who is charged with the crime of disrupting commerce.³²⁸ At first, he is represented by Antek, a young activist lawyer for the union organization and one of the heroes of the Gdansk shipyard strikes, but Antek suddenly dies of a heart attack. Darek’s wife desperately seeks out Antek’s old mentor, Labrador (played by Aleksander Bardini). In contrast to Antek, Labrador is a shrewd mediator who knows how to operate within the legal system. He has access to the judges and the prosecutor on a personal basis, and he works with his client and the complaining party to reach a resolution of the case.

In the Socialist legal tradition, offers of leniency are authorized by explicit policy. The U.S. film *Red Corner*³²⁹ depicts the Chinese sentencing policy of “leniency for those who confess; severity for those who resist.”³³⁰ And in the film *The Confession*,³³¹ the accused are promised that they will avoid a death sentence if they confess. Several of the defendants who confess are nonetheless sentenced to death and later executed.

³²⁶ *No End*, *supra* note 11.

³²⁷ The Independent Self-governing Trade Union (Solidarity) is a Polish trade union federation that was founded in September 1980 at the Gdansk Shipyard as an anti-communist movement, led by Lech Walesa. In 1981, martial law was imposed and Solidarity was banned. The government eventually negotiated with Solidarity-led opposition, and Solidarity was allowed to participate in 1989 elections. Walesa was elected President of Poland (1990-1995). After the collapse of the Soviet Union, Solidarity became a more traditional trade union.

³²⁸ See Polish Penal Code art. 46 (the victim may bring the charge), *available at* https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf (last visited Oct. 11, 2014). It is therefore possible to get the charged dropped by negotiating with the charging party.

³²⁹ *Red Corner*, *supra* note 24.

³³⁰ See Randall Peerenboom, *What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, MICH. J. INT’L L. 823, 851 (2006).

³³¹ *The Confession*, *supra* note 132.

This practice of making explicit offers of leniency reflects the Socialist legal tradition in which the interests of the state trump those of the individual, and criminal procedure is a method of rehabilitating and reeducating.

Countries of the Socialist legal tradition also obtain “cooperation” from a suspect by appointing defense counsel who is really a “handler” whose mission is to extract a confession. In the U.S. film *Red Corner*, filmmaker John Avnet depicts such a practice in China’s modern-day totalitarian regime. In *Red Corner*,³³² Jack Moore (played by Richard Gere), an American attorney on a business trip in Beijing, becomes a murder suspect. During Moore’s initial custody, his state-appointed attorney pressures him to confess to avoid the death penalty. The film depicts the Confucian role of Chinese lawyers as “state legal workers” who are required to owe greater loyalty to the state than to their clients. As depicted in *The Confession*,³³³ state-appointed defense counsel in Czechoslovakia were really handlers or coaches who helped prepare the accused for a proper performance (confession) during a climactic Soviet-styled “show” trial.

Such practices of the Socialist legal tradition are, however, arguably comparable to the practice of plea-bargaining in the United States. Although U.S. defense counsel owe a duty of loyalty to their clients, the practice of plea-bargaining places them in the awkward position of having to convince their clients to confess. One might argue therefore that the plea-bargaining system in the United States and other countries, including Germany, is analogous to the practice in the Socialist legal tradition of using government-appointed attorneys to elicit confessions from suspects and accused. Defense counsel in the United States is permitted to exert a fair amount of pressure on a client to accept a deal.³³⁴

C. Pretrial Detention

Because the presumption of innocence is better protected in adversarial systems than it is in inquisitorial ones, one would expect pretrial detention to be more prevalent in inquisitorial systems than it is in adversarial systems, and films tend to prove the point. As the U.S. Supreme Court stated: “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”³³⁵ In the United States, the Bail Reform Act provides that a federal court may order the pretrial detention of a defendant if the prosecutor demonstrates by clear and convincing evidence at an adversarial bond hearing

³³² *Red Corner*, *supra* note 24.

³³³ *The Confession*, *supra* note 132.

³³⁴ *See, e.g.*, *Uresti v. Lynaugh*, 821 F.2d 1099 (5th Cir. 1987) (the defendant asked for a few days to think over the plea bargain, but his defense counsel insisted that he decide that very same day).

³³⁵ *United States v. Salerno*, 481 U.S. 739 (1987).

that no conditions of release, such as bond, “will reasonably assure . . . the safety of any other person and the community.”³³⁶

An accused that is charged with murder, rape or treason will likely be held in pretrial detention in any criminal justice system, and most courtroom dramas involve serious crimes. And yet, in the Canadian film *I Confess*,³³⁷ the accused is not detained pending a murder trial. Indeed, pre-trial detention is discouraged in Canada. And in the Australian films *The Last Wave*³³⁸ and *A Cry in the Dark*,³³⁹ the accused, which are charged with murder, are not detained pending trial.

By contrast, many films of inquisitorial systems in action depict pretrial detention for less serious crimes, such as the Japanese film *I Just Didn't Do It*³⁴⁰ in which the accused is charged with groping a young female on the subway, the Mexican film *Esmeralda Comes by Night*³⁴¹ in which the accused is charged with polygamy, and the Italian film *The Conviction*³⁴² in which the accused is charged with seducing a woman through fraud. Consider also the Iranian film *Close Up*³⁴³ in which the accused, who is charged with petty fraud, is detained pending trial. Still, it should be noted that there are films of inquisitorial systems in which the accused is not detained pending trial, such as *The Life of Emile Zola*³⁴⁴ (France) (criminal libel) and films of the Nordic legal tradition including *June Night*³⁴⁵ (Sweden) (aggravated assault) and *The Rite*³⁴⁶ (Sweden) (obscenity).

Another concern is the length of pretrial detention. In the United States, the Sixth Amendment guarantees defendants a speedy trial, and the right has been extended to defendants in state court.³⁴⁷ By contrast, trials in inquisitorial systems tend to be lengthy and therefore countries such as Mexico, Brazil and Argentina are criticized for prolonged detention pending trial, as depicted in *Lion's Den*³⁴⁸ (Argentina) and *Presumed Guilty*³⁴⁹ (Mexico). India has an adversarial criminal system, but it does not guarantee a speedy trial. The Indian criminal justice system is notorious for long delays in bringing defendants to trial. Nearly all Indian films depict pretrial detention and give the false impression that trial occurs rather quickly after arrest. In reality, Indian defendants spend several years in pretrial detention.

³³⁶ 18 U.S.C. § 3142(e).

³³⁷ *I Confess*, *supra* note 22.

³³⁸ *The Last Wave*, *supra* note 19.

³³⁹ *A Cry in the Dark*, *supra* note 20.

³⁴⁰ *I Just Didn't Do It*, *supra* note 266.

³⁴¹ *Esmeralda Comes by Night*, *supra* note 86.

³⁴² *The Conviction*, *supra* note 283.

³⁴³ *Close Up*, *supra* note 141.

³⁴⁴ *The Life of Emile Zola*, *supra* note 13.

³⁴⁵ *June Night* (Svensk Filmindustri 1940) (Se.).

³⁴⁶ *The Rite*, *supra* note 315.

³⁴⁷ *Klopper v. North Carolina*, 386 U.S. 213 (1967).

³⁴⁸ *Lion's Den*, *supra* note 304.

³⁴⁹ *Presumed Guilty*, *supra* note 87.

IV. FILMIC DEPICTIONS OF TRIAL

Arguably the most significant, overriding aspect of criminal procedure is the degree to which a legal system respects the presumption of innocence. Although a country's laws may expressly pronounce that a suspect or accused has a right to the presumption of innocence, such a pronouncement does not, by itself, tell us whether the right is guaranteed. The presumption of innocence is a principle that must be implemented through the enforcement of other rights such as the right to remain silent, through evidentiary rules such as those concerning the prosecutor's burden of proof and the admissibility of character evidence and confessions, and through trial procedures concerning such things as where the accused sits and the amount of votes needed to reach a guilty verdict.

A. Prosecutor's Litigative Role

The presumption of innocence is a principle of justice that is strongly protected in the United States,³⁵⁰ largely due to safeguards that protect the right of both a suspect and an accused to remain silent. Due to the presumption, the U.S. prosecutor bears a heavy burden of proving guilt at trial. In most jurisdictions, the prosecutor must prove that the defendant is guilty beyond a reasonable doubt,³⁵¹ and the jury's verdict must be unanimous.³⁵²

At the same time, the U.S. prosecutor enjoys many advantages at trial, including the atmospheric advantage of representing the government. Despite a strong policy of presumption of innocence in the United States, jurors cannot help but presume that the defendant must have done something wrong. The U.S. prosecutor also has a greater opportunity to create rapport with the jury. He or she sits closer to the jury box,³⁵³ speaks to the trier of fact first during opening statements, presents the incriminating evidence first, and then speaks first and last during summations.

In every other country in the world, defense counsel speaks last, as seen in several films, including *Law Breakers*³⁵⁴ (France), *Tenth District Court*³⁵⁵ (France), *After the Truth*³⁵⁶ (Germany), *Devil in Silk*³⁵⁷

³⁵⁰ See *Coffin v. United States*, 156 U.S. 432 (1895) (recognized the presumption of innocence of persons accused of crimes).

³⁵¹ *Id.* (the standard is a natural safeguard of the presumption of innocence); *In Re Winship*, 397 U.S. 358 (1970) (due process clause requires proof of guilt beyond a reasonable doubt in juvenile cases in state courts).

³⁵² In the United States, unanimity is required in federal prosecutions, and only two states allow for non-unanimous verdicts in felony prosecutions.

³⁵³ As a general rule, the party that carries the burden of proof, namely the prosecutor in criminal cases and the plaintiff in civil cases, sits closer to the jury box. In Germany, the prosecutor may speak last, but rarely exercises that power.

³⁵⁴ *Law Breakers*, *supra* note 12.

³⁵⁵ *Tenth District Court*, *supra* note 74.

³⁵⁶ *After the Truth*, *supra* note 94.

³⁵⁷ *Devil in Silk*, *supra* note 93.

(Germany), *Malèna*³⁵⁸ (Italy), *Scorpion Woman*³⁵⁹ (Austria), *Life Sentence*³⁶⁰ (Poland), *Presumed Guilty*³⁶¹ (Mexico), and *Witness for the Prosecution*³⁶² (England). It remains perplexing that the U.S. prosecutor should speak last in a country where it seems that nearly every procedural aspect of trial is designed to favor the accused.

The degree of the prosecutor's neutrality also has a bearing on the outcome of the adjudicative process, and the defined role of the prosecutor differs materially among legal traditions, as seen in film. In adversarial, Common Law systems, the prosecutor's motivation is to prove guilt. In inquisitorial, Civil Law systems, the prosecutor is a non-voting member of the court and is expected to play a more neutral role, though the role varies from country to country.

In the American system, the prosecutor is not a member of the judiciary and is expected to be partial and adversarial in the adjudicative process. There are bright lines between investigation, prosecution and adjudication. The suspect is investigated by the police, often under the supervision of the government prosecutor, and once probable cause is established through evidence gathered during the investigation, the prosecutor brings formal charges and the suspect becomes a defendant. The American prosecutor plays the role of adversary on behalf of the state, euphemistically called "The People" in most state- and local-level prosecutions.

The degree to which a prosecutor is considered to be a member of the court can be seen in the *mise en scène*, namely the layout of the court. As seen in the French documentary *Tenth District Court*,³⁶³ the prosecutor enters the courtroom with the judges, indicating that she is a member of the court. On the other hand, she seats herself at a separate table, and her robe is different than the judges' robes. Her role is therefore ambiguous; she is a member of the court and occasionally suggests questions that the presiding judge might pose to a witness. Her primary role is to recommend a sentence and give argument in support of the recommendation. But, as depicted in *Tenth District Court*, she first speaks directly to the defendant in a chiding, adversarial manner. The prosecutors in *Tenth District Court* consistently make harsh comments about the veracity or lack of remorse of the accused and recommend rather harsh sentences which the judges rarely adopt.

Compared to the depiction of the prosecutor in Greek films, the French prosecutor in *Tenth District Court* is relatively partial and adversarial. In the Greek film *Maria in Silence*,³⁶⁴ the prosecutor sits at the same bench with the judges, and as one would predict, shows no partiality during the proceedings. By contrast,

³⁵⁸ *Malèna* (Medusa Film 2000) (It.).

³⁵⁹ *Scorpion Woman*, *supra* note 35.

³⁶⁰ *Life Sentence*, *supra* note 10.

³⁶¹ *Presumed Guilty*, *supra* note 87.

³⁶² *Witness for the Prosecution*, *supra* note 14.

³⁶³ *Tenth District Court*, *supra* note 74.

³⁶⁴ *Maria in Silence*, *supra* note 37.

in the English film *Witness for the Prosecution*,³⁶⁵ as in all English courtroom films, the prosecutor is shown seated next to defense counsel at a table that faces the bench. This layout accurately predicts a partial, adversarial prosecutor.

The attire of the lawyers and judges also reflects the relationship between the prosecutor and the judges. In Common Law countries, where the prosecutor is not a member of the judiciary, there is a stark contrast between the dress of judges and prosecutors, and prosecutors and defense counsel dress alike. In the United States, the opposing lawyers wear business attire, and the judge wears a black robe. In the United Kingdom, the barristers and the judge wear expensive horse-hair wigs (perruques), but the barristers wear plain black robes, whereas the judge wears a luxurious red robe. In Civil Law countries, where prosecutors are more closely associated with the judiciary, the prosecutor's attire often resembles the judges' ornate attire, whereas defense counsel's attire is plainer in comparison.

B. Victim's Role at Trial

Despite strong policies that favor victims of crimes in the United States, victims play a relatively minor role in the adjudicative process. They do not sit at the table with the prosecutor, and any civil action must be brought separately. In the United States, the victim of a crime is just another witness and is therefore sequestered from the courtroom until it is time to testify. If the defendant is convicted, the victim may testify during the sentencing hearing under more relaxed evidentiary rules.

Typically, the U.S. victim brings a civil action against the defendant after the conclusion of the criminal trial because a criminal conviction (for which the prosecutor must prove guilt beyond a reasonable doubt) assures a civil judgment (for which the victim need prove liability only by a lesser preponderance-of-the-evidence standard of proof) under the doctrine of collateral estoppel (also known as issue preclusion).

Films reveal that victims are allowed greater participation in other Common Law countries. In the South African films *A Dry White Season*³⁶⁶ and *In My Country*,³⁶⁷ the victims are permitted to retain attorneys to participate in the questioning of witnesses at inquests into police misconduct. The Canadian film *I Accuse*³⁶⁸ is based on the real trial of Dr. John Schneeberger who was charged and convicted in 1999 of

³⁶⁵ *Witness for the Prosecution*, *supra* note 14.

³⁶⁶ *A Dry White Season*, *supra* note 239.

³⁶⁷ *In My Country* (Chartoff Productions 2004) (US-Za).

³⁶⁸ *I Accuse* (Accusatory Productions Inc. 2000) (Ca.).

drugging and sexually assaulting Candice Foley in a Saskatchewan hospital.³⁶⁹ In the film, the victim is seated at the prosecutor's table during trial.

In many Civil Law countries, victims have the power to bring charges or consolidate a civil claim with the prosecution. Victim's counsel sits at a separate table and is allowed to participate by questioning witnesses and making the first summation at the end of the trial, as shown in the films *Malèna*³⁷⁰ (Italy), *Law Breakers*³⁷¹ (France), *The Conviction*,³⁷² (Italy), and *Seven Beauties*³⁷³ (Italy).

