EVIDENTIARY BARRIERS TO CONVICTION AND TWO MODELS OF CRIMINAL PROCEDURE: A COMPARATIVE STUDY

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INTRODUCTION

Comparative research of criminal justice systems is still in its infancy. It is not surprising, then, that when questions are asked transcending the concerns of a single system very little is actually known, and answers tend to be mostly in the nature of impressionistic beliefs and vague hypotheses. One such belief, frequently voiced, is that the rules of evidence under the common law adversary system of criminal procedure present much more formidable barriers to conviction than do corresponding rules in the non-adversary civil law system. This belief is then related to a more general feeling that the "higher evidentiary barricades" to conviction somehow emanate from the very nature of adversary proceedings and that their lowering smacks of the "inquisitorial" continental procedure.[1] Both beliefs are interesting to a comparatist.

[1] A recent example of such views can be found in the vigorous dissent of Justice

Consider first the comparison of evidentiary barriers. Even if a comparatist is skeptical about whether, in their practical implementation, evidentiary rules present very high barriers to conviction in any modern criminal justice system, he will still have to recognize that there might be less prominent differences among systems concerning the difficulty of proving the defendant's guilt. If these differences actually exist, their importance probably exceeds the relatively narrow and technical field of evidence. True, it would be fallacious to infer from a finding of relatively high evidentiary obstacles, that the criminal justice system as a whole will find it difficult to maintain a high conviction rate. For it is possible, for instance, that grave evidentiary problems arising for the prosecutor under one mode of proceedings within a system will be instrumental in the development of alternative and less demanding ways of processing criminal cases.[2] Similarly, it would be erroneous to infer from relatively high evidentiary obstacles to conviction that, as a result, the factfinding precision within the system is also high. Higher barriers to conviction not only decrease the chances that an innocent person may be convicted but—perhaps in equal measure—also increase the chances that the guilty may escape punishment. Hence, by letting more guilty persons go free, the factfinding precision in the total volume of criminal cases may remain unaffected or even be decreased. Notwithstanding all these limitations on drawing broad conclusions from a narrow evidentiary point, the comparison of evidentiary obstacles to conviction still seems to have a larger significance. For it seems reasonable to assume that unequal evidentiary difficulties in proving guilt, if indeed they exist, have broader implications which somehow transcend the narrow bounds of the law of evidence and affect the working of the whole machinery of criminal justice. Perhaps they even exert an influence on the shaping of doctrines and rules of substantive criminal law.

Assuming that the two evidentiary styles, that of the common and that of the civil law, generate disparate problems of proving guilt, can this phenomenon be related to the opposition between the adversary and non-adversary models of criminal procedure? This is the second major question of interest to the comparatist. In an age so fascinated with constructing models it is tempting to test their explanatory force in the highly technical field of comparative law of evidence. Equally interesting, perhaps, is the necessary propaedeutic to any such pursuit: one must seek to ascertain—and the task is a difficult one from either the civil or common law perspective—which procedural ideas and structural patterns are embraced by the two broad classificatory labels of "adversary" and "non-adversary" procedure. Thus, before exploring the possible relationship between procedural models and evidentiary obstacles to conviction, one has to give, adapting Mallarmé's phrase to another purpose, *"un sens plus pur aux mots de la tribu."*

The comparative study which follows will be in two parts. In the first, more technical part, I shall contrast difficulties in proving guilt that arise under the evidentiary rules of the common law and civil law systems, in an attempt to test the validity of the general impression concerning unequal obstacles to a successful prosecution.

But consider some of the problems involved in the comparison. Within each of the two general legal systems, that of common and that of civil law, proof processes change as we move from jurisdiction to jurisdiction. It is therefore only on a rather general level that styles of factfinding exhibit certain common characteristics. Nor are evidentiary rules applied with equal rigor in all types of criminal cases, even within a single jurisdiction. An additional difficulty resides in the fact that, at least at first blush, there is so much highly complex law on the common law side and so little law on the civil law side. Also, there is in the law of evidence a very pronounced disparity between the law on the books and actual practice. Everywhere so many tendencies seem to be at work, often operating in opposite directions, that one is tempted to suspect that a kind of self-canceling Brownian motion may be the end-result. Finally, conceptual tools and systematic arrangements in the civil and common law differ so widely in the evidentiary field, that one finds oneself groping for common denominators in order to make issues comparable.[3] All these difficulties require that I make

Douglas in Johnson v. Louisiana, 406 U.S. 356, and Apodaca v. Oregon, 406 U.S. 404, at 406 U.S. 380 (1972). Believing that the rule requiring a unanimous jury verdict is essential to the effective operation of the standard of proof beyond a reasonable doubt, the Justice expressed his concern that the abandonment of the unanimity rule may "lower the barricades" against easy conviction. The fact-determining process, he felt, may become "stacked" against the accused and a step taken away from the accusatory system, presumably in the direction of continental "inquisitorial" procedure.

[2] Suffice it to say here that, in a system like that of the United States, where the overwhelming majority of criminal defendants plead guilty and the need for trial is thus obviated, *see* TASK FORCE ON THE ADMINISTRATION OF JUSTICE, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 134-35 (1967), prosecutors may be quite effective in obtaining convictions in spite of carefully cultivated protective rules of evidence.

[3] It is, of course, tempting to look for comparative statistics on the percentages of prosecutions resulting in conviction in the two systems as an indicator of relative evidentiary difficulties confronting prosecutors. Unfortunately, reliable and comparable statistics on this score have not yet been compiled. But, even if such statistics were available, it would be dangerous to draw far-reaching inferences from them in an attempt to facilitate our inquiry here. The issues involved are highly complex. The screening and selection of cases for trial is done in different ways in the two systems. For example, the impact of the continental pretrial investigation would have to be correlated with the effect of plea bargaining. Many other variables will become apparent as I continue the discussion in the text.

a few introductory remarks and a number of reservations before I proceed to unveil the outline of this study.

The first remark concerns the problem of evidentiary styles. Do distinct common and civil law evidentiary styles in fact exist, or are they merely an invention of scholars? As I see it, they do exist and they emerge from the confluence of three main factors. The first one is the opposition, already alluded to, between adversary and non-adversary procedures. It produces, *inter alia*, such important contrasts as the presentation of evidence solely by the parties as opposed to the production of evidence by the judge. The second factor stems from the difference in the structure of the adjudicating bodies. While in the Anglo-American orbit rules of evidence were responsive to the demands of trials to a jury of laymen, continental rules were tailored to meet the needs of the mixed tribunal.[4] Obviously, dissimilar evidentiary problems arise in a system where guilt is determined by a body of laymen, and in a system where guilt is established by a tribunal on

Despite all these reservations, the reader might still want at least some statistical data as an illustration. Consider, then, statistics compiled for the French *Cours d'Assises*, graciously made available to me by Mlle. Yvonne Marx, Centre Français de Droit Comparé, Paris. Those courts, which are not typical of continental adjudicative bodies, *see* note 4 *infra*, are rough analogues of the common law court sitting with a jury: three professional judges join nine jurors and decide both the issue of guilt and the sentence. In 1967, only 5.29% of the defendants were acquitted by the *Cours d'Assises*; in 1968, 6.81%; and in 1969, 6.08%. As types of disposition other than those on the merits are virtually nonexistent and statistically negligible, the reader may assume that in all remaining cases defendants were convicted by the French courts. Now, if one bears in mind that, over the same period, taking acquittals and dismissals together, only about 70% of defendants were convicted in the United States federal district courts, one would be tempted to assume that these differences are very significant. I do not think, however, that, in the absence of further analysis, such facile statistical comparisons have any real meaning.

If, on the other hand, comparison of meaningful conviction/acquittal ratios, here and on the Continent, did not reveal any significant differences, it would nonetheless be hasty to conclude that prosecutorial evidentiary barriers too are not significantly disparate. That would be similar to insisting that two runners assigned different obstacle courses cannot cross the finishing lines at the same time.

[4] The jury trial was transplanted to the Continent at the time of the French Revolution and in the wake of continental enthusiasm with English institutions. Somewhat modified from the very beginning (for example, there was never a requirement of unanimity), the continental jury never really became acculturated and soon suffered a decline, for reasons admirably related in Mannheim, *Trial by Jury in Modern Continental Criminal Law*, 53 L.Q. REV. 99, 388 (1937). At present the jury trial has been retained only in a small number of Western European countries (Austria, Belgium, Norway and a few Swiss cantons) for the disposition of a narrow class of criminal offenses. Although Lenin had a few kind words to say about the pre-revolutionary jury in Tsarist Russia, trial by jury was not adopted following the revolution of 1917. *See* 4 V. LENIN, SOCHINENIYA [SELECTED WORKS] 83-84 (2d ed. 1928). Nor have socialist countries of Eastern Europe opted for the jury trial.