In *Malèna*, various men in the town of Castelcuto in the early 1940s pursue the voluptuous Malèna (played by Monica Bellucci), one of them being the local dentist Dr. Gaspare Cusimano who falsely brags that he is having an affair with her. The dentist's wife, as victim, brings criminal and civil charges against her husband and Malèna for adultery and alienation of affections. In the French film *Law Breakers*, the victim's widow requests the appointment of an investigating judge, and she is represented by counsel at the trial. During trial in *The Conviction*, the Italian presiding judge introduces victim's counsel and invites her to make a statement. In *Seven Beauties*, Pasqualino (played by Giancarlo Giannini), murders his sister's pimp, chops up his body and mails the pieces to different parts of Italy in the 1930s. For his crime, he earns the moniker "monster of Naples." At trial, counsel for the victims sit at a separate table.

In *Rape of Love*,³⁷⁴ the victim is represented by counsel who appears at hearings before the French investigating judge. In *Tenth District Court*,³⁷⁵ the presiding judge of the French misdemeanor court is shown levying both criminal fines and civil damages in the same case. In *Close Up*,³⁷⁶ the Iranian judge (*quadi*) plays a mediating role in the Islamic tradition and convinces the victims to drop their charges against the defendant.

C. Accused's Rights at Trial

1. Presumption of Innocence and the Right to Remain Silent

The presumption of innocence is an essential element of the adversarial system, because in the Common Law tradition, the government, especially the judiciary, cannot be trusted. The government seeks

³⁶⁹ *Sask. doctor sentenced for rape*, CBC News, Nov. 10, 2000, available at www.cbc.ca/news/canada/story/1999/11/26/saskdr991126.html (last visited Oct. 11, 2014).; Lona Manning, *Rapist, M.D.*, CRIME MAG., Feb. 6, 2004, available at crimemagazine.com/rapist-md-0 (last visited Oct. 11, 2014).

³⁷⁰ *Malèna*, *supra* note 358.

³⁷¹ *Law Breakers*, *supra* note 12.

³⁷² *The Conviction*, *supra* note 283.

³⁷³ *Seven Beauties* (Medusa Distribuzione 1975) (It.).

³⁷⁴ *Rape of Love*, *supra* note 32.

³⁷⁵ *Tenth District Court*, *supra* note 74.

³⁷⁶ *Close Up*, *supra* note 141.

information to prove only the guilt of a suspect or accused and has no interest in proving innocence. The presumption of innocence was therefore invented in the early development of the Common Law tradition to counterbalance the government's biased quest for incriminating evidence to support a conviction. The presumption of innocence is becoming, if not already, an international norm of human rights law. It is expressed in Article 11 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights.³⁷⁷

Many would argue that the presumption of innocence in adversarial courtrooms does not really exist in the minds of judges because they know that probable cause has already been established. Likewise many would argue that it does not really exist in the minds of jurors because they do not believe that the state would waste its time and resources prosecuting innocent citizens. Yet, theoretically, as a matter of law, a U.S. juror could be excused during *voir dire* for responding "I don't know" when asked whether the defendant is innocent. The correct response, strictly applying the presumption of innocence, would be "I assume that the defendant is innocent until it is proven otherwise beyond a reasonable doubt."

The presumption is not expressed in the U.S. Constitution, but it is strongly protected by other constitutional provisions, including the Self-Incrimination Clause of the Fifth Amendment³⁷⁸ which is the basis of the right to remain silent. The right to remain silent itself, however, must be complemented by other safeguards. The presumption can be compromised in a variety of ways at trial, compelling the accused to waive the right to remain silent and speak out in his or her own defense.

To further protect the right to remain silent (and therefore the presumption of innocence), the United States has developed extraordinary evidentiary rules at trial, most notably the burden of the prosecutor to prove guilt beyond a reasonable doubt, the exclusionary rule, and the "*Griffin*" rule³⁷⁹ which prohibits comment (by the prosecutor) on the defendant's failure to take the stand to testify on his own behalf.³⁸⁰ The *Griffin* rule is extraordinary because it defies common sense and Common Law rules of evidence regarding inferences that can be drawn from silence. It therefore remains a controversial evidentiary rule.³⁸¹

There is no presumption of innocence *or guilt* in the Civil Law tradition.³⁸² A presumption of guilt or innocence has no place in the logic of the pure inquisitorial mind, because the entirety of the

³⁷⁷ See *supra* note 161.

³⁷⁸ U.S. Const. amend. V.

³⁷⁹ *Griffin v. California*, 380 U.S. 609 (1965).

³⁸⁰ See *supra* notes 215 & 216 ("public safety" and "English warning" exceptions).

³⁸¹ See, e.g., Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OH. ST. L.J. 229 (2010).

³⁸² Qanuni Assassi Jumhurii Islami [The Constitution of the Islamic Republic of Iran] art. 37 [1980] ("Innocence is the basic principle No person is considered legally guilty, except in cases where his guilt is established in a competent court."), available at www.iranchamber.com/government/laws/constitution_ch03.php (last visited Oct. 11, 2014).

adjudicative process constitutes a balanced inquiry into both incriminating and exculpatory evidence, and the inquiry is conducted and controlled by a neutral judiciary. Therefore, even though French law provides for a presumption of innocence,³⁸³ it is negated in practice by the persistent cultural expectation of cooperation from a suspect or accused.³⁸⁴

Inquisitorial systems do not respect the presumption of innocence as much as adversarial ones do, largely due to the expectation of cooperation. Such an expectation is manifested in several traditional Civil Law mechanisms, discussed below, that are designed to coax an accused to testify at trial. They include the requirement to take the stand at trial, inferences that may be drawn from the remaining silent, the admissibility of character and hearsay evidence, and the lack of a separate sentencing hearing. All of these mechanisms are depicted in action in film.

a. Requirement to Take the Stand

In the United States and other Common Law countries, the prosecution puts on its case, and defense counsel attempts to discredit it through cross-examination of the state's witnesses and by introducing exculpatory evidence. In the United States, the defendant rarely takes the stand to testify, and under the U.S. *Griffin* rule,³⁸⁵ the prosecutor may not comment on the defendant's decision not to testify. The judge also carefully instructs the jury that no adverse inferences may be drawn from the defendant's decision not to testify.

Other Common Law countries do not have anything like the *Griffin* Rule, and trial is not bifurcated. There are therefore several films of Common Law countries that depict the defendant's taking the stand to testify on his or her own behalf, even when it is very risky to do so. As depicted in the British films *Cause célèbre*³⁸⁶ and *The Paradine Case*,³⁸⁷ defense counsel's decision to place his or her client on the stand is a risky one.

In *The Paradine Case*, barrister Keane's rash decision to place his client Mrs. Paradine (played by Alida Valli) on the stand leads to disastrous results. After diverting suspicion of murder from Mrs. Paradine to a key prosecution witness Latour (played by Louis Jourdan), Keane overplays his hand and has Mrs. Paradine testify. During her testimony, it is announced in open court that Latour has committed suicide. At

³⁸³ See Universal Declaration of the Rights of Man and the Citizen, art. 9 (1789) (Fr.) ("Any man being presumed innocent until he has been declared guilty."), available at avalon.law.yale.edu/18th_century/rightsof.asp (last visited Mar. 22, 2014); C. pr. pén., *supra* note 69, preamble ("any person suspected or prosecuted is presumed innocent for as long as their guilt has not been established.").

³⁸⁴ See Frase, *supra* note 64 at 218.

³⁸⁵ *Griffin v. California*, 380 U.S. 609 (1965).

³⁸⁶ *Cause célèbre* (Anglia Television 1987) (GB).

³⁸⁷ *The Paradine Case*, *supra* note 15.

that point, the jurors might infer that the suicide is evidence of Latour's consciousness of guilt which would exonerate Mrs. Paradine. But Mrs. Paradine is on the stand at the time of the announcement, and upon hearing of Latour's suicide, breaks down and confesses that she was the one who killed her husband so that she could be with Latour. She had seduced Latour, and he committed suicide over the revelation, during cross-examination, of his shameful disloyalty to his employer, the late Mr. Paradine. After Mrs. Paradine's confession in open court, the visibly humiliated and defeated Keane realizes the error of his overzealousness and hubris and apologizes to the court for his poor performance as defense counsel. He then relinquishes further representation to his co-counsel and exits the courtroom.

Cause célèbre is an exceptionally well-crafted made-for-television film about the real-life 1935 trial of thirty-something Alma Rattenbury (played by 42-year-old Helen Mirren) and her 18-year-old lover George (played by David Morrissey) for the murder of Alma's much older husband Francis Rattenbury (played by Harry Andrews).³⁸⁸ Young and naïve George kills the impotent Francis in a fit of unfounded jealousy, without Alma's knowledge or encouragement, but she confesses to the crime to protect George. They are both charged with murder.

Alma's defense counsel (played by David Suchet) persuades Alma to take the stand and tell the truth about her lack of culpability, whereas George's defense counsel decides not to place George on the stand and concocts a false defense that George was addicted to cocaine. George is convicted but spared the death penalty. Although George does not testify to corroborate Alma's testimony, the jury believes her and acquits her.

If convicted, the defendant in Common Law countries will be given an opportunity to speak at a separate sentencing hearing to seek the court's mercy. By contrast, in inquisitorial, Civil Law countries, there are multiple facets of the trial that are designed to compel the accused to speak and, if culpable, to confess. Most notably, the accused is expected to take the stand to undergo scrutiny by the presiding judge, even though there is a right to remain silent.

The prosecution does not go first. Rather, the presiding judge begins by questioning the accused, who is not placed under oath. The accused cannot be compelled to respond to questions, but adverse inferences may be drawn from the failure to respond. This Civil Law tradition of beginning the trial by having the accused take the stand is depicted in several films, including *Two Men in Town*³⁸⁹ (France), *The Conviction*³⁹⁰ (Italy), *Devil in Silk*³⁹¹ (Germany), *Lion's Den*³⁹² (Argentina), and *Presumed Guilty*³⁹³ (Mexico).

³⁸⁸ TRIAL OF ALMA VICTORIA RATTENBURY AND GEORGE PERCY STONER (F.T. Jesse, 2d ed. 1950).

³⁸⁹ *Two Men in Town*, *supra* note 76.

³⁹⁰ *The Conviction*, *supra* note 283.

³⁹¹ *Devil in Silk*, *supra* note 93.

³⁹² *Lion's Den*, *supra* note 304.

b. Evidentiary Rules

The evidentiary rules of the United States and other legal systems differ in many ways, but one of the most defining differences is the treatment of character evidence. In the United States, the admissibility of character evidence is very limited,³⁹⁴ whereas in other systems, adversarial and inquisitorial alike, character evidence is of utmost importance to the trier of fact. In *The Paradine Case*,³⁹⁵ British barrister Keane has fallen in love with his client and exploits the opportunity to know her better by stressing the importance of character in her trial. In the Italian adaptation of the French novel *The Stranger*,³⁹⁶ the story centers on the French-Algerian investigating judge's relentless interest in the suspect Mersault's character. In France, "one judges the man, not the acts."³⁹⁷ In *The Widow of St. Pierre*,³⁹⁸ therefore, the presiding judge tests the sincerity of the defendants' confessions and probes their character before handing down verdicts and sentences. Other Civil Law films that depict the consideration of character evidence include *Two Men in Town*³⁹⁹ (France), *The Trial*⁴⁰⁰ (Austria), *Tenth District Court*⁴⁰¹ (France), and *June Night*⁴⁰² (Sweden). Examples of Common Law films in which the court does not allow consideration of character evidence include *Cause célèbre*.⁴⁰³

U.S. evidentiary rules are the most stringent because the United States protects the presumption of innocence with safeguards such as the right to remain silent to a higher degree than all other countries. Character evidence will be heard only for purposes of sentencing, so the sentencing hearing is conducted separately, after conviction. In other countries, there is no need to convene a separate sentencing hearing because character evidence has already been disclosed during trial.

Another difference between the United States and other countries concerns the admissibility of hearsay evidence such as affidavits and videotaped testimony. In the United States, the defendant's right to confront the accuser and to examine witnesses is a constitutional right, protected by the Sixth Amendment,⁴⁰⁴ so hearsay is inadmissible,⁴⁰⁵ subject to limited exceptions.⁴⁰⁶ By contrast, inquisitorial

³⁹³ Presumed Guilty, *supra* note 87.

³⁹⁴ See Fed. R. Evid. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

³⁹⁵ *The Paradine Case*, *supra* note 76.

³⁹⁶ Camus, *supra* note 299.

³⁹⁷ See Pugh, *supra* note 80.

³⁹⁸ *The Widow of St. Pierre* (Cinémainaire Inc. 2000) (Ca.).

³⁹⁹ *Two Men in Town*, *supra* note 76.

⁴⁰⁰ *The Trial*, *supra* note 27.

⁴⁰¹ *Tenth District Court*, *supra* note 74.

⁴⁰² *June Night*, *supra* note 345.

⁴⁰³ *Cause célèbre*, *supra* note 386.

⁴⁰⁴ U.S. Const. amend VI ("the accused shall enjoy the right to . . . be confronted with the witnesses against him [and] to have

evidentiary rules allow adjudicators to consider hearsay and character evidence. Allowing such evidence compels the accused to take the stand on his or her own behalf and therefore compromises the right to remain silent.

In some countries, evidentiary rules are also designed to protect victim witnesses at the expense of the accused's right to confront his or her accuser. In *I Just Didn't Do It*,⁴⁰⁷ the defendant is charged with the relatively minor crime of groping a 15-year-old on the subway. He is detained for several months, however, until the victim has had a chance to testify. And when she testifies, she is shielded from his view.

In the United States, a judge tends to enforce rules of evidence more strictly in jury trials. There is little evidence of that, however, in Civil Law countries that have independent juries (Austria, Brazil, Greece, Poland, Spain and Russia). Hearsay and character evidence are admissible, and the judge instructs the jury on the meaning of the evidence before they adjourn to deliberate. In countries that use mixed panels, the judges and the lay jurors deliberate together, so the judges can instruct the jurors on the meaning of the evidence in closed session.

In inquisitorial systems, the presiding judge has especially broad discretion on what evidence will be allowed, and objections usually concern only the form of the question and not the substantive information that is being elicited. Even when France used independent juries, there were no formal rules of evidence in French courts,⁴⁰⁸ so objections are rarely seen in French films. One exception is *Law Breakers*⁴⁰⁹ in which the trial, which is held before a mixed panel, is unusually adversarial by French standards.

In the Dutch film *A Question of Silence*,⁴¹⁰ the presiding judge impatiently rejects the evidentiary objections of defense counsel, except when the prosecutor becomes overly theatrical. In *The Reader* (Germany),⁴¹¹ defense counsel makes an objection which the presiding judge ignores. In the Greek film *Women with a Past*,⁴¹² nearly all of the objections concern attempts by the attorneys to make their own personal opinions about the evidence or to introduce testimony that is designed to play on the emotions of the independent jury. In *Black List*,⁴¹³ the Quebecois judge sustains the defense attorney's objection that the prosecutor is leading the witness.

compulsory process for obtaining witnesses in his favor).

⁴⁰⁵ Fed. R. Evid. 802.

⁴⁰⁶ Fed. R. Evid. 803.

⁴⁰⁷ *I Just Didn't Do It*, *supra* note 266.

⁴⁰⁸ In France, all evidence is admissible as long as the opposing party has an opportunity to challenge it. See Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 460 (2006).

⁴⁰⁹ *Law Breakers*, *supra* note 12.

⁴¹⁰ *A Question of Silence*, *supra* note 31.

⁴¹¹ *The Reader*, *supra* note 93.

⁴¹² *Women with a Past*, *supra* note 36.

⁴¹³ *Black List* (GPA Films 1995) (Ca.).