The prevailing contemporary continental system is that of a unified bench in which the professional judge or judges are flanked by lay assessors. Even in France, after the reforms of 1941, the "jurors" deliberate and vote with the professional judges, so that the system remains that of "jury trial" in name only. Adjudication solely by professional judges, while not unknown (for example, such is the practice in the Netherlands), is usually employed in the disposition of minor offenses and is definitely not representative of the modern continental style. In sum, the continental law of evidence is most profitably examined against the background of trial by a mixed tribunal.

which lay and learned judges sit and deliberate together. The third and final factor contributing to the emergence of distinct evidentiary styles reduces to the circumstance whether or not the trial is preceded by a purportedly non-partisan investigation, the results of which are available to the judges. Imagine only the numerous consequences stemming from the contrast between a factfinder who begins the trial sterilized of any prior knowledge of the case and operates initially in a factual vacuum, and a factfinder who is familiarized in advance of the trial with summarized records of all testimony taken during the preliminary investigation. The evidentiary style emerging from the compenetration of these three main factors leads me to the first important reservation. In cataloguing and contrasting evidentiary hindrances to a successful prosecution, I shall focus only on those aspects of the proof-taking process which seem to me characteristic of the respective evidentiary style. True, adopting this limitation gives rise to the apprehension that representational accuracy may be diminished, but, at the same time, it enables me to extract and contrast the more salient features of each style while avoiding fruitless analysis of minutiae.

If the first reservation decreases the precision of my exposition, the second is designed to increase it. Jurisdictions in both the common law and the civil law systems, of course, have evolved several methods, of varying degrees of formality, for processing criminal cases. In most continental countries streamlined proceedings were devised for the adjudication of less serious offenses, while more elaborate procedures were designed for the disposition of cases involving serious crimes.[5] However, the continental defendant does not decide which type of processing will be followed in his case; the nature of the offense in-

[5] Many continental countries distinguish between "criminal" and "noncriminal" offenses, notably in the area of traffic, economic, and public nuisance offenses. Conduct characterized as "noncriminal" (which often would be deemed "criminal" in America) is handled by administrative agencies, the evidentiary rules of which are less demanding than those encountered in the processing of criminal offenses. But even in the realm of criminal offenses proper, crimes of different gravity (in terms of penalties authorized) are usually entrusted to courts of differing original jurisdiction, and somewhat different procedural and evidentiary rules apply. The less serious the crime, the less elaborate the rules. *See, e.g.*, THE GERMAN CODE OF CRIMINAL PROCEDURE § 407 (The American Series of Foreign Penal Codes, No. 10, H. Niebler transl. 1965) [hereinafter cited as WEST GERMAN CODE]; CODE OF CRIMINAL PROCEDURE art. 392 (Collection of Yugoslav Laws XIX, M. Damaška transl., Belgrade 1969) (Yugoslavia) [hereinafter cited as YUGOSLAV CODE OF CRIMINAL PROCEDURE].

In France, where the distinction between administrative offenses and criminal offenses has traditionally been rejected, analogous developments in the evidentiary field took place. Thus, before the *Cours d'Assises*, which try the most serious crimes, quite stringent evidentiary rules apply. The latter are somewhat relaxed in cases of median gravity, considered by the *Tribunal de Grande Instance*. Still less demanding, at the bottom of the judicial hierarchy, are *Tribunaux d'Instance* which have jurisdiction over cases that would in the majority of other continental jurisdictions be classified as mere administrative offenses. *See, e.g.*, Statute No. 72-5 of Jan. 3, 1972, 92 Gazette du Palais No. 1, at 58 (1972). *See generally* 2 G. STEFANI & G. LAVASSEUR, DROIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNALE 460 (2d ed. 1966).

volved is decisive. In common law jurisdictions, meanwhile, it is the defendant who determines the type of proceeding in which his case will be processed, by using the pleading mechanism and by exercising waiver. Neglecting this by no means unimportant difference,[6] I shall limit my comparison of prosecutorial evidentiary difficulties encountered in prosecution only to those problems which arise in the processing of cases where the full panoply of evidentiary rules applies. Accordingly, cases tried to a common law jury, a miniscule fragment of the totality of criminal cases, will be contrasted with continental criminal cases involving serious offenses, also only a segment of the total picture. I believe that this second limitation will prove not to be too disappointing to the reader. I impose it in part because the possibility of having to try a case to a jury influences both the law of evidence and substantive criminal doctrines of common law jurisdictions. More important, limitation to this small sector of the whole tableau will hopefully provide the right starting point from which to undertake a more comprehensive comparison of criminal justice systems.

In organizing the first part of the present study, adjudicative factfinding activities will be divided, like Caesar's Gaul, into three parts: activities preparatory to proof-taking, actual proof-taking, and the weighing or evaluation of evidence. Evidentiary barriers to a successful prosecution arising in each phase will be analyzed separately in full awareness that related processes are thus examined in artificial isolation. But, before I close the first part of my study, the results of the analysis will be placed in a larger context and its implications briefly surveyed. After drying my theme in the closet of evidentiary technicalities, I will place it in a broader, more natural habitat. Hopefully, it will then regain its proper dimensions and its vitality.

Since my conclusion in the first part of the Article is that the full-fledged common law trial does place somewhat higher evidentiary barriers to conviction than does its continental counterpart, I shall reflect, in the second part, on the possible nexus between this phenomenon and the opposition between adversary and non-adversary procedures. Of course, one cannot set his mind free to speculate about this theme before obtaining a sufficiently clear idea of the essential characteristics of adversary and non-adversary types of procedure. Unfortunately, as

[6] Under the American system, for instance, the defendant, by refusing to plead guilty and to waive the jury trial, can cause a relatively minor case to be processed in the most elaborate, costly and time-consuming manner. On the Continent, simplified procedural patterns are utilized in the disposition of less serious cases, and the defendant cannot compel the court to dispose of the case either in a more or a less elaborate manner than that prescribed for the type of crime in question. The implications of this difference in approach will be explored later, *see* notes 97-101 *infra* & accompanying text.

the reader will see, there is more than the usual degree of confusion on this score. The terms "adversary" or "accusatorial" and "non-adversary" or "inquisitorial" are assigned, both here and in Europe, a variety of loose meanings. Therefore, before hazarding a few thoughts on the relationship between evidentiary barriers and procedural models, I shall have to discuss the most important ways in which the opposition of the two rival models can be conceived, and attempt to isolate the opposition most fruitful for the purpose of this comparative study.

Having completed this preliminary work, I shall then argue that the level of evidentiary obstacles which prosecutors face in the two systems may well be related to the nature of the two rival procedural models, in that the latter are committed to an unequal degree to the pursuit of truth. Whether or not the two models in fact set different store by the discovery of truth will be discussed in the last sections of the present study. In this manner, the explanatory force of procedural models will be tested in a narrow technical field, and both "myopic and panoramic vision cultivated simultaneously."[7]

I. Comparison of Evidentiary Barriers to Conviction

A. *Activities Preliminary to Proof-taking*

In both the civil law and the common law systems the judge must first decide what evidence will be examined at trial. It is here that we encounter one of the most often repeated generalizations in comparative discussion of the law of evidence. It is said that while common law systems are mainly concerned with the issue of admissibility, civil law systems admit all evidence that is logically relevant. It is tempting to hypothesize from this that on the common law side of our comparison the prosecutor experiences greater difficulties than his continental counterpart in transforming his informational sources into admissible evidence. As usual, closer examination tends to lead to qualifications and refinements. Do they destroy the generalization?

In seeking an answer to this question, two kinds of exclusionary rules will, for the sake of clarity, be held apart throughout my discussion of this initial phase of adjudicative factfinding. First, evidence may, of course, be excluded because of the belief that it may impede the pursuit of truth. But, second, it may also be excluded for reasons extraneous to truth-finding considerations and often at odds with them, as in the case of reliable evidence obtained in an illegal manner. I begin with evidence excluded under the first rationale.

[7] 12 A. Toynbee, A Study of History, Reconsiderations 132 (1961).

1. Admissibility Rules Designed to Improve Factfinding Accuracy

Evidence which has passed the test of logical relevancy and has been found suitable for rational inference may still fail to be admitted under the common law rules of evidence. Some of these rules, more rooted in experience than inspired by logic,[8] exclude certain classes of logically relevant evidence, largely on the theory that its impact on the trier of facts may be stronger than its actual probative weight. In contrast, continental law does not contain rules excluding relevant evidence on the ground that factfinders might erroneously assess its credibility and thus endanger factfinding precision. This is not the place to enter into a discussion of how much of this omission is due to the fact that continental decisionmakers are not solely untrained citizens and how much is due to other reasons.[9] The fact is that lawyers trained in the civil law system are nearly unanimous in their rejection of this first type of exclusionary rules. They seem more optimistic than their common law brethren that the factfinders, lay or professional, will be capable of disregarding the influence of relevant but untrustworthy evidence—for example, some types of hearsay—and, having heard it, exclude it from the calculus of decision. Paradoxically, in view of their general attitude toward anticipating the future by legislation, they are more pessimistic than common law lawyers about the wisdom of framing general rules rather than relying on a case-by-case approach. They do not believe that it is possible to frame successfully legal rules based on expectations about the impact of certain classes of evidence. "These are good rules of thumb in an average case," they might say when confronted with common law rules of admissibility, "and perhaps professional judges could use them to good advantage when debating evidence informally with lay judges, in situations in which the concrete circumstances of the case at hand seem to make the rules applicable.