Like the United States, other Common Law countries, especially those that use independent juries, have elaborate schemes of evidentiary rules. Therefore, as depicted in film, the lawyers' objections can concern either form or substance. In *A Passage to India*⁴¹⁴ (colonial India), defense counsel objects when the prosecutor McBryde tries to present argument during his opening statement. In *Witness for the Prosecution*⁴¹⁵ (England), the barristers object to questions that call for speculation on the part of the witness, argumentative questions, and questions that seek testimony that is more prejudicial than probative. In Indian films, the attorneys constantly interrupt each other with speaking objections about both form and substance, as depicted in *Waqt*⁴¹⁶ (objections concerning relevance and leading questions) and *Insaf ka Tarazu*⁴¹⁷ (objection concerning a prejudicial question). In the Hong Kong film *The Unwritten Law*,⁴¹⁸ the prosecutor repeatedly objects to questions that call for speculation from the witness, questions that are argumentative, questions that seek prejudicial testimony, and questions that are designed to badger the witness.

On the other hand, England and other Commonwealth countries are distinctive in the manner in which a barrister, especially the prosecutor, may "put the question" to a witness during cross-examination, as depicted in *The Paradine Case*.⁴¹⁹ In the United States and most other countries, attorneys (and judges) must pose questions, not statements, to the witness. Until a question is pending, the witness is not obliged to respond. Statements would be objectionable as improper argument by the questioning attorney. Because they are prejudicial, they tend to compromise the presumption of innocence. In the English tradition, however, a barrister may confront a witness during cross-examination with an accusation or "submission." Such an accusation will generally begin with "I put it to you that . . . [you are lying]," for example. The jury then observes the witness's response, both in substance and in demeanor.

c. No Separate Sentencing Hearing

In the United States and other Common Law countries, most criminal trials are bifurcated so that sentencing is decided separately, after a determination of guilt.⁴²⁰ The purpose of a separate sentencing hearing in the United States is to allow the court to hear additional evidence that was inadmissible at trial,

⁴¹⁴ *A Passage to India* (EMI Films 1984) (GB).

⁴¹⁵ *Witness for the Prosecution*, *supra* note 14.

⁴¹⁶ *Waqt* (United Producers 1965) (In.).

⁴¹⁷ *Insaf ka Tarazu* (B.R. Films 1980) (In.).

⁴¹⁸ *The Unwritten Law* (Seasonal Film Corporation 1985) (HK).

⁴¹⁹ *The Paradine Case*, *supra* note 15.

⁴²⁰ For U.S. sentencing procedures, *see* Fed. R. Crim. P. 32; 18 U.S.C. § 3593 (1998) (Federal Death Penalty Act); 21 U.S.C. § 848 (1998) (Continuing Criminal Enterprise statute). For Canadian sentencing procedures, *see* Canadian Criminal Code § 720 ("A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed."). For English sentencing procedures, *see* Martin's Annual Criminal Code (2000).

including hearsay and character evidence.⁴²¹ In inquisitorial trials, there is no separate sentencing hearing because guilt and punishment are decided together, and the consideration of character evidence is part-and-parcel of deciding both. When all of the evidence has been presented, the judges and jurors (if any) adjourn to deliberate on the questions of both guilt and, if necessary, the sentence. The judges then return to hand down both the verdict and, if the verdict is guilty, the sentence.

Because the accused in an inquisitorial trial is not allowed the luxury of seeing whether the prosecution has proven its case before presenting evidence in mitigation of the sentence, he or she has an incentive to testify *and even to confess* at trial to obtain the court's mercy. In the United States, the convicted defendant, who probably did not testify, has nothing to lose by acknowledging his or her guilt and begging for mercy. Thus, one will rarely see an accused decline to testify in any film that depicts a trial in an inquisitorial country. One possible exception is *The Conviction*⁴²² (Italy) in which the accused answers most, but not all, of the presiding judge's questions.

2. Right to Be Present

The right of a defendant in the United States to be present during trial derives from both the Fifth Amendment due process right to be heard and the Sixth Amendment right to confront and call witnesses.⁴²³ The U.S. Supreme Court has ruled that a disruptive defendant can lose the right to be present at trial.⁴²⁴ The Court ruled that a judge has the discretion either to bind and gag a disruptive defendant or to order his or her removal from the courtroom. As depicted in film in both Common Law and Civil Law countries, judges are reluctant to use that power.⁴²⁵

In the German film *The Baader Meinhof Complex*,⁴²⁶ the presiding judge drives on somewhat helplessly despite the constant haranguing of the defendants. The 1987 U.S. film *Conspiracy: The Trial of the Chicago 8*⁴²⁷ depicts a dramatic re-enactment of the real-life trial of the "Chicago 8" and the decision of a frustrated Judge Julius Hoffman to bind and gag one of the disruptive defendants (Bobby Seale).

A related concern is the use of security measures such as guards or shackles during trial. The U.S. Supreme Court has ruled that such measures must be used as a last resort because, among other things, they compromise the presumption of innocence by suggesting "to the jury that the justice system itself sees

⁴²¹ See *Ring v. Arizona* 536 U.S. 584 (2002) (If a death sentence is at issue, the jury will also hear the additional evidence).

⁴²² *The Conviction*, *supra* note 283.

⁴²³ U.S. Const. amends. V & VI.

⁴²⁴ *Illinois v. Allen*, 397 U.S. 337 (1970).

⁴²⁵ See also International Covenant on Civil and Political Rights, *supra* note 161, art. 14 (right to be present).

⁴²⁶ *The Baader Meinhof Complex*, *supra* note 93.

⁴²⁷ *Conspiracy: The Trial of the Chicago 8* (Inter Planetary 1987) (US).

a ‘need to separate a defendant from the community at large.’⁴²⁸ U.S. judges are therefore careful to eliminate any clues to the jury that the defendant is in pretrial detention. Furthermore, the defendant is allowed to sit with his or her defense counsel so that they can communicate.

Films show that no other country follows this practice. In Civil Law and Common Law countries alike, the defendant sits or stands, guarded, in a separate area as often shown in several courtroom films. In Italy, the accused sit in a cage, as shown in *Seven Beauties*⁴²⁹ and *The Sicilian Girl*.⁴³⁰ In England and other Common Law countries, the accused is led by guards to a separate dock, as shown in many films, including *The Trials of Oscar Wilde*⁴³¹ (England), *Johnny Belinda*⁴³² (Canada), *I Confess*.⁴³³ (Quebec), *Mesmerized*⁴³⁴ (New Zealand), *Return to Paradise*⁴³⁵ (Malaysia), *49 Days*⁴³⁶ (Hong Kong), and countless Indian films.

3. Right to a Public and Oral Trial

A public trial is guaranteed in the Common Law tradition, subject to exceptions in cases that concern national security.⁴³⁷ The Sixth Amendment guarantees the accused a “public trial,” but the defendant has no right to request a closed trial.⁴³⁸ The guarantee is considered to be a protection for all accused because it keeps the criminal justice system under public scrutiny. Article 10 of the Universal Declaration of Human Rights provides that “[e]veryone is entitled in full equality to a fair and public hearing . . . in the determination of his rights and obligations and of any criminal charge against him.”⁴³⁹ And Article 14(1) of the International Covenant on Civil and Political Rights provides that “[i]n the determination of any criminal charge . . . , everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁴⁴⁰

⁴²⁸ *Deck v. Missouri*, 544 U.S. 622 (2005) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)).

⁴²⁹ *Seven Beauties*, *supra* note 373.

⁴³⁰ *The Sicilian Girl*, *supra* note 104.

⁴³¹ *The Trials of Oscar Wilde* (Viceroy Films Ltd. 1960) (GB). See Bosley Crowther, *Wilde Absolved: Writer’s ‘Trials’ Get New Examination*, N.Y. TIMES, June 28, 1960 (film review), available at www.nytimes.com/movie/review?res=9C0DE7D7123EEF3ABC4051DFB066838B679EDE (last visited Oct. 11, 2014).

⁴³² *Johnny Belinda*, *supra* note 21.

⁴³³ *I Confess*, *supra* note 22.

⁴³⁴ *Mesmerized*, *supra* note 23.

⁴³⁵ *Return to Paradise*, *supra* note 26.

⁴³⁶ *49 Days* (Sundream Motion Pictures 2006) (HK).

⁴³⁷ See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, § 502, 110 Stat. 1214, 1258-68 (1996) (codified at 8 U.S.C. § 1532) (establishment of the five-judge Alien Terrorist Removal Court); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified at 8 U.S.C. § 1803) (establishment of the seven-judge Foreign Intelligence Surveillance Court).

⁴³⁸ *Singer v. United States*, 380 U.S. 24, 35 (1965) (“although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial”).

⁴³⁹ Universal Declaration of Human Rights, *supra* note 161, art. 10. See also *id.*, art. 11.

⁴⁴⁰ International Covenant on Civil and Political Rights, *supra* note 161 art. 14(1). See generally Mark S. Ellis, *A Training Manual for the Legal Profession—A Focus on the Judiciary*, 43 S. Tex. L. Rev. 355 (2002).

Although courtroom proceedings are public in inquisitorial systems, consistent with the Common Law “principle of publicity,”⁴⁴¹ the courtroom phase is just a formality that follows a lengthy inquest that is not public. The irony of the film *The Trial*⁴⁴² is that there never is a trial. Or, put another way, the trial is really the entire investigation, and only the final hearing is public. The final public hearing is, in effect, a “show trial” at the conclusion of the investigation. And in many countries, none of the proceedings are public, as shown in the Mexican documentary *Presumed Guilty*.⁴⁴³

The Civil Law tradition does not support either the principle of publicity or the related principle of orality (presentation of evidence through live witnesses) which, in the United States, translates into the right to call, question and confront witnesses in a public trial. Rather, the investigating judge meets individually with witnesses and compiles a *dossier* for later review by the trial court. The trial court may hear witnesses during the courtroom phase, but it relies heavily on the witnesses’ affidavits which are contained in the *dossier*. Such reliance on the contents of the *dossier* is depicted in several films, including *A Question of Silence*⁴⁴⁴ (Netherlands), *The Conviction*⁴⁴⁵ (Italy), *Presumed Guilty*⁴⁴⁶ (Mexico), and *Lion’s Den*⁴⁴⁷ (Argentina).

In the Islamic inquisitorial tradition, there is no right at all to a public trial. The *quadi* may permit an open hearing, but is not required to state a justification for excluding the public. Otherwise, virtually all trial films from all countries depict courtroom proceedings before a crowded gallery of lively and attentive spectators.

The right to a public and oral trial is perverted, however, in the Socialist legal tradition which uses the courtroom phase as an opportunity to educate the public. The use of such “show trials” is depicted in the films *The Confession*⁴⁴⁸ and *Danton*.⁴⁴⁹ In *The Confession*, the defendants are entitled to a state-appointed attorney and an open trial, but those rights are provided only in form, not in substance. The purpose of the highly publicized courtroom trial is to stir up anger, fear and loyalty among the populace by having the traitors shamefully admit their wrongdoings.

Danton is about the hero of the French Revolution who, in 1793, expresses his disagreement with the Reign of Terror engineered by the Committee for Public Safety under Robespierre. When Danton begins to acquire support for his criticism of Robespierre’s methods, Robespierre has him and his followers tried for treason before a revolutionary tribunal. Danton is “afforded” all of the legal procedures

⁴⁴¹ See Szonja Navratil, *A Comparative Overview of Publicity in the Administration of Justice*, 27 IUS Gentium 177 (2014).

⁴⁴² *The Trial*, *supra* note 27.

⁴⁴³ *Presumed Guilty*, *supra* note 87.

⁴⁴⁴ *A Question of Silence*, *supra* note 31.

⁴⁴⁵ *The Conviction*, *supra* note 283.

⁴⁴⁶ *Presumed Guilty*, *supra* note 87.

⁴⁴⁷ *Lion’s Den*, *supra* note 304.

⁴⁴⁸ *The Confession*, *supra* note 132.

⁴⁴⁹ *Danton*, *supra* note 277.

that were adopted in 1790 and 1791 to ensure a fair criminal justice system.⁴⁵⁰ He is given an opportunity to be heard before a tribunal of five judges and an independent jury in open court before a large audience. He openly challenges the authority of the tribunal until he becomes so hoarse he can barely speak. But the outcome of the trial is pre-determined, so he is convicted and sentenced to death by the guillotine.

Although nearly all countries follow the principle of publicity, differences arise concerning what the public is allowed to see (the principle of orality v. reliance on the *dossier*), how readily a judge will remove them from the courtroom for misconduct, and whether the trial may be broadcast by sound or video.

a. Inquisitorial Trial by Judge and *Dossier*

The Sixth Amendment of the U.S. Constitution guarantees the accused the right to confront “witnesses against him” and to call “witnesses in his favor.”⁴⁵¹ These rights necessarily imply that the defendant has a right to a public trial that is oral which means that testimony will be presented orally and not by a collection of affidavits in a *dossier*. This right is also known as the principle of orality.

The principle of orality does not apply in an inquisitorial system of justice. A trial is just a formality after which all of the testimony has already been collected by the investigating judge through affidavits. All of the evidence gathered by the investigating judge is collected in a *dossier*⁴⁵² and then presented to the court at trial. Live witnesses may be heard by the court as well, but the presiding judge conducts the questioning, and the lawyers are only there to make their arguments in summation.

As Thaman observes, it is a “two-stage, secret procedure in which the first, investigative stage is decisive.”⁴⁵³ The second, courtroom phase is “a perfunctory review of the paperwork in the investigative file” or *dossier*. In the film *A Question of Silence*,⁴⁵⁴ the examining psychiatrist’s husband remarks cynically at a dinner party that “everything is arranged before the trial; defending counsel attends the trial as a formality, so the Defendant feels he’s being defended, but personally I think you can do damn little as counsel for the defense.”

The *mise-en-scène* of a film reveals whether the judge conducts and controls the questioning of witnesses. In adversarial, Common Law courtrooms, the witness box faces the lawyers’ tables, not the judge. This arrangement reveals that the lawyers, not the judge, question the witnesses. The prosecutor and

⁴⁵⁰ See William Savitt, *Villainous Verdicts? Rethinking the Nineteenth-Century French Jury*, 96 Colum. L. Rev. 1019, 1023 (1996) (in 1791, the National Assembly established a new penal code and code of criminal procedure).

⁴⁵¹ U.S. Const. amend. VI.

⁴⁵² See, e.g., Fairchild & Dammer, *supra* note 9 at 148-49.

⁴⁵³ Stephen C. Thaman, *COMPARATIVE CRIMINAL PROCEDURE* 16 (Michael Corrado ed., 2002).

⁴⁵⁴ *A Question of Silence*, *supra* note 31.

defense counsel take turns presenting and testing the witnesses' testimony through direct examination, cross-examination, re-direct and so on.

The judge's role is managerial, posing questions only to clarify an ambiguous point, not to make a point. The course of the questioning can be very dramatic, because it reveals weaknesses in the testimony and, sometimes, in the moral character of the witnesses. Cross-examination is often depicted in Common Law films, because it pleases audiences with dramatic conflict.

In the courtrooms of inquisitorial systems, the witness stand faces the presiding judge, not the lawyers, because it is the presiding judge who controls the questioning. Inquisitorial courtroom procedure therefore competes with the accused's universally accepted rights to a public and oral trial, to counsel, and to call and question witnesses.⁴⁵⁵ Sometimes the prosecutor and defense counsel ask the witnesses no questions at all, as shown in the Italian film *The Conviction*,⁴⁵⁶ the French documentary *Tenth District Court*,⁴⁵⁷ and the German film *The Baader Meinhof Complex*.⁴⁵⁸

As shown in *Tenth District Court*, the presiding judge, who is flanked by two associate judges, poses all questions to the defendants who stand to testify at the witness stand or *temoin à la barre*. The prosecutor and defense counsel speak only to make their summations to the panel of judges. If they want to ask a question of the witness, they pose it to the judge who decides whether the witness shall answer it. In the Iranian film *Close Up*,⁴⁵⁹ there are no attorneys or jurors, and the *quadi* conducts all of the questioning.

The documentary *Presumed Guilty*⁴⁶⁰ depicts the lack of a public and oral trial in Mexico. The trial is an inquest that is conducted, in the traditional inquisitorial manner, through numerous interviews and hearings over the course of several months. The judge's reliance on affidavits, instead of live testimony in open court, is shown in *Presumed Guilty* as well as the Italian film *The Conviction*.⁴⁶¹

In the United States, when a defendant pleads guilty, the judge decides whether to accept the plea in an open hearing which is followed by a separate sentencing hearing, but there is not a full-blown trial. In Civil Law countries, the courtroom phase is a formality that takes place at the end of an investigation, even when the accused has already confessed. One might therefore argue that the courtroom trial of an accused in the traditional inquisitorial system is analogous to a "show trial" at which guilt or innocence has been predetermined, regardless of how it has been determined.

⁴⁵⁵ *But see* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 431 (1992).

⁴⁵⁶ *The Conviction*, *supra* note 283.

⁴⁵⁷ *Tenth District Court*, *supra* note 74.

⁴⁵⁸ *The Baader Meinhof Complex*, *supra* note 93. *See also* the U.S. film *The Reader*, *supra* note 93 (depicting a German presiding judge's questioning of witnesses).

⁴⁵⁹ *Close Up*, *supra* note 141.

⁴⁶⁰ *Presumed Guilty*, *supra* note 87.

⁴⁶¹ *The Conviction*, *supra* note 283.

b. Spectator Conduct

In the United States, the right to an open trial is said to protect the integrity of the criminal justice system in general by holding it up to public scrutiny.⁴⁶² The U.S. Supreme Court has held, however that “the trial judge has an affirmative obligation to control the courtroom and keep it free of improper influence” on the jury.⁴⁶³ Examples of films in which disruptions by the gallery are not tolerated include *The Specialist*,⁴⁶⁴ the documentary of the Israeli Eichmann trial during which the presiding judge repeatedly admonishes the gallery members not to express their feelings in response to Eichmann’s testimony. And in *A Dry White Season*⁴⁶⁵ (South Africa), the judge threatens to clear the gallery if the spectators do not behave.

By contrast, in the French tradition, the public in the gallery are free to express their approval or disapproval of witness statements or attorney comments, even though it may influence the jury. As one legal commentator observed a century ago, the gallery in a French courtroom is “responsible to every sentiment and emotion caused by a piece of evidence or argument. . . [T]he jury being only human must be swayed one way or another under the influence of the psychology of the crowd.”⁴⁶⁶ As seen in the films *The Life of Emile Zola*,⁴⁶⁷ *Law Breakers*⁴⁶⁸ and *Two Men in Town*,⁴⁶⁹ the presiding judge says nothing when the gallery reacts loudly to evidence and argument. Likewise, in the Italian film *Open Doors*,⁴⁷⁰ when the gallery expresses outrage, the presiding judge says nothing.

Given the greater tolerance for reactions from the gallery, which is depicted in film, it could be argued that the right to (or tradition of) a public trial is better protected in the Civil Law tradition.

c. Media and Community Pressure

Public trials carry their disadvantages as well, however, because public hysteria, especially when fostered by the media, often leads to biased results. Article 14(1) of the International Covenant on Civil and Political Rights provides that “[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the

⁴⁶² See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (public scrutiny of the criminal trial “enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole”); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

⁴⁶³ *Carey v. Musladin*, 549 U. S. 70 (2006).

⁴⁶⁴ *The Specialist*, *supra* note 167.

⁴⁶⁵ *A Dry White Season*, *supra* note 239.

⁴⁶⁶ Edward Swann, *Judge Swann on French Law: Contrasts Rules of Evidence-Too Narrow Here, He Says*, N.Y. TIMES (July 27, 1914).

⁴⁶⁷ *The Life of Emile Zola*, *supra* note 13.

⁴⁶⁸ *Law Breakers*, *supra* note 12.

⁴⁶⁹ *Two Men in Town*, *supra* note 76.

⁴⁷⁰ *Open Doors*, *supra* note 34.

interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”⁴⁷¹

In response to media coverage of the 1935 trial of the accused kidnapper of Charles Lindbergh’s infant son, the American Bar Association adopted a judicial canon that prohibited all photography and broadcast coverage of courtroom proceedings. The U.S. Supreme Court has since held, however, that there is no constitutional bar to televising courtroom proceedings,⁴⁷² and states have gradually allowed such coverage. Federal courts nonetheless continue to ban any photography.

In 1960, India abolished the jury system because of the perceived susceptibility of juries to the media and public influence in the sensational 1959 Bombay case of *K. M. Nanavati vs. State of Maharashtra*.⁴⁷³ The Swedish film *June Night*⁴⁷⁴ depicts a ban on photography in the courtroom and how its violation results in injustice to the victim. In the Mexican film *Esmeralda Comes by Night*,⁴⁷⁵ the judge closes the trial due to media attention. The Iranian film *Close Up*⁴⁷⁶ begins with the filmmakers’ requesting permission from the local *quadi* to film in the courtroom and, surprisingly, they are granted permission by the *quadi*’s superiors.

The adverse effects of a public trial due to public hysteria are depicted in *A Cry in the Dark*.⁴⁷⁷ The film is an adaptation of John Bryson’s book *Evil Angels* which is based on the true story of Lindy Chamberlain who claimed that her baby daughter Azaria was carried off and killed by a dingo while the family was camping near Ayers Rock in the Australian desert in the Northern Territory. Lindy was tried and convicted in 1982 for the murder of Azaria whose body was never found. She was released after about four years in prison because of new evidence and continuing doubts about the reliability of the jury’s verdict. The conviction was formally quashed another two years later, following a Royal Commission inquiry. Filmmaker Schepisi is an Australian who depicts that Lindy and her husband were denied due process during the highly publicized criminal jury. It was the first trial ever televised live to the Australian public.⁴⁷⁸

⁴⁷¹ International Covenant on Civil and Political Rights, *supra* note 161. *See generally* Ellis, *supra* note 440.

⁴⁷² *Chandler v. Florida*, 449 U.S. 560 (1981).

⁴⁷³ *See* Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58 Am. J. Comp. L. 525, 528 (2010). The *K. M. Nanavati* case is the basis of the films *Yeh Rastey Hain Pyar Ke* (Ajanta Arts 1963) (In.) and *Achanak* (1973) (In.).

⁴⁷⁴ *June Night*, *supra* note 245.

⁴⁷⁵ *Esmeralda Comes by Night*, *supra* note 86.

⁴⁷⁶ *Close Up*, *supra* note 140.

⁴⁷⁷ *A Cry in the Dark*, *supra* note 20. *See* Vincent Canby, *Meryl Streep in A Cry in the Dark*, N.Y. TIMES, Nov. 11, 1988 (film review), available at www.nytimes.com/movie/review?res=940DE1DF1039F932A25752C1A96E948260 (last visited Oct. 11, 2014).

⁴⁷⁸ Paul Bergman & Michal Asimow, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES 9 (1996). Michael Chesterman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America*, AM. J. COMP. L. (Winter 1997).

Press coverage can prejudice the judge as well as the jurors as depicted in the film *Return to Paradise*.⁴⁷⁹ A Malaysian judge imposes the death penalty in angry reaction to an editorial in a Western newspaper about the trial. Other films that depict the influence of the media and public pressure on the outcome of a trial include *In the Name of the Father*⁴⁸⁰ (England), *The Life of Emile Zola*⁴⁸¹ (France), *Law Breakers*⁴⁸² (France) and *Superstition*⁴⁸³ (Italy).

4. Right to Call and Question/Confront Witnesses

The Confrontation Clause of the Sixth Amendment of the U.S. Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.” The Fourteenth Amendment guarantees this right in state courts. As a result, the cross-examination of witnesses is a hallmark of the adversarial trial, and Common Law lawyers are well-known for such skills, as shown in countless U.S. films.

In inquisitorial proceedings, the investigating judge collects affidavits in a *dossier* which is presented to the judges. This is contrary to the principle of orality, and it is the sort of practice that the Confrontation Clause was designed to prevent. As the U.S. Supreme Court stated in *Crawford v. Washington*, “the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”⁴⁸⁴

Even when testimony is oral in inquisitorial proceedings, the presiding judge conducts the questioning. Defense counsel is expected to play a minor, passive role during trial, as is the prosecutor. Therefore the attorneys do not normally possess strong cross-examination skills. The accused must therefore depend upon the presiding judge to elicit exculpatory testimony or to discredit adverse witnesses.

Defense counsel may ask questions, either through the presiding judge or with the judge’s permission, as depicted in *The Life of Emile Zola*⁴⁸⁵ and *Tenth District Court*.⁴⁸⁶ But such an indirect method of questioning is much less effective than a searing cross-examination in which defense counsel directly confronts a witness on the stand. This inability to conduct cross-examination also compromises the accused’s fundamental right to call and question witnesses.

⁴⁷⁹ *Return to Paradise*, *supra* note 26.

⁴⁸⁰ *In the Name of the Father*, *supra* note 17.

⁴⁸¹ *The Life of Emile Zola*, *supra* note 13.

⁴⁸² *Law Breakers*, *supra* note 12.

⁴⁸³ *Superstition* (Movie Masters 2001) (NL).

⁴⁸⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁴⁸⁵ *The Life of Emile Zola*, *supra* note 13.

⁴⁸⁶ *Tenth District Court*, *supra* note 74.

Cross-examination by defense counsel is seen in a handful of films from Civil Law countries with relatively adversarial systems such as the Greek films *Maria in Silence*⁴⁸⁷ and *Women with a Past*⁴⁸⁸ and the Polish films *Ghetto Queen*⁴⁸⁹ and *Coup d'État*.⁴⁹⁰ Also, Chile⁴⁹¹ and Italy⁴⁹² are converting from an inquisitorial to an adversarial criminal justice system, as depicted in the Italian film *The Sicilian Girl*.⁴⁹³ The film is based on the true story of Paolo Borsellino (played by Gérard Jugnot), the anti-Mafia crusader, and of seventeen-year-old Rita Atria (played by Veronica D'Agostino) who was a key witness against the mafia in a 1992 trial in Palermo, Sicily. The courtroom scenes depict a mixture of inquisitorial and adversarial processes. The presiding judge controls the questioning, but defense counsel is very participatory, often raising objections to evidence proffered by the prosecutor.

5. Right to Effective Assistance of Counsel

In the United States the right to appointed counsel at trial is constitutionally guaranteed. The Sixth Amendment guarantees that the accused shall “have the Assistance of Counsel for his defence.” In 1932, the U.S. Supreme Court held that the accused has a right to *appointed* counsel in federal cases,⁴⁹⁴ and in 1963 it held that the accused has the same right in state cases.⁴⁹⁵ The U.S. Supreme Court has recognized that the right to defense counsel includes the right to *effective* assistance of counsel and that a violation occurs when a court prevents defense counsel from giving effective assistance⁴⁹⁶ and when defense counsel provides poor representation.⁴⁹⁷

As depicted in film, this right to effective assistance of defense counsel applies only in adversarial legal systems. In inquisitorial criminal proceedings, the lawyers play a minor role. The presiding judge conducts the questioning, and the lawyers rarely pose their own questions. When they do, they may not question the witness directly; their questions must be approved by the presiding judge. This form of indirect questioning is seen in the modern French courtroom (*Tenth District Court*)⁴⁹⁸ as well as courtrooms

⁴⁸⁷ *Maria in Silence*, *supra* note 37.

⁴⁸⁸ *Women with a Past*, *supra* note 36.

⁴⁸⁹ *Ghetto Queen*, *supra* note 124.

⁴⁹⁰ *Coup d'État*, *supra* note 129.

⁴⁹¹ See Cristián Riego, *Oral Procedures and Case Management: The Innovations of Chile's Reform*, 14 SW. J. L. & TRADE AM. 339, 340 (2008).

⁴⁹² See Michele Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 30 N.C. J. Int'l L. & Com. Reg. 577 (2005).

⁴⁹³ *The Sicilian Girl*, *supra* note 104.

⁴⁹⁴ *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932).

⁴⁹⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁹⁶ *Glasser v. United States*, 315 U.S. 60 (1942).

⁴⁹⁷ *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronin*, 466 U.S. 648 (1984).

⁴⁹⁸ *Tenth District Court*, *supra* note 74.

of the *Belle Époque* (*The Life of Emile Zola*).⁴⁹⁹ The Dutch film *A Question of Silence*⁵⁰⁰ provides a rare example of what happens when defense counsel dares to assert the defendants' rights. The presiding judge abruptly shuts defense counsel down. Likewise, the presiding judge in *The Life of Emile Zola*⁵⁰¹ makes it nearly impossible for defense counsel to raise an effective defense.

Germany's trial procedure is more adversarial than what is found in other Civil Law countries, so defense counsel plays a greater role. It is therefore not surprising that defense counsel is depicted as a heroic figure in the films *Devil in Silk*⁵⁰² and, to an extent, *M*.⁵⁰³ Likewise, Polish criminal procedure is relatively adversarial, so one finds defense counsel depicted heroically in films such as *No End*⁵⁰⁴ and *A Short Film About Killing*.⁵⁰⁵ In most other Civil Law countries, however, defense counsel is depicted in film as a mere observer who is permitted to make a closing argument or summation.

In the films of Common Law countries, however, the role of defense counsel is much more prominent, and the story is often driven by the experience or inexperience of defense counsel, because it matters. The degree of defense counsel's effectiveness has a bearing on the outcome of the case in an adversarial proceeding, whereas it has little or no bearing on the outcome of an inquisitorial proceeding. In *Breaker Morant*,⁵⁰⁶ the British court-martial is a show trial intended to appease the government of Germany by sacrificing three Australian officers. The British military therefore tries to ensure its intended outcome by appointing an experienced prosecutor and providing the defendants with defense counsel (played by Jack Thompson) who has no litigation experience whatsoever. Defense counsel reveals the injustice of the proceedings by being more effective than expected, making it more difficult for the court-martial judges to reach their pre-determined verdicts.

Indian films also often portray inexperienced defense counsel as heroic figures against corrupt, experienced prosecutors. Examples include *Waqt*⁵⁰⁷ and *Kasoor*.⁵⁰⁸ The entertaining British comedy *Trial and Error*⁵⁰⁹ is noteworthy because the defendant's conviction is later overturned due to the ineffectiveness of his defense counsel (played by Peter Sellers).

⁴⁹⁹ *The Life of Emile Zola*, *supra* note 13.

⁵⁰⁰ *A Question of Silence*, *supra* note 31.

⁵⁰¹ *The Life of Emile Zola*, *supra* note 13.

⁵⁰² *Devil in Silk*, *supra* note 93.

⁵⁰³ *M*, *supra* note 91.

⁵⁰⁴ *No End*, *supra* note 11.

⁵⁰⁵ *A Short Film About Killing*, *supra* note 127.

⁵⁰⁶ *Breaker Morant*, *supra* note 167. See Janet Maslin, *Breaker Morant*, N.Y. TIMES, Dec. 22, 1980 (film review); Bridges, Barry, *Lord Kitchener & the Morant-Hancock Executions*, 73 J. ROYAL AUSTRALIAN HIST. SOC'Y 24 (June 1987).

⁵⁰⁷ *Waqt*, *supra* note 416.