[8] *See* 4 J. WIGMORE, EVIDENCE § 1171, at 395 (Chadbourn rev. 1972). Examples in point would be the hearsay rules and the general prohibition against informing the trier of fact of an accused's prior criminal record.

[9] The discussion here centers primarily on the presence, as opposed to reasons for the absence, of hearsay rules. Many scholars attribute these rules to the existence of the jury trial, but this view is questioned by others. In any event, many common law lawyers currently find exclusionary rules, although somewhat modified, to be imperative even in nonjury cases. *See generally* Levin & Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905 (1971).

Those who believe that the exclusionary rules are a necessary corollary of the jury trial will probably classify it as one of the ironies of history that the transplantation—largely rejected later, *see* note 4 *supra*—of the jury trial to the Continent signaled the end of a comprehensive system of evidentiary law. Throughout its history on the Continent, the transplanted jury trial operated without an analogue of common law exclusionary rules. For an explanation of this curious phenomenon, see Hammelmann, *Hearsay Evidence: A Comparison*, 67 L.Q. REV. 67 (1951).

However, it is not wise to ossify them into rules of law."[10] Obviously, then, common law lawyers will search the civil law in vain for the hearsay rule, rules excluding gruesome or inflammatory evidence, and similar rules of "auxiliary probative policy."[11] They will also be surprised or even shocked to find that, although the defendant is said to

[10] How can continental rule-skepticism in the evidentiary area be explained? Some will, no doubt, be inclined to view this phenomenon as rooted in the alleged continental desire to reduce technical complexity in processing criminal cases to a minimum, and thus "lower the barriers" to conviction. The historical perspective suggests, however, a much less dramatic explanation: that the skepticism is a response to bad experiences under the medieval system of legal proof.

Medieval evidentiary law, designed for use in the inquisitorial procedure, was basically the same all over the Continent. Strikingly characteristic of this law were rigid rules concerning the quantity and quality of proof needed for a conviction. Circumstantial evidence alone was regarded as insufficient proof of guilt in "ordinary" (mostly capital) cases. The defendant could be convicted only upon the testimony of two unimpeachable eyewitnesses or upon his (usually corroborated) confession. Where the investigator gathered the legally required evidence, the court was legally bound to convict, irrespective of its subjective evaluation of that evidence. The reverse was, of course, also true. No matter how persuaded of the defendant's guilt on the basis of circumstantial or legally defective direct evidence, the medieval court was not authorized to convict and sentence to the "ordinary punishment" (for the most part, death). For an excellent discussion of these rules in their French variant, see A. ESMEIN, HISTOIRE DE LA PROCÉDURE CRIMINELLE EN FRANCE 260-83 (Frankfurt-am-Main 1969) (photocopy of the 1882 Paris edition). The underlying policy of this system of legal proof is expressed with great clarity in M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, THE ITALIAN LEGAL SYSTEM 139-42 (1967), but the reader should bear in mind that this exposition deals with legal proof in *civil* procedure, where there was more emphasis on "numerical jurisprudence" and more juggling with "proof-fractions."

Although late into modernity many, like Leibnitz, believed that comprehensive rules could be framed determining a priori the weight of evidentiary material, dissatisfaction with the medieval system of legal proof in criminal matters reached its high point at the time of the Enlightenment. There were two primary criticisms. First, the factfinders' ability to make a subjective evaluation of the evidence was disregarded. Second, the rigid and very demanding standards of proof in cases involving major crimes brought about the widespread use of torture, which, because of the unavailability of two unimpeachable witnesses, was often the sole means of obtaining the required proof for conviction—the defendant's confession. *See* note 215 *infra*.

Following the French Revolution the so-called system of "free evaluation of evidence" replaced the medieval system of legal proof. Both rules affixing a priori weights to evidence and rules requiring *how many* and *which* pieces of evidence must be gathered for conviction were stricken from the books. The inspiration of these reforms was not a desire to "lower the barriers" to conviction, but rather a desire to improve the defendant's lot and, more generally, to further factfinding precision. But, and this is of particular importance, the rejection of these rules was predicated on the belief that it is impossible to determine satisfactorily in advance the impact of particular evidentiary material on the factfinder.