⁵⁰⁸ *Kasoor*, *supra* note 52.

⁵⁰⁹ *Trial and Error* (Metro-Goldwyn-Mayer British Studios 1962) (GB).

The relationship between defense trial counsel and the accused is especially close in the United States. The failure of U.S. defense counsel to meet with the defendant to prepare for trial would most likely result in the reversal of a conviction on appeal due to ineffective assistance of counsel. And yet, it is not uncommon for an English barrister never to meet with the accused. It is the solicitor who conducts trial preparation which probably includes meetings with the defendant. The defense barrister might not even review the file (the “Brief”) until the day before trial. Therefore, in *The Paradine Case*,⁵¹⁰ the fact that the barrister meets often with his client is unusual and supports the plot point of his falling in love with her. The unusually close relationship between barrister and defendant is also depicted in *Provoked: A True Story*⁵¹¹ and *Trial and Error*.

a. Freedom of Communication (Access)

The right to defense counsel at trial is less-respected in inquisitorial systems than it is the United States, especially when the accused is in custody pending the trial. This can be seen by the layout of the courtroom alone. In the United States, where defense counsel’s access to the client is heavily protected,⁵¹² the defendant and defense counsel sit next to each other. A few other countries, such as India, have this seating arrangement, as depicted in *Kasoor*.⁵¹³ The proximity of the defendant to defense counsel allows defense counsel greater control over the client defendant, and it gives the defendant greater participation in the defense.

In inquisitorial system courtrooms, the accused and defense counsel sit apart from one another, especially when the accused is being held in custody. As discussed above, this seating arrangement also impinges on the accused’s right to the presumption of innocence. As depicted in the Italian films *Open Doors*,⁵¹⁴ *Seven Beauties*⁵¹⁵ and *The Sicilian Girl*,⁵¹⁶ the accused sits in a cage, with other accused, like a zoo animal, unable to speak confidentially with defense counsel. In the French film *Law Breakers*,⁵¹⁷ the accused are not being held in custody, but they sit in a dock behind defense counsel. The accused and their counsel are able to converse, but not discretely. Even in England, an accused who is in custody (also called “the prisoner”) sits in a separate dock, unable to communicate freely with the barrister who is defending the

⁵¹⁰ *The Paradine Case*, *supra* note 15.

⁵¹¹ *Provoked: A True Story*, *supra* note 58.

⁵¹² *See Geders v. United States*, 425 U.S. 80 (1976) (attorney-client consultation restricted during overnight recess).

⁵¹³ *Kasoor*, *supra* note 52.

⁵¹⁴ *Open Doors*, *supra* note 34.

⁵¹⁵ *Seven Beauties*, *supra* note 373.

⁵¹⁶ *The Sicilian Girl*, *supra* note 104.

⁵¹⁷ *Law Breakers*, *supra* note 12.

case, as depicted in numerous British films, including *In the Name of the Father*,⁵¹⁸ *Witness for the Prosecution*,⁵¹⁹ *White Mischief*,⁵²⁰ *Cause célèbre*,⁵²¹ and *Term of Trial*.⁵²²

b. Disagreement between the Accused and Defense Counsel

As explained in the next section, a defendant has a right of self-representation. The U.S. Supreme Court has ruled, however, that a represented defendant does not have control over all decisions that are made in a case. And although the Sixth Amendment guarantees a defendant legal representation by counsel *of choice*, defense counsel maintains control over “strategic decisions” such as what witnesses to call to the stand and whether or when to conduct cross-examination of a witness.

The accused has control over “personal” or “fundamental right” decisions such as whether to take the stand to testify.⁵²³ In general, a disagreement between defense counsel and the accused over a strategic decision is not grounds for substitution of new counsel.⁵²⁴ In England, the barrister has similar authority to handle the case as he or she sees fit. This independent authority of English defense counsel is depicted in *The Paradine Case*,⁵²⁵ *Cause célèbre*,⁵²⁶ and *Witness for the Prosecution*.⁵²⁷

In *The Paradine Case*, defense barrister Keane (played by Gregory Peck) meets with his client Mrs. Paradine during a recess, and she objects to Keane’s stratagem of raising suspicions about her former valet Latour. Keane insists that he has the final say on how to proceed with the defense. “I must go on the way I’ve begun. I must act according to my own view.” When Keane resumes his searing cross-examination of Latour, he elicits Latour’s confession that he had a sexual liaison with Mrs. Paradine, thereby drawing suspicion to him, and away from Mrs. Paradine, as the murderer of Mrs. Paradine’s husband.

In *Hostile Witness*, the accused (played by Ray Milland) objects to his barrister’s decision not to call a particular weak defense witness to the stand. The barrister seeks permission from the judge to consult with her client. During their discussion, Crawford insists that she call Maitland as a witness, and Larkin refuses: “I must do what I think is right. And to call him now would be utterly wrong. If you insist on calling him, I shall be forced to withdraw from the case.” Crawford fires Larkin and proceeds to defend himself. The

⁵¹⁸ *In the Name of the Father*, *supra* note 17.

⁵¹⁹ *Witness for the Prosecution*, *supra* note 14.

⁵²⁰ *White Mischief* (Columbia Pictures 1987) (US-GB).

⁵²¹ *Cause célèbre*, *supra* note 386.

⁵²² *Term of Trial* (Romulus Films 1962) (GB).

⁵²³ *See* *Brookhart v. Janis*, 384 U.S. 1 (1966); *Jones v. Barnes*, 463 U.S. 745 (1983).

⁵²⁴ *See* *Florida v. Nixon*, 543 U.S. 175 (2004).

⁵²⁵ *The Paradine Case*, *supra* note 15.

⁵²⁶ *Cause célèbre*, *supra* note 386.

⁵²⁷ *Witness for the Prosecution*, *supra* note 14.

overconfident Crawford (who is a barrister himself) conducts direct examination of the witness and, just as his barrister had predicted, he ends up hurting rather than helping his defense.

c. Right to Self-Representation

In the United States, a defendant has a Sixth Amendment right to free counsel, but also has the right to proceed *in propria persona* (also known as “pro se” or “pro per”). The U.S. Supreme Court has ruled that the structure of the Sixth Amendment implies a right to self-representation.⁵²⁸ If the accused does not agree with his or her defense counsel’s decisions, and wants the authority to make all decisions on how to try a case, he or she may elect to proceed pro per. As described above, that is precisely what occurs in the British film *Hostile Witness*.⁵²⁹ Likewise, in *Red Corner*⁵³⁰ (China), the accused disagrees with his appointed attorney strategy and is allowed by the court to represent himself.

V. FILMIC DEPICTIONS OF ADJUDICATION AND SENTENCING

Lay participation in the fact-finding and sentencing process tends to protect an accused against politicized justice and the excesses of government that can occur when the government has a stake in the outcome of the trial and the judiciary lacks independence. The traditions of both Civil Law and Common Law systems reflect a mistrust of the government, particularly the judiciary. The independent jury was born of such mistrust in England, and Civil Law countries adopted the invention of trial by independent jury in the eighteenth century, after the French Revolution. Judicial participation in a criminal trial is especially minimized in the United States, and most Civil Law countries incorporate or increase lay participation in trials for more serious crimes.

The degree of lay participation in adjudication and sentencing can be measured by their independence, the degree to which the presiding judge holds sway over them, and their voting power. The independent jury, which deliberates without any judges, represents the greatest degree of lay participation, whereas the judge-only panel represents the smallest degree of lay participation. In-between lies the mixed panel which is composed of judges and jurors who deliberate together. If the jury is independent, consider further how many jurors sit on the jury, how much instruction the judge may give them, and whether the jury decides the sentence. If the panel is mixed, consider further the ratio of jurors to judges and the amount of votes needed to reach a verdict and sentence.

⁵²⁸ *Faretta v. California*, 422 U.S. 806 (1976).

⁵²⁹ *Hostile Witness* (Caralan Productions Ltd. 1968) (GB).

⁵³⁰ *Red Corner*, *supra* note 24.

No jurors are used in the Islamic and Socialist traditions, and many Civil Law countries still do not use jurors. Nearly all Common Law countries and a few Civil Law countries (Austria, Brazil, Greece, Poland, Spain and Russia) use independent juries, and many Civil Law countries use mixed panels of judges and jurors. The relative voting power of the judges and jurors on mixed panels varies from country to country. Jurors tend to have more voting power in countries of the French Civil Law tradition than in countries of the German Civil Law tradition. There is a tendency in countries that follow the German Civil Law tradition to increase the ratio of judges to jurors on mixed panels for the most serious crimes.

Greece and Austria are among a small number of Civil Law countries in which an independent jury deliberates on its own to decide guilt or innocence, as shown in the Greek film *Women with a Past*⁵³¹ and the Austrian film *The Scorpion Woman*.⁵³² In all other Civil Law countries, either there is no jury at all or the panel is mixed, as shown in many films, including the German films *M*⁵³³ and *Devil in Silk*,⁵³⁴ the Italian films *Seven Beauties*⁵³⁵ and *Open Doors*,⁵³⁶ the Polish films *No End*⁵³⁷ and *The Consul*,⁵³⁸ the Swedish film *June Night*,⁵³⁹ and the Spanish film *In This Tricky Life*.⁵⁴⁰

The *mise-en-scene* gives an indication of the judiciary's independence from the political branches of government. In the United States, courtroom walls are not particularly ornate, and they are free of any indicia of higher governmental or religious authority. This is consistent with the fact that the judiciary is a separate and counterbalancing branch of U.S. government. In no other country does the judiciary have so much independence. In other countries, indicia of higher political and religious authorities are common, such as portraits of leaders, religious symbols such as crucifixes, and political symbols such as swastikas.

A. Judge-Only (No Jurors)

Not surprisingly, films from countries in which there is no lay participation tend to show a lack of confidence in the ability of the courts to achieve just results. Nearly all Indian films depict the courtroom as a place where a clueless judge is hoodwinked by the dirty tricks of prosecutors and defense counsel alike.

⁵³¹ *Women with a Past*, *supra* note 36.

⁵³² *Scorpion Woman*, *supra* note 35.

⁵³³ *M*, *supra* note 91.

⁵³⁴ *Devil in Silk*, *supra* note 93. *See also* the U.S. film *The Reader*, *supra* note 93.

⁵³⁵ *Seven Beauties*, *supra* note 373.

⁵³⁶ *Open Doors*, *supra* note 34.

⁵³⁷ *No End*, *supra* note 11.

⁵³⁸ *The Consul* (Zespół Filmowy "Kadr" 1989) (Pl.).

⁵³⁹ *June Night*, *supra* note 345.

⁵⁴⁰ *In This Tricky Life* (Avalon Productions 2001) (Es.).

India has no jury system.⁵⁴¹ The documentary *Presumed Guilty*⁵⁴² depicts a prolonged Mexican murder case in which the single judge fails to mete out justice. There are also no juries in Socialist legal systems, and films such as *The Confession*⁵⁴³ and *Red Corner*⁵⁴⁴ depict unjust judge-only trials. *A Dry White Season*⁵⁴⁵ depicts predetermined, politicized justice before a single judge in South Africa during Apartheid. One notable exception is the Iranian documentary *Close Up*⁵⁴⁶ which depicts a fair trial before a single judge (*quadi*).

B. Independent Jury

Independent juries are used in Common Law countries and several civil law countries, including Austria, Brazil, Greece, Poland, Spain, Russia and formerly France. The independent jury is depicted in the Austrian film *Scorpion Woman*,⁵⁴⁷ the Polish films *Coup d'État*,⁵⁴⁸ *Life Sentence*⁵⁴⁹ and *Ghetto Queen*,⁵⁵⁰ the Greek films *Women with a Past*⁵⁵¹ and *With Fear and Passion*,⁵⁵² the French film *The Life of Emile Zola*⁵⁵³ and the Russian film *12*.⁵⁵⁴ *12* is a loose remake of *12 Angry Men*, set in a Russia. Twelve jurors struggle to decide the fate of a Chechen teenager who allegedly killed his Russian stepfather.

The Sixth Amendment guarantees that a criminal defendant “shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”⁵⁵⁵ The right to a jury trial is not absolute, however. Juries are not required in juvenile proceedings,⁵⁵⁶ and in federal court the defendant can waive a jury trial only if the prosecutor agrees.⁵⁵⁷ Most states, however, do not give the prosecutor the power to demand a jury trial.

⁵⁴¹ See *supra* note 473 (India abolished the jury system in 1960 due to the verdict in the sensational 1959 Bombay case of *K. M. Nanavati vs. State of Maharashtra*).

⁵⁴² *Presumed Guilty*, *supra* note 87.

⁵⁴³ *The Confession*, *supra* note 132.

⁵⁴⁴ *Red Corner*, *supra* note 24.

⁵⁴⁵ *A Dry White Season*, *supra* note 239.

⁵⁴⁶ *Close Up*, *supra* note 141.

⁵⁴⁷ *Scorpion Woman*, *supra* note 35.

⁵⁴⁸ *Coup d'État*, *supra* note 129.

⁵⁴⁹ *Life Sentence*, *supra* note 10.

⁵⁵⁰ *Ghetto Queen*, *supra* note 124.

⁵⁵¹ *Women with a Past*, *supra* note 36.

⁵⁵² *With Fear and Passion*, *supra* note 39.

⁵⁵³ *The Life of Emile Zola*, *supra* note 13.

⁵⁵⁴ *12* (Federal Agency for Culture and Cinematography 2007) (Ru.).

⁵⁵⁵ U.S. Const. amend VI. See *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (jury required only if the authorized term of imprisonment is more than six months). Vermont and Virginia provide a defendant with right to jury trial in all cases.

⁵⁵⁶ See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juveniles do not have a right to a jury trial).

⁵⁵⁷ *Patton v. United States*, 281 U.S. 276 (1930). See also *Fed. R. Crim. P. 23(a)*; *Singer v. United States*, 380 U.S. 24 (1965) (upholding the constitutionality of *Fed. R. Crim. P. 23(a)*).

The U.S. Supreme Court has ruled that the right to a jury trial applies if the crime charged carries a jail or prison sentence of more than six months⁵⁵⁸ and that the jury must be composed of at least six jurors.⁵⁵⁹ It is less clear whether and when unanimity is required. In *Apodaca v. Oregon*,⁵⁶⁰ the U.S. Supreme Court upheld Oregon's constitutional provision that ten of twelve jurors (83.3%) could reach a verdict in a felony case. In *Burch v. Louisiana*,⁵⁶¹ however, the Court struck down Louisiana's law that five of six jurors (83.3%) could reach a verdict in a misdemeanor case. Today, unanimity is required in federal prosecutions, and only two states allow for non-unanimous verdicts in felony prosecutions.

The U.S. judge is relegated to the role of neutral referee of a battle between the prosecutor and defense counsel over the minds of a jury which conducts fact-finding with no prior knowledge of the case, highly filtered facts, no legal training, and little guidance from the judge. Likewise, when it comes to weighing the evidence and arriving at a verdict, the U.S. judge may not participate whatsoever in the jury's deliberation of the facts which therefore remains unmonitored and unseen by both the public *and the government*.

The separate jury box for the independent jury means that judge and jury do not communicate with each other. The judge does not deliberate with the jurors and may not attempt to persuade them to vote one way or the other. Films that provide a glimpse of the deliberative process in action include *I Confess*⁵⁶² (Quebec), the English films *Murder!*,⁵⁶³ *The Chatterley Affair*⁵⁶⁴ and *King and Country*,⁵⁶⁵ and the Russian film *12*.⁵⁶⁶

In the United States, judges are especially circumspect when speaking to, or in the presence of, jurors. The judge speaks to the jury only to give carefully worded instructions on the law at the beginning and end of the trial and when ruling that certain testimony shall be stricken and therefore disregarded. Because of their inexperience and limited communication with the judge, independent juries are more easily swayed by emotional arguments and public hysteria, as depicted in *The Life of Emile Zola*⁵⁶⁷ and the Australian film *A Cry in the Dark*,⁵⁶⁸ more easily misled by clever counsel as depicted in the Indian film

⁵⁵⁸ *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989).