It now becomes obvious why continental systems reject not only rules assigning weight to evidence but also rules excluding evidence for the purpose of improving factfinding precision. Although the two types of rules are analytically different, they are both based on the theory that one can satisfactorily draft rules of evidence anticipating the impact of specific classes of evidence on the factfinder. The difference is only that one type of rule says to the trier of fact, "This is reliable evidence and you must attach such-and-such weight to it," while the other says to him, "This is spurious evidence and you may not even consider it."

[11] This is Wigmore's term. *See* J. WIGMORE, *supra* note 8, § 1171, at 395.

For the sake of comprehensive presentation I should note that there are a few basically civilian jurisdictions which consider hearsay evidence ordinarily inadmissible. Thus, in Japan hearsay will not be admitted in the most formal type of proceedings unless the opposing party consents to it. *See* THE CODE OF CRIMINAL PROCEDURE arts. 320, 326-27 (compiled by Liaison Section, General Secretariat, Supreme Court (Japan) 1949). This, however, is clearly outside the main current of the civil law.

have the right to lie,[12] he is freely examined for evidentiary purposes and not required to take an oath.[13]

No matter how important the difference between the two systems due to the absence in civil law of these exclusionary rules, the distance may easily be overstated and even misunderstood. Various devices leading to the exclusion of relevant evidence were developed on the Continent so that not all evidence that is to a continental lawyer relevant is ipso facto admissible. The comparatist must detect these devices disguised by different labels and ascertain exclusionary side-effects of procedural rules designed by continentals to achieve other purposes.

Let me quickly survey some of these devices. In all continental jurisdictions the judge has the power, seldom defined with precision by written law, to refuse examination of evidence even though it appears logically relevant and there is no specific exclusionary rule in point. For instance, in many European jurisdictions the judge may refuse to hear witnesses if there is reason to believe that, even if the witnesses confirmed the contention of the party, their testimony would have no influence on the fact-determination.[14] By means of this important

[12] *See* note 44 *infra.*

[13] The "prophylactic" rule requiring that the defendant testify under oath is regarded by continentals as unnecessary. The oath, they argue, will not prevent the guilty defendant from perjuring himself. Further, factfinders will take the defendant's unsworn statement with a grain of salt in any event, and will draw useful inferences even from his lies.

Perhaps more importantly, the requirement that the defendant testify under oath is considered by continental lawyers as undesirable and unfair. It is precisely on this score that lawyers from both Western and Eastern Europe criticize the common law requirement as "inquisitorial." For an example of Soviet views on this point see N. ALEKSEEV & V. LUKASHEVICS, LENINSKIE IDEI V SOVETSKOM UGOLOVNOM SUDOPROIZVODSTVE [LENINIST IDEAS IN SOVIET CRIMINAL PROCEEDINGS] 183 (1970). What is the thrust of the criticism? The requirement of oath is said to be an unfair pressure on the guilty defendant either to convict himself out of his own mouth by telling the truth, or else to suffer punishment for perjury by lying. In view of the incentive to testify so as to avoid possible unfavorable inferences from his failure to take the witness stand, the defendant often has little opportunity to avoid this "agonizing" alternative. Placing him in this predicament is even termed "inhumane." *Cf.* 2 P. BOUZAT & J. PINATEL, TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE 944 (1963). In the language of Garrity v. New Jersey, 385 U.S. 493 (1967), relating to a context not so remote from ours as it might appear at first blush, *see* note 40 *infra*, the common law defendant is viewed by continental lawyers as "having a choice between the rock and the whirlpool." Few continentals realize that it is the fear of exposing the factfinder to unreliable evidence which underlies the oath requirement. But even if they were aware that the explanation lies in what Wigmore termed "prophylactic rules of admissibility," J. WIGMORE, *supra* note 8, § 1172, at 397, the strength of their belief on this point is so great that I do not believe they would retract their criticism.

[14] For example, the court may refuse to hear a witness because it is already thoroughly convinced of the factual proposition the party purports to prove. It must be borne in mind that the continental mixed panel decides both the question of admissibility and the ultimate question of guilt. Thus, decisions to deny a motion to examine an item of evidence often amount to an interlocutory verdict. For an extensive comparative discussion of this problem, see E. KREUZER, DIE BESTIMMUNG DES UMFANGS DER BEWEISAUFNAHME IM DEUTSCHEN, FRANZÖSISCHEN UND ITALIENISCHEN STRAFPROZESS 77 *et seq.* (1964).

power accorded to the continental trial judge, many items of evidence, inadmissible under the common law rules (such as, for example, multiple hearsay), will, as a rule, be inadmissible in the continental court as well.

Another continental device exerting an exclusionary effect is the so-called "principle of immediacy." It reflects a violent reaction against a much criticized feature of the medieval inquisitorial procedure. The examiner who conducted the secret "*inquisitio*" was required to put in the record every procedural step taken and all evidence heard. The official "dossier" (*acta inquisitionis*) thus contained minutes describing, among other things, the results of proof-taking. At the close of the investigation the file was, in all serious criminal cases, transmitted to a panel of judges who based their decision solely or primarily on evidentiary items contained in the dossier. The judges seldom, if ever, came into personal contact with the defendant or the witnesses. The realization that "original" evidence is more probative than evidence filtered through intermediary sources led to the adoption in modern continental procedures of the principle that evidentiary sources be examined by the decisionmaker in their original rather than derivative form. Perhaps the principle can best be explained to common law lawyers as an extension of the "best evidence rule" to all types of evidence. The precise meaning and reach of the principle vary as we go from continental jurisdiction to jurisdiction and it is generally one of preference only.[15] But, no matter how restricted the meaning of the principle, it will often require the judge to examine the original declarant of a statement. Clearly, then, at least *some* evidence which is excluded in common law countries as verbal or written hearsay will be rejected by the continental courts as violative of the "principle of immediacy."[16] Considering that on the common law side of our compari-

[15] In probably the majority of continental jurisdictions the principle is construed narrowly, solely as a device to eliminate the documentary curtain from the trial. Thus, whenever possible, witnesses must be produced in court in place of introducing their prior testimony. In West Germany, however, the principle is interpreted more broadly so as to prohibit, *inter alia*, the examination of a hearsay witness with respect to the truth of the statement he has heard, at least as long as there is an eyewitness available. The hearsay witness may, however, be examined with respect to the fact that he has heard the original statement. In this respect he is treated as an eyewitness regarding circumstantial evidence. *See* 1 E. SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ 254 (1964).

[16] It must be noted in passing that continental legal doctrine often exaggerates the extent to which the principle of immediacy actually reduces the impact of evidence examined during the pre-trial stages of the criminal process. Consider only that the typical continental presiding judge is expected to study the dossier in advance of the trial: without familiarity with documents contained therein he could hardly be efficient in carrying out interrogations. It would be unrealistic to deny that the dossier leaves at least some imprint upon the mind of the presiding judge, who is, in turn, a very influential member of the continental mixed tribunal. On this problem see Jescheck, *Germany*, in THE ACCUSED: A COMPARATIVE STUDY 246, 247 (J. Coutts ed. 1966). A

son there are numerous exceptions to the hearsay rule, with all the obscurity of their refinements, the gap between the two systems on the issue of using hearsay is not as wide as might appear at first sight.

It is also easy to attach too much significance to the absence in the civil law of rules excluding the defendant's prior criminal record and evidence of other crimes of which he has not been convicted. Continental judges will agree with their common law brethren that the defendant's prior criminal record per se should not play a part in the guilt determination as proof of a propensity toward criminal activity. The explanation will, however, be different, exemplifying the fact that some problems, which in common law jurisdictions would be posed as questions of admissibility, are treated by civilian lawyers as problems of logical relevancy. For example, continentals would simply say that the prior criminal record per se, that is, without regard to its possible value as circumstantial evidence, is irrelevant because it is unsuitable for logical inference. Only if, as in proof of *modus operandi*, a prior conviction permits rational inferences, will continental judges use it for evidentiary purposes.[17] Further, the continental judge will refuse to hear evidence of other crimes with which the defendant has not been formally charged or of which the defendant has not yet been convicted. The presumption of innocence will be said to preclude the possibility of according any weight to as yet undetermined criminal activity, and the latter cannot be determined in court as it was not charged.[18] In contrast, common law jurisdictions admit such evidence under certain circumstances. Thus, though continental law, unlike the common law, contains no express prohibition against introduction of these sorts of evidence, it may be that, as a practical matter, it is more restrictive than the common law in this regard. The fact remains, however, that the continental judge will always be familiar with the defendant's prior criminal record in advance of the decision on guilt. It is not too far-fetched to imagine that this knowledge may tip the scales against the continental defendant in some close cases where the common law defendant would be acquitted, despite the proclamation of the continental legal folklore that the prior record is logically irrelevant.