⁵⁵⁹ *Williams v. Florida*, 399 U.S. 78 (1970) (six is enough); *Ballew v. Georgia*, 435 U.S. 223 (1978) (five is too few).

⁵⁶⁰ *Apodaca v. Oregon*, 406 U.S. 404 (1972).

⁵⁶¹ *Burch v. Louisiana*, 441 U.S. 130 (1979).

⁵⁶² *I Confess*, *supra* note 22.

⁵⁶³ *Murder!* (British International Pictures 1930) (GB).

⁵⁶⁴ *The Chatterley Affair* (BBC Wales 2006) (GB).

⁵⁶⁵ *King and Country* (BHE Films 1964) (GB).

⁵⁶⁶ *12*, *supra* note 554.

⁵⁶⁷ *The Life of Emile Zola*, *supra* note 13.

⁵⁶⁸ *A Cry in the Dark*, *supra* note 20.

*Kasoor*⁵⁶⁹ and more prone to invent their own, unfounded reasons for finding reasonable doubt, as depicted in the New Zealand film *Mesmerized*.⁵⁷⁰

In England and other Common Law countries, judges are permitted to comment on the evidence as well as the law as depicted in the films *Cause célèbre*⁵⁷¹ and *King and Country*.⁵⁷² In *A Cry in the Dark*⁵⁷³ (Australia), the jury returns a guilty verdict despite the fact that the judge provides commentary on the evidence that is favorable to the defendants. Excessive commentary on the evidence, depicted in the film *Let Him Have It*,⁵⁷⁴ is known in England as “descending into the arena.” The judge is not supposed to become an advocate in the proceeding. Such excessive judicial commentary on the evidence is also depicted in the Austrian film *Scorpion Woman*.⁵⁷⁵

In the United States, jury selection is a time-consuming process in which the prosecutor and defense counsel conduct thorough questioning of prospective jurors and are given ample opportunity to exclude prospective jurors for cause as well as for no cause at all (known as a peremptory challenge). This jury selection process, known as *voir dire*, is a mini-proceeding by itself in which the attorneys take advantage of the opportunity to establish a rapport with the eventual jurors and subtly set forth the arguments of their cases as they decide which jurors to keep and which to exclude.

The *voir dire* process does not exist in England so there is a higher risk of impaneling biased or otherwise unacceptable jurors.⁵⁷⁶ In 1988, England abolished all peremptory challenges. The high risk of impaneling unacceptable jurors, due to the lack of a *voir dire* process, is exacerbated by the fact that a unanimous verdict is not required in England. Although the English judge may require a unanimous verdict, as seen in the film *Murder!*,⁵⁷⁷ only ten of twelve jurors are required to reach a guilty verdict, as seen in the film *Provoked: A True Story*.⁵⁷⁸

Extensive use of *voir dire* and peremptory challenges distinguishes our jury selection procedure from the process of selecting the Continental mixed panel or the British independent jury. Historically, Continental systems have not recognized peremptory challenges to either professional or lay judges. In Germany, for example, the grounds for challenging professional and lay judges are the same and are limited to what we categorize as “for cause” challenges. Lay members of the German mixed panel are not selected

⁵⁶⁹ *Kasoor*, *supra* note 52.

⁵⁷⁰ *Mesmerized*, *supra* note 23.

⁵⁷¹ *Cause célèbre*, *supra* note 386.

⁵⁷² *King and Country*, *supra* note 565.

⁵⁷³ *A Cry in the Dark*, *supra* note 20.

⁵⁷⁴ *Let Him Have It*, *supra* note 57.

⁵⁷⁵ *Scorpion Woman*, *supra* note 35.

⁵⁷⁶ Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992).

⁵⁷⁷ *Murder!*, *supra* note 563.

⁵⁷⁸ *Provoked: A True Story*, *supra* note 58.

for each case, but are assigned to particular courts randomly for fixed periods of time, and there is no *voir dire* or other procedure for challenging the selection of jurors.

C. Mixed Panel

After the French Revolution, all European countries except the Netherlands adopted the Common Law invention of trial by independent jury. As shown in the film *The Life of Emile Zola*,⁵⁷⁹ the nineteenth century French jury sat in a box, separate from the panel of judges. Independent juries, however, too often considered irrelevant factors to arrive at legally untenable decisions. As Civil Law governments gained greater power, independent juries were converted to a “mixed” or “unitary” model in which the judge and jury sit together during the courtroom trial and deliberate together in secret.

Germany invented the mixed panel in the nineteenth century⁵⁸⁰ and then, under totalitarian regimes during the twentieth century, other countries followed suit, including Russia under the Bolsheviks, Italy under Mussolini, Spain under Franco, and Vichy France under German occupation, as depicted in *Open Doors*⁵⁸¹ (Italy) and *Story of Women*⁵⁸² (France).

Jurors on a mixed panel are closely controlled by the presiding and associate judges. The amount of control varies from country to country. The German model, which is depicted in *Devil in Silk*,⁵⁸³ is found in continental countries including the Czech Republic, Hungary, Poland, Serbia, and Switzerland. The typical German-styled mixed panel consists of one professional judge and two jurors (also known as “lay assessors”). Generally, the ratio of judges to jurors is higher in the German model than it is in the French model.⁵⁸⁴ The mixed panel hear the evidence together, and they deliberate together to decide both the verdict and the sentence, as shown in the Italian film *Open Doors*.⁵⁸⁵ *Open Doors* is remarkable for its portrayal of the deliberation, the give-and-take that occurs behind “closed doors” among the two judges and five lay jurors on the panel of the *corte d’assise*.

In the French model, the ratio of jurors to judges is greater than in the German model. Also, jurors in the French model vote secretly after deliberation. In France, the mixed panel consists of nine jurors and

⁵⁷⁹ *The Life of Emile Zola*, *supra* note 13.

⁵⁸⁰ For a history of the invention of the mixed panel in Germany, see Dubber, *supra* note 96; Casper & Zeisel, *supra* note 96.

⁵⁸¹ *Open Doors*, *supra* note 34.

⁵⁸² *Story of Women* (MK2 Productions 1988) (Fr.).

⁵⁸³ *Devil in Silk*, *supra* note 93.

⁵⁸⁴ Elizabeth R. Sheyn, *A Foothold for Real Democracy in Eastern Europe: How Instituting Jury Trials in Ukraine Can Bring About Meaningful Governmental And Juridical Reforms And Can Help Spread These Reforms Across Eastern Europe*, 43 VAND. J. TRANSNAT'L L. 649, 675-76 (2010).

⁵⁸⁵ *Open Doors*, *supra* note 34.

three judges, and eight votes are required to reach a verdict. This means that eight jurors could overrule the three judges (and the ninth juror) to reach a verdict.

All mixed panel models are nonetheless heavily compromised versions of the independent jury, because they give the professional judge voting power and influence over the deliberative process. It also ensures that, under the Civil Law principle of legality, all violations of the law will be punished. The presiding judge's control over the mixed panel virtually eliminates the risk of a nullifying or "runaway" jury.

Today, most Civil Law governments that use jurors in criminal trials have maintained the mixed panel model. Austria, Brazil, Greece, Poland, Spain, and Russia are exceptions, because they have moved toward a more adversarial system of justice. One might draw the conclusion that lay participation in the adjudicative process tends to be greater in systems that have adopted the adversarial model. However, the extent of lay participation is also a function of what the country is willing to spend on a jury system and whether the public is educated and politically sophisticated enough to participate. India does not have a jury system because its society lacks pluralism. Indian jurors would tend to be biased toward or against defendants based on ethnicity, religion and/or social status.

VI. DEATH PENALTY FILMS⁵⁸⁶

Despite a strong anti-death-penalty movement worldwide,⁵⁸⁷ death penalty practice thrives in the United States due to a strong "vigilante tradition" of retributive justice.⁵⁸⁸ Fortunately, the United States is also recognized as a country whose criminal procedure affords ample, even excessive, protections to criminal defendants. Among countries that have ever applied the death penalty, the United States is the only one in which the jury, not the judge, decides the sentence.⁵⁸⁹ By contrast, in the English film *Let Him Have It*,⁵⁹⁰ the judge imposes the death penalty despite the jury's recommendation of mercy.

The death penalty has a profound effect on the adjudicative process, from the prosecutor's charging decisions, to the selection of capable defense counsel, to the course of plea-bargaining, to the selection of only jurors who are willing to impose it, to law that requires full lay participation in the decision to impose it, to mandatory appeals which are responsible for prolonged detention and the so-called death row phenomenon.

⁵⁸⁶ The author thanks David Shea Bettwy, B.A. Film Studies, Notre Dame University, LL.M. International Human Rights Law, National University of Ireland, Galway, for the contribution of his scholarship on death penalty films.

⁵⁸⁷ See ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 40-50 (2008); Roger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a New Dynamic*, 38 *CRIME & JUST.* 1, 10-11 (2009).

⁵⁸⁸ See SANGMIN BAE, *WHEN THE STATE NO LONGER KILLS* 93-94 (2007).

⁵⁸⁹ *Ring v. Arizona*, 536 U.S. 584 (2002).

⁵⁹⁰ *Let Him Have It*, *supra* note 57.

In capital cases, life is at stake, not just liberty, so death penalty films tend to dramatize, more than other courtroom dramas, the flaws of a country's criminal procedure and the dire consequences of unjust results. Films dramatically depict the stark differences in death penalty practice between the United States and the vast majority of other countries in the world, especially between the United States and Europe which are the two most divergent and influential advocates on each side of the debate.

As film reviewer Stephanie Goldberg asserts, film has emerged as an important medium for the portrayal of the death penalty, saying: "After public executions fell out of favor in the late 1930's, it was inevitable that movies would become our window on capital punishment. Film makers have etched on our brains images of what transpires in this form of ritual death."⁵⁹¹ The body of death penalty cinema in the United States and in Europe is substantial, and its contribution to the discussion reflects the entire spectrum of points within the death penalty debate.⁵⁹²

U.S. cinema supports all three prongs of the pro-death penalty argument, namely the need for incapacitation (*Executioner's Song*, *In Cold Blood*, *The Star Chamber*, and *To Kill a Mockingbird*),⁵⁹³ retribution (*Death Wish* series, *Collateral Damage*, *The Brave One*, and *Inglourious Basterds*)⁵⁹⁴ and deterrence (*Angels with Dirty Faces*).⁵⁹⁵ Most of the films reflect a strong vigilante culture and the principle of retributive justice, as expressed in *Gregg v. Georgia*.⁵⁹⁶

Anti-death penalty films in Europe provide responses to the U.S. pro-death penalty argument with films that depict the realistic hope of rehabilitation (*The Widow of St. Pierre*),⁵⁹⁷ the futility and senselessness of revenge (*Irreversible*)⁵⁹⁸ and the danger of the death penalty as a tool of terror in the hands of ruthless regimes (*Sophie Scholl-The Final Days*, *Open Doors*, *The Confession* and *Danton*).⁵⁹⁹

⁵⁹¹ Stephanie B. Goldberg, *Walking the Last Mile, on Film*, N.Y. TIMES, Dec. 24, 1995, § 2, at 9 (film review).

⁵⁹² For films depicting incapacitation, see DEAD MAN WALKING (Havoc 1995) (US); EXECUTIONER'S SONG (Film Communications Inc. 1982) (US) (made for television); THE GREEN MILE (Castle Rock Entertainment 1999) (US); TO KILL A MOCKINGBIRD (Brentwood Productions 1962) (US). For films depicting retribution, see COLLATERAL DAMAGE (Warner Bros. Pictures 2002) (US); INGLOURIOUS BASTERDS (Universal Pictures 2009) (US). For a film depicting deterrence, see ANGELS WITH DIRTY FACES (Warner Bros. Pictures 1938) (US). For films depicting the realistic hope of rehabilitation, see LIFE LOVE DEATH (Les Films 13 1969) and *The Widow of St. Pierre*, *supra* note 398. For a film depicting revenge gone wrong, see IRRÉVERSIBLE (120 Films 2002) (Fr.) For a film depicting the misuse of the deterrent effect of the death penalty, see A Short Film About Killing, *supra* note 127.

⁵⁹³ THE EXECUTIONER'S SONG, *supra* note 592; IN COLD BLOOD (Columbia Pictures Corp. 1967) (US); THE STAR CHAMBER (Frank Yablans Presentations 1983) (US); TO KILL A MOCKINGBIRD, *supra* note 592.

⁵⁹⁴ DEATH WISH (Dino De Laurentiis Co. 1974) (US); DEATH WISH II (Cannon Films 1982) (US); DEATH WISH 3 (Cannon Group 1985) (US); DEATH WISH 4: THE CRACKDOWN (Cannon Group 1987) (US); DEATH WISH V: THE FACE OF DEATH (21st Century Film Corp. 1994) (US); COLLATERAL DAMAGE, *supra* note 592; THE BRAVE ONE (Redemption Pictures 2007) (US); and INGLOURIOUS BASTERDS, *supra* note 592.

⁵⁹⁵ ANGELS WITH DIRTY FACES, *supra* note 592. See Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 834-40 (2010).

⁵⁹⁶ *Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976).

⁵⁹⁷ *The Widow of St. Pierre*, *supra* note 398.

⁵⁹⁸ IRRÉVERSIBLE, *supra* note 592.

⁵⁹⁹ *Sophie Scholl - The Final Days*, *supra* note 92; *Open Doors*, *supra* note 34; *The Confession*, *supra* note 132; *Danton*, *supra* note

Both U.S. and European anti-death penalty films depict the danger of convicting and executing innocent persons and the fundamental injustice of the death penalty, but their approaches differ. Whereas U.S. anti-death penalty films portray fictional characters who are wrongly convicted (*The Star Chamber* and *The Green Mile*),⁶⁰⁰ some of whom narrowly escape conviction and execution (*The Fugitive*, *12 Angry Men*, and *My Cousin Vinny*),⁶⁰¹ European films portray real-life cases in which wrongly accused persons were executed (*10 Rillington Place*, *Let Him Have It* and *Sacco and Vanzetti*).⁶⁰²

Both U.S. and European anti-death penalty films depict the cruelty of the death row phenomenon and the brutality of executions (*Dead Man Walking*, *The Green Mile*, *Two Men in Town*, *A Short Film About Killing*, *Let Him Have It*, and *Dancer in the Dark*),⁶⁰³ but European depictions are more disturbing. And whereas U.S. anti-death penalty films depict real-life murderers who are worthy of sympathy (*Dead Man Walking* and *A Time to Kill*),⁶⁰⁴ European films characteristically portray fictional, unsympathetic murderers and successfully equate their executions with the reprehensible acts that they committed (*Two Men in Town*, *Open Doors*, and *A Short Film About Killing*).⁶⁰⁵

European anti-death penalty films are arguably more effective than U.S. anti-death penalty films at conveying a universal message that defeats practical concerns as well as the principle of retributive justice.⁶⁰⁶ As Zimring argues, the vigilante ideology is deep-seated in U.S. film, and abolitionist cinema will require more discursive filmmaking, such as that found in European cinema, to weaken the tradition.⁶⁰⁷

European anti-death penalty films such as the 1988 Polish film *A Short Film About Killing* and the 1979 French film *The Red Sweater*⁶⁰⁸ may have influenced the abolition of the death penalty in their home countries.⁶⁰⁹ An online film review on “Films de France” suggests that the 1952 French film *We Are All*

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⁶⁰⁰ THE STAR CHAMBER, *supra* note 593; THE GREEN MILE, *supra* note 592.

⁶⁰¹ THE FUGITIVE (Warner Brothers Pictures 1993) (US); 12 ANGRY MEN (Orion-Nova Productions 1957) (US); MY COUSIN VINNY (Palo Vista Productions 1992) (US).

⁶⁰² 10 Rillington Place (Columbia Pictures 1971) (US-GB); Let Him Have It, *supra* note 57; SACCO AND VANZETTI (Jolly Film 1971) (It.).

⁶⁰³ DEAD MAN WALKING, *supra* note 592; THE GREEN MILE, *supra* note 592, Two Men in Town, *supra* note 76; A Short Film About Killing, *supra* note 127; Let Him Have It, *supra* note 57; DANCER IN THE DARK (Zentropa Entertainments 2000) (Den.).

⁶⁰⁴ DEAD MAN WALKING, *supra* note 592; THE EXECUTIONER’S SONG, *supra* note 592; *see also* David R. Dow, *Fictional Documentaries and Truthful Fictions: the Death Penalty in Recent American Film*, CONST. COMMENT 511, 548-49 (2000).

⁶⁰⁵ Two Men in Town, *supra* note 76; A Short Film About Killing, *supra* note 127.

⁶⁰⁶ *See* Christopher J. Meade, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 761 (1996) (“The Note concludes by arguing that anti-death penalty advocates must focus their attention on telling stories about guilty defendants -- for only by telling effective stories about guilty defendants can the fight against the death penalty be won.”).

⁶⁰⁷ FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 181 (2003).

⁶⁰⁸ THE RED SWEATER (Port Royal Films 1979) (Fr.).

⁶⁰⁹ David Shea Bettwy, *The United States-Europe Death Penalty Debate: A Comparison of Filmic Apologists*, 17 Sw. J. Int’l L. 1, 60-61 (2011).

*Assassins*⁶¹⁰ had an impact on public opinion and was perhaps a contributing factor that led to the abolition of the death penalty decades later.⁶¹¹

In England, three cases involving miscarriages of justice, all of which have been told in film, eventually led to abolition of the death penalty in 1965 (except for treason, piracy and military offenses).⁶¹² The first concerned the conviction and execution of Timothy John Evans in 1950 for the murder of his wife and daughter, depicted in the 1971 British film *10 Rillington Place*⁶¹³ which is based on the 1961 book by Ludovic Kennedy.⁶¹⁴ In 1953, three years after Evans was convicted and executed, the police discovered that serial killer John Reginald Christie was probably the real murderer,⁶¹⁵ and the public became outraged.

The other two cases concerned the 1953 execution of Derek Bentley, depicted in the 1991 film *Let Him Have It*,⁶¹⁶ and the 1955 execution of Ruth Ellis, depicted in the 1985 British film *Dance with a Stranger*.⁶¹⁷ *Let Him Have It*⁶¹⁸ is based on the real-life story of Derek Bentley (played by Christopher Eccleston), a mentally challenged 19-year-old. Bentley and his friend Christopher Craig are tried for the murder of a police officer during their attempt to burglarize a warehouse. Bentley's 1953 case coincided with the discovery that Timothy Evans had been wrongly convicted and executed, so the public was already in a state of outrage. His case aroused further public sentiment against the death penalty because of Bentley's limited role in the 1952 murder, his young age, and his mental deficiencies.⁶¹⁹

⁶¹⁰ WE ARE ALL MURDERERS (Jolly Film 1952) (Fr.).

⁶¹¹ James Travers, *Nous sommes tous des assassins*, Films De France (2004), filmsdefrance.com/FDF_Nous_sommes_tous_des_assassins_rev.html (last visited Mar. 22, 2014).

⁶¹² Murder (Abolition of Death Penalty) Act, *available at* www.legislation.gov.uk/ukpga/1965/71 (last visited Oct. 11, 2014). The following year, Timothy Evans was pardoned posthumously. *See* 734 PARL. DEB., H.C. (5th Ser.) (1966) 38-40 (U.K.). The death penalty was finally abolished entirely in 1998. *See* Human Rights Act 1998 (UK), ch. 42, sec. 21(5), www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1 (last visited Oct. 11, 2014); Geoffery Bennett, *Wrongful Conviction, Lawyer Incompetence and English Law—Some Recent Themes*, 42 BRANDEIS L.J. 189, 192 (2004).

⁶¹³ *10 Rillington Place*, *supra* note 602; *See* Vincent Canby, *A Portrait of John Christie, the Murderer: London Crime Recalled in "10 Rillington Place"*, N.Y. TIMES, May 13, 1971 (film review).

⁶¹⁴ LUDOVIC KENNEDY, *TEN RILLINGTON PLACE* (Littlehampton Book Services Ltd. 1961).

⁶¹⁵ Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 565 (2008). Christie testified at his own trial that he murdered Evans' wife. *Id.* at 567-68.

⁶¹⁶ *Let Him Have It*, *supra* note 57.

⁶¹⁷ In 1955, 28-year-old Ruth Ellis became the last woman executed in England, depicted in *DANCE WITH A STRANGER* (Channel Four Films 1985) (GB), after a public uproar over her execution. *See* Brian P. Block & John Hostettler, *HANGING IN THE BALANCE: A HISTORY OF THE ABOLITION OF CAPITAL PUNISHMENT IN BRITAIN* 164 (Waterside Press 1997) ("Because of her age -- she was 28 -- her children and the fact that the killing was impulsive rather than planned and, of course because she was a woman, there was a great deal of public sympathy for Ruth Ellis and many people believed that the home secretary would relent at the last moment.").

⁶¹⁸ *Let Him Have It*, *supra* note 57. Former Thomas Jefferson School of Law student Sarah Suskauer is acknowledged for her contribution to this film summary. *See* Janet Maslin, *Executing a Man in Anger at Another, the Real Killer*, N.Y. TIMES, Dec. 6, 1991 (film review). Books, songs, and poetry have been written about the Bentley case, including Elvis Costello, *Let Him Dangle* (Warner Bros. Records 1989).

⁶¹⁹ Steve Greenfield & Guy Osborn, *Pulped Fiction? Cinematic Parables of (In)justice*, 30 U.S.F. L. REV. 1181, 1189 (1996); Millett, *supra* note 615 at 571.

Despite pressure from Parliament, widespread public sympathy for Bentley, and the jury's recommendation for clemency, Bentley was put to death by hanging. In 1994, the persistence of his family members and the work of the newly created Criminal Cases Review Commission culminated with Bentley's posthumous pardon.⁶²⁰ Bentley's family members believe that the 1991 film helped to influence the decision to pardon Bentley.⁶²¹

VII. CONCLUSION

By viewing foreign courtroom dramas, comparatists can reach some conclusions on the pros and cons of different aspects of criminal procedure found in different countries and their legal traditions. Early access to counsel is especially important to a suspect, because he or she is vulnerable to police abuse and trickery. Common Law, adversarial systems tend to protect the suspect's right to remain silent more than Civil Law, inquisitorial systems do. The written laws of Civil Law countries may provide for a right to remain silent, but the safeguards are missing, and even defense counsel tend to respect the cultural expectation of innocent suspects to cooperate.

Common Law, adversarial systems tend to safeguard the presumption of innocence more than Civil Law, inquisitorial systems in other ways as well. Most notably, pretrial detention is less common, and there are several safeguards to protect an accused's right to remain silent. In the United States, the right to remain silent is especially well-protected by the Exclusionary Rule, the *Griffin* Rule, and the bifurcated trial. The presumption of innocence is further protected in the United States by rules of evidence that limit character evidence and by seating the defendant at counsel's table.

Common Law, adversarial systems also tend to provide an accused a greater opportunity to challenge the prosecution's evidence than Civil Law systems do. The principles of orality and publicity apply, so defense counsel may cross-examine prosecution witnesses. In the United States, the defendant is seated next to counsel and therefore has a better opportunity to participate in his or her defense. By contrast, Civil Law judges rely on a pre-prepared *dossier* and control the sequence and questioning of witnesses.

⁶²⁰ See *R v. Sec'y of State for the Home Dep't Ex Parte Bentley*, [1994] Q.B. 349 (Eng.). In 1998, the Court of Appeal quashed the conviction as well. See *R v. Derek Bentley (Deceased)* [2001] 1 Crim. App. 307, 332 (Eng.), available at murderpedia.org/male/B/images/bentley_derek/BENTLEY_DEREK_-30_7_98.pdf (last visited Mar. 22, 2014); Sarah Lyall, *Briton Hanged in 1953 Is Finally Exonerated*, N.Y. TIMES, July 31, 1998, at A3.

⁶²¹ Greenfield & Osborn, *supra* note 619 at 1196 ("Iris Bentley indicated during our interview that . . . overall the film was a positive force in the fight to clear Derek's name . . . in terms of increasing awareness of the injustice that had been perpetrated.").

Still, there are aspects of criminal procedure that the United States could adopt to improve its protection of a suspect's or defendant's rights. The power to detain a "suspected" terrorist for seven days without benefit of counsel or judicial oversight is an overly vague and overbroad compromise of the right to remain silent, not to mention liberty interests. Plea-bargaining is an efficient system that other countries have adopted, but there must also be safeguards against coercive tactics by overzealous prosecutors, especially in death penalty cases. The strong U.S. tradition of an open trial, without regard to the wishes of the defendant, has led to unjust results in highly publicized cases. The United States needs to develop safeguards such as those set forth in the International Covenant on Civil and Political Rights. The United States is the only country in the world in which the prosecutor speaks last in rebuttal. This is an enormous advantage that also invites unethical "sandbagging," namely saving arguments until rebuttal so that the defense will not have an opportunity to respond. U.S. jurors are the most independent in the world, which results in too many misguided decisions, especially in highly publicized, emotional cases. The United States should consider adopting the British model which permits judges to comment on the meaning of the evidence as well as the law, especially when the prosecutor speaks last. And finally, despite a strong tradition of retributive justice, the United States should curtail or even abolish the death penalty. Moral considerations aside, the death penalty gives the prosecutor too much negotiating power in a plea-bargaining system.

APPENDIX A

Films by Legal Tradition and Country

THE CIVIL LAW TRADITION

FRANCE

INVESTIGATORY DETENTION

Garde à vue (1981)

THE NEUTRAL INVESTIGATING JUDGE

Law Breakers or *Les assassins de l'ordre* (1971)

Rape of Love or *L'amour violé* (1978)

The Judge and the Assassin or *Le juge et l'assassin* (1976)

The Stranger or *L'étranger* or *Lo straniero* (1967)

Violette (1978)

FELONY COURT (COUR D'ASSISES)

Two Men in Town or *Deux hommes dans la ville* (1973)

Nikita or *La femme Nikita* (1990)

Confusion of the Genders or *La confusion des genres* (2000)

MISDEMEANOR COURT (TRIBUNAL CORRECTIONNEL)

Tenth District Court or *10e chambre - Instants d'audience* (2004)

THE LATE MIDDLE AGES / EARLY RENAISSANCE

The Passion of Joan of Arc or *La passion de Jeanne d'Arc* (1928)

The Advocate or The Hour of the Pig (1993)

The Return of Martin Guerre or *Le retour de Martin Guerre* (1982)

THE FIRST REPUBLIC AND THE REIGN OF TERROR (1793-1794)

Danton (1983)

THE SECOND REPUBLIC

The Widow of St. Pierre or *La veuve de Saint-Pierre* (2000)

THE THIRD REPUBLIC AND THE BELLE EPOQUE

The Life of Emile Zola (1937)

WORLD WAR I

Paths of Glory (1957)

WORLD WAR II

Story of Women or *Une affaire de femmes* (1988)

TELEVISION SERIES

Engrenages (2005)

Les cordier, juge et flic (1992)

Placé en garde à vue (1994)

Maître da Costa (1997)

Avocats & associés (1998)

OTHER FRENCH FILMS

I Have Killed or *J'ai tué!* (1924)

Les misérables (1934)

Justice Is Done or *Justice est faite* (1950)

A Tale of Two Cities (1935)

Bluebeard or *Landru* (1963)

The Big Softie or *Le Grand Dadais* (1967)

Risky Business or *Les risques du metier* (1967)
To Die of Love or *Mourir d'aimer* (1971)
Suspect of Murder or *Les granges brûlées* (1973)
Jury of One or *Il testamento* (1974)
Special Section (1975)
The Drummer-Crab or *Le crabe-tambour* (1977)
Question of Love or *L'amour en question* (1978)

OTHER COUNTRIES OF THE FRENCH CIVIL LAW TRADITION

ARGENTINA

Lion's Den or *Leonera* (2008)
The Secret in Their Eyes or *El secreto de sus ojos* (2009)

CHILE

The Judge and the General (2008)
Pinochet's Last Stand (2006)
Pinochet Case or *Le cas Pinochet* (2001)

MEXICO

Esmeralda Comes by Night or *Esmeralda de noche* (1998)
Presumed Guilty or *Presunto culpable* (2008)
Legitimate Defense or *Legítima defensa* (1957)
History of a Gangster or *Historia de un canalla* (1964)
Adolescent Love or *Amor de adolescente* (1965)

THE NETHERLANDS

A Question of Silence or *De stilte rond Christine* (1982)
Character or *Karakter* (1997)

PORTUGAL

Justice of Heaven or *Justiça do Céu* (1952)
Two Cases or *Duas Causas* (1953)
The Voice of Blood or *A voz do sangue* (1966)
Vertigo or *Vertigem* (1992)

SPAIN

High Heels or *Tacones lejanos* (1991)
In This Tricky Life or *En la puta vida* (2001)

Pinochet Case or *Le cas Pinochet* (2001)

That Woman or *Esa mujer* (1969)

GERMANY

PROTESTANT REFORMATION

Luther (2003)

WEIMAR REPUBLIC

Love in Thoughts or *Was nützt die Liebe in Gedanken* (2004)

M (1931)

THIRD REICH

Sophie Scholl-The Final Days or *Sophie Scholl-Die letzten Tage* (2005)

POST-WWII

Judgment at Nuremberg (1961)

Council of the Gods or *Der Rat Der Götter* (1951)

Verdict on Auschwitz (1993)

The Reader (2009)

1970s

The Baader Meinhof Complex or *Der Baader Meinhof Komplex* (2008)

REUNIFIED GERMANY

After the Truth or *Nichts als die Wahrheit* (1999)

OTHER GERMAN FILMS

Mary (1931)

Children on Trial or *Kinder vor Gericht* (1931)

I Accuse or *Ich klage An* (1941)

The Affair Blum or *Affaire Blum* (1948)

The Debt of Dr. Homma or *Die Schuld des Dr. Homma* (1951)

The Sergeant's Daughter or *Der Große Zapfenstreich* (1952)

Devil in Silk or *Teufel in Seide* (1956)

The House Tyrant or *Der Haustyrann* (1959)

Roses for the Prosecutor or *Rosen für den Staatsanwalt* (1959)

I Cannot Remain Silent or *Ich kann nicht länger schweigen* (1962)

The Molesters or *Der Sittlichkeitsverbrecher* (1963)

The Bachmeier Case: No Time for Tears or *Der Fall Bachmeier Keine Zeit für Tränen* (1984)

Man under Suspicion or *Morgen in Alabama* (1984)

Stammheim: The Baader Meinhof Trial (1986)

The Rose Garden or *Der Rosengarten* (1989)

Justice or Justiz (1993)

14 Days to Life or *14 Tage lebenslänglich* (1997)

Leo and Claire or *Leo und Claire* (2001)

Baader (2002)

OTHER COUNTRIES OF THE GERMAN CIVIL LAW TRADITION

AUSTRIA

THE INQUISITORIAL PROCESS

The Trial or *Le procès* (1962)

THE JURY TRIAL

Scorpion Woman or *Die Skorpionfrau* (1989)

GREECE

The Highway of Hate or *I Leoforos Tou Misous* (1950)

The Chauffeur Lady or *I Soferina* (1964)

Women with a Past or *Katigoro Tous Anthropous* (1966)

Concerto for Machine Guns or *Kontserto Gia Polyvola* (1967)

Z (1969)

Visibility Zero (1970)

In the Name of the Law or *En Onomati Tou Nomou* (1970)

What Did You Do in the War, Thanassi? or *Ti Ekanes Ston Polemo Thanasi* (1971)

With Fear and Passion or *Me Fovon Kai Pathos* (1972)

Maria in Silence or *I Maria Tis Siopis* (1973)

The Trial of the Judges or *I Diki Ton Dikaston* (1974)

ITALY

LATE RENAISSANCE

Artemisia (1997)

WORLD WAR II

Seven Beauties or *Pasqualino Settebellezze* (1975)

Open Doors or *Porte aperte* (1990)

Malèna (2000)

POST-WORLD WAR II

Seduced and Abandoned or *Sedotta e abbandonata* (1964)

The Conviction or *La Condonna* (1991)

POST-MILLENIUM

Il Divo (2008)

The Sicilian Girl or *La siciliana ribelle* (2008)

OTHER ITALIAN FILMS

A Day in Court or *Un Giorno in Pretura* (1954)

The Immortal Bachelor or *A Mezzanotte Va la Ronda del Piacere* (1975)

Pasolini, an Italian Crime or *Pasolini, un delitto italiano* (1995)

Superstition (2001)

The Bankers of God: The Calvi Affair or *I Banchieri di Dio* (2002)

The Session is Open or *L'Udienza è Aperta* (2006)

The Monster of Florence (TBD)

POLAND

THE SECOND REPUBLIC (1918-1939)

Life Sentence or *Wyrok Zycia* (1933)

Ghetto Queen or *Królowa przedmiescia* (1937)

Coup d'État or *Zamach Stanu* (1981)

POST-WWII

No End or *Bez Konca* (1985)

A Short Film About Killing or *Krótki Film o Zabijaniu* (1988)

OTHER POLISH FILMS

Trial or *Proces* (1957)

The Criminal Who Stole a Crime or *Zbrodniarz, Który Ukradł Zbrodnię* (1969)

Life Story or *Zyciorys* (1975)

The Consul or *Konsul* (1989)

The Depths of Hell or *Dno Piekla* (1989)

The Trial of the Sixteen or *Proces Szesnastu* (1991)

Silent Harbor or *Cicha przystan* (1995)

Unprofessional Rope or *Niefachowy stryczek* (1997)

BRAZIL

- The Case of the Naves Brothers or *O Caso dos Irmãos Naves* (1967)
- Olga (2004)
- Justice or *Justiça* (2004)

SOUTH KOREA

- A Good Lawyer's Wife or *Baramnan gajok* (2003)
- Running Wild or *Ya soo* (2006)
- Parallel Life or *Pyeong-haeng-i-ron* (2010)

SWITZERLAND

- The Molesters or *Sittlichkeitsverbrecher* (1963)
- Anna Göldin, Last Witch or *Anna Göldin, letzte Hexe* (1991)
- The Grüniger Case or *Grünigers Fall* (1997)

THAILAND

- Brokedown Palace (1999)

TURKEY

- Midnight Express (1978)

VENEZUELA

- A Question of Justice (2004)

NORDIC CIVIL LAW TRADITION

FINLAND

- Beyond the Law or *Lain Ulkopuolella* (1987)
- Eila (2003)

SWEDEN

- Perhaps a Poet or *Kanske en Diktare* (1933)
- Genera is the Worst or *Släkten är Värst* (1936)
- June Night or *Juninatten* (1940)
- In Darkest Småland or *I Mörkaste Småland* (1943)
- Maria of Kvarngården or *Maria på Kvarngården* (1945)
- Meeting in the Night or *Möte i Natten* (1946)
- Girl without a Name or *Flicka utan Namn* (1954)
- The Rite or *Riten* (1969)
- Witness for the Crown or *Kronvittnet* (1989)

Illusions or *Illusioner* (1994)

The Girl Who Kicked the Hornet's Nest or *Luftslottet Som Sprängdes* (2009)

COMMON LAW TRADITION

ENGLAND

SIXTEENTH CENTURY ENGLAND

A Man for All Seasons (1966)

Anne of the Thousand Days (1969)

VICTORIAN ENGLAND

The Trials of Oscar Wilde or The Green Carnation (1960)

Victim (1961)

Wilde (1997)

INER-WAR ENGLAND

Murder! (1930)

The Girl in the News (1941)

Cause Célèbre (1987)

COLONIAL ENGLAND

QUÉBEC

Battle of the Brave (2004)

INDIA

A Passage to India (1984)

COLONIAL KENYA

White Mischief (1987)

COLONIAL SINGAPORE

The Letter (1940)

MODERN (POST-WWII) ENGLAND

The Paradine Case (1947)

Witness for the Prosecution (1957)

Trial and Error (The Dock Brief) (1962)

Term of Trial (1962)

Hostile Witness (1968)

10 Rillington Place (1971)

A Fish Called Wanda (1988)

Let Him Have It (1991)

In the Name of the Father (1993)

Some Mother's Son (1996)

The Jury (2002)

Provoked: A True Story (2006)

The Chatterly Affair (2006)

COURTS-MARTIAL

King and Country (1964)

Conduct Unbecoming (1975)

Breaker Morant (1980)

OTHER BRITISH FILMS

The Franchise Affair (1951)

Eight O'clock Walk (1954)

Court Martial (1955)

Brothers in Law (1957)

The Boys (1962)

Dr. Crippen (1964)

Justice (1971-1974) (television series)

See No Evil: The Moors Murders (2006)

Longford (2006)

DOMINION COUNTRIES

AUSTRALIA

The Last Wave (1977)

A Cry in the Dark or Evil Angels (1988)

Prisoners of the Sun (1990)

Black and White (2002)

CANADA

NOVA SCOTIA

Johnny Belinda (1948)

SASKATCHEWAN COURTROOM

I Accuse (2003)

TORONTO COURTROOM

Karla (2006)

QUÉBEC SUPERIOR COURT

I Confess (1953)

COURT OF QUÉBEC

Black List or *Liste noire* (1995)

Red Nose or Take Me Home or *Nez Rouge* (2003)

NEW ZEALAND

Beyond Reasonable Doubt (1982)

Mesmerized (1986)

REPUBLIC OF IRELAND

The General or I Once Had a Life (1998)

UNITED STATES

COLONIAL PERIOD

The Crucible (1996)

RACE

Amistad (1997)

Intruder in the Dust (1949)

To Kill a Mockingbird (1962)

RELIGION

Inherit the Wind (1960)

FREEDOM OF SPEECH

The People vs. Larry Flint (1996)

RAPE TRIAL

And Justice for All (1979)

MURDER TRIALS

Angels with Dirty Faces (1938)

12 Angry Men (1957)

Anatomy of a Murder (1959)

In Cold Blood (1967)

Absence of Malice (1981)

The Star Chamber (1983)

Jagged Edge (1985)

Presumed Innocent (1990)

My Cousin Vinny (1992)

A Time to Kill (1996)

Primal Fear (1996)

Double Jeopardy (1999)

High Crimes (2002)

COURTS-MARTIAL

The Caine Mutiny (1954)

A Few Good Men (1992)

SOUTHEAST ASIA

INDIA

Samaj Ki Bhool (1934)

Awāra (1951)

Amar (1954)

Ab Dilli Dur Nahin (1957)

Adalat (1958)

Kala Pani (1958)

Anāri (1959)

Do Ustad (1959)

Kanoon (1960)

Yeh Rastey Hain Pyar Ke (1963)

Waqt (1965)

Mera Saaya (1966)

Pinjra (1972)

Achanak (1973)

Daag: A Poem of Love (1973)

The Scales of Justice or *Insaf ka Tarazu* (1980)

Kudrat (1981)

A Passage to India (1984)

Meri Jung (1985)

Pehchaan (1993)

Damini – Lightning (1993)

Gupt: The Hidden Truth (1997)

Daag: The Fire (1999)

Khauff (2000)

Moksha (2000)

No Silence in This Court (2001)

Kasoor or Blame (2001)

Deewangee (2002)

Bardaasht (2004)

Saatchya Aat Gharat (2004)

Kaydyacha Bola (2005)

Shaurya: It Takes Courage to Make Right . . . Right (2008)

MALAYSIA

Return to Paradise (1998)

SINGAPORE

The Letter (1940)

Korban Fitnah (1959)

HONG KONG

The Unwritten Law or *Fat ngoi ching* (1985)

49 Days or *Sai chiu* (2006)

MIXED LEGAL TRADITIONS

EGYPT

Alexandria . . . Why? (1978)

The Trial or *Almohakama* (1982)

Against the Government or *Dedh Elbokoma* (1992)

INDONESIA

Ganja Queen (2007)

ISRAEL

The Man in the Glass Booth (1975)

The Specialist (1999)

JAPAN

Gun Crazy: Beyond the Law (2002)

I Just Didn't Do It or *Soredemo boku wa yattenai* (2007)

PHILIPPINES

Ang Leon at ang daga (1975)

Miguelito: Batang rebelde (1985)

Walang piring ang katarungan (1990)

Matud nila (1991)

Wanted: Perfect Father (1994)

Ang ika-labing isang utos: Mahalin mo, asawa mo (1995)

The Marita Gonzaga Rape Slay: In God We Trust (1995)

Ipaglaban mo: The movie II (1997)

Birador (1999)

Suspek (1999)

PUERTO RICO

Under Suspicion (2000)

RUSSIA

The Fixer (1968)

Crime and Punishment or *Prestuplenie i nakazanie* (1969 & 2008)

12 (2007)

SCOTLAND

Madeleine (1950)

SOUTH AFRICA

Dingaka (1964)

Cry Freedom (1987)

A World Apart (1987)

A Dry White Season (1989)

In My Country (2004)

SOCIALIST LEGAL TRADITION

SOVIET UNION

The Accused or *Podsudimyy* (1985)

Sedev, Counsel for the Defense or *Zashchitnik Sedov* (1989)

CHINA

Goddess or *Shen Nu* (1934)

Stage Sisters or *Wutai jiemei* (1965)

The Warlord or *Da jun fa* or *Dai gwnn fat* (1972)

Sworn Brothers or *Gan dan xiang zha*o (1987)

The Story of Qiu Ju or *Qiu Ju da guan si* (1993)

Red Corner (1997)

CZECHOSLOVAKIA

The Trial or *Le proces* (1962)

The Confession (1970)

Normal the Düsseldorf Ripper (2009)

ISLAMIC LEGAL TRADITION

IRAN

Close Up (1990)

The Stoning of Soraya M. (2008)

A Separation (2011)

NIGER

Justice at Agadez (2006)

PAKISTAN

Veer-Zaara (2004)

Dishonored (2008)

INDIGENOUS LAW

AUSTRALIA

The Last Wave (1977)

BURKINA FASO

The Law (1990)

INTERNATIONAL CRIMINAL PROCEDURE

KOSOVO

Rule of Law: Justiz im Kosovo (2006)

INTERNATIONAL WAR CRIMES TRIBUNALS

Judgment at Nuremberg (1961)

Pride or *Puraido: Unmei no toki* (1998)

Best Wishes for Tomorrow or *Ashita e no Yuigon* (2007)

War Don Don (2010)

APPENDIX B

Sample Course Syllabus

The following films are selected because of their relevance to the topic and because they are available through streaming from services such as Amazon, Netflix, iTunes and Hulu. Films are assigned as readings in preparation for discussion in class. The students write a paper on a film of their choice and make an in-class presentation, commencing the third week of the course.

Week No. 1 – Common Law Tradition / Foreign Law / Comparative Legal Analysis

Witness for the Prosecution (U.K.)

I Confess (Canada)

Text: I through II.C.1

Week No. 2 – Civil Law Tradition

Lion's Den (Argentina)

The Sicilian Girl (Italy)

Text: II.C.2

Week No. 3 – Socialist Legal Tradition

The Confession (Czechoslovakia)

Red Corner (China)

Text: II.C.3.a

Student Presentations Commence

Week No. 4 – Islamic and Indigenous Traditions / International Legal Norms

A Separation (Iran)

The Last Wave (Aboriginals)

Text: II.C.3.b, II.C.3.c & II.D

Week No. 5 – Investigating and Charging the Crime

In the Name of the Father (U.K.)

Under Suspicion (Puerto Rico)

Fifth Amendment of the U.S. Constitution

Text: III.A.1 & II.A.2

Week No. 6 – Investigating and Charging the Crime

The Trial (Austria)

The Secret in Their Eyes (Argentina)

Text: III.A.3 & III.A.3

Week No. 7 –Prosecutor

The Judge and the General (Chile)

Spiral (France)

Text: III.B & III.C

Week No. 8 –Presumption of Innocence and Associated Rights

M (Germany)

The Baader Meinhof Complex (Germany)

Text: IV.A

Art. 14, International Covenant on Civil and Political Rights

Week No. 9 –Victim’s Role at Trial

A Passage to India (colonial India)

In My Country (South Africa)

Text: IV.B

Week No. 10 –Accused’s Participation at Trial

A Cry in the Dark (Australia)

Sophie Scholl - The Final Days (Nazi Germany)

Text: IV.C.1 through IV.C.4

Sixth Amendment of the U.S. Constitution

Week No. 11 –Accused’s Right to Effective Assistance of Counsel

Breaker Morant (U.K. Court-Martial)

A Fish Called Wanda (UK)

Text: IV.C.5

Sixth Amendment of the U.S. Constitution

Week No. 12 –Adjudication and Sentencing

Tenth District Court (France)

12 (Russia)

Text: V

Sixth Amendment of the U.S. Constitution

Week No. 13 – Sentencing / Death Penalty

10 Rillington Place (U.K.)

Let Him Have It (U.K.)

Text: VI

Eighth Amendment of the U.S. Constitution (cruel and unusual punishment)

Week No. 14 – International Criminal Procedure in Action

The Reader (Post-WWII Germany)

War Don Don (Special Court for Sierra Leone)

Text: II.D (review)

General Rules and Principles of International Criminal Procedure (Hague Institute for the Internationalisation of Law)

Arts. 9 & 14, International Covenant on Civil and Political Rights

Arts. 9-11, Universal Declaration of Human Rights

Opinio Juris in Comparatione offers the strength of a peer reviewed international publication.

It is an electronic full open access journal devoted to "Studies in Comparative and National Law".

It aims at enhancing the dialogue among all legal traditions in a broad sense. The intend of diffusing contributions on national law as well and not only to focus on comparative issues, is to expand access to foreign legal materials and ideas to those who do not already have access to the traditional avenues (such as journals in the language of the explored legal system). All contributions will be inserted in the *Opinio Juris in Comparatione* website.

Opinio Juris offers the benefits of a preliminary and early diffusion of the contributions before the papers are actually published somewhere else.

The three different languages of preferred submission are English, French and Spanish. The constraints set out for dealing with purely national law contributions is to give descriptions of domestic law in a language other than the language of the system itself (please see instructions for the **online submission** on *Opinio Juris in Comparatione* website for further details).

Articles (*Opinio Juris* will give preference to articles under 25.000 words in length including text and footnotes);

Essays (8.000 words or less in length, and its primary purpose is to advance an idea, to summarize a development, or to initiate or engage in discussion);

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