It thus appears that the two systems are not so far apart concerning this first type of admissibility rules. Counter-tendencies to basic orientations narrow the gap on both sides. Yet there is no gainsaying that a great deal of information, inadmissible under common law evidentiary rules, reaches the continental adjudicators. Consequently, the prosecutor in the civil law system will often find it less difficult than his common law counterpart to squeeze his informational sources into the corset of technical rules of evidence.

For our purposes, perhaps the most important residual difference is the relatively greater ease with which the continental prosecutor can introduce evidence of out-of-court declarations of witnesses. In virtually all jurisdictions testimony recorded at the pre-trial examination, and often even prior to that, during the initial police inquiry, may be used in court for substantive evidentiary purposes.[19] The continental prose-

minority of continental jurisdictions have entrusted the examination of witnesses primarily to the parties and only subsidiarily to the judge (*e.g.*, some Scandinavian countries and four constituent republics of the USSR). Under this system familiarity on the part of the presiding judge with the dossier is no longer imperative. There is only one basically civil law jurisdiction known to me where the presiding judge must begin the interrogation although he knows nothing about the case: Japan. This arrangement is, however, termed "illogical" even by Japanese authorities. *See* S. DANDO, JAPANESE CRIMINAL PROCEDURE 374 (B. George transl. 1965). Other factors operating so as to reduce the practical importance of the immediacy principle arise from exceptions to it. *See* note 19 *infra*.

[17] All this is not to say that practically important differences do not remain. Thus, for instance, continental lawyers will attribute a broader meaning to "*modus operandi*." Consider as an illustration the "Karlsrühe case," so vividly described in S. BEDFORD, THE FACES OF JUSTICE (1961). In offering support for his judgment in this case, the West German judge denies that he accorded any weight to prior convictions per se. He draws inferences, however, from the *modus operandi* established in prior proceedings: all prior thefts were "stupid, impulsive actions prompted by sudden temptation, doomed to failure," *id.* 180. This particular formulation of *modus operandi* would not seem to common law lawyers "so unusual and distinctive as to be like a signature," in McCormick's felicitous phrase. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 449 (2d ed. 1972).

Specific references to the use of prior criminal records as evidence are seldom found in continental legislation. *But see* WEST GERMAN CODE, *supra* note 5, § 243, and the comments thereon in T. KLEINKNECHT, STRAFPROZESSORDNUNG 580 (29th ed. 1970). As there is in continental law no "impeachment" of the defendant in the strict technical sense, and as he is under no legal obligation to testify truthfully, *see* note 41 *infra*, the use at common law of prior criminal record to impeach a witness' credibility has no precise parallel in continental criminal evidentiary law.

[18] In order to understand this difference, the contrasting procedural contexts must be borne in mind. In perhaps the majority of continental systems the prosecutor is required by law to prosecute whenever there is sufficient evidence of crime. Moreover, joinder of offenses is mandatory. Thus, the judge is actually telling the prosecutor, "If you have credible evidence of related crimes committed by the defendant, go ahead and bring charges." True, sometimes it becomes absolutely necessary in a criminal case to prove a fact or set of facts falling partly under another category of crime (*e.g.*, in order to trace a murder weapon stolen from a store to the defendant). Then this fact or set of facts, rather than the offense as such, will be subject to proof in court.

[19] True, evidence which has not been brought out during trial may not be used in arriving at the decision. Evidentiary material contained in the dossier technically does not constitute evidence, although it does in fact influence the presiding judge and, through him, other members of the adjudicating panel. But, even disregarding actual practice, once evidence contained in the dossier has been brought out (by reading out summaries of interrogation or in some other way), it may legally be used for substantive purposes. *See, e.g.*, WEST GERMAN CODE, *supra* note 5, §§ 251, 253 and comments thereon in T. KLEINKNECHT, *supra* note 17, at 624. Information on Italian law may be found in A. DE MARSICO, DIRITTO PROCESSUALE PENALE 243 (1966); for French law see 2 P. BOUZAT & J. PINATEL, *supra* note 13, at 952. *See also* YUGOSLAV CODE OF CRIMINAL PROCEDURE, *supra* note 5, arts. 301, 305. The practice of liberally using prior inconsistent statements for substantive purposes is sometimes criticized, but mostly by academic lawyers. *See, e.g.*, 2 E. SCHMIDT, *supra* note 15, commentary to § 253, at 723. Even if a witness has not been interrogated before the trial, the substance of his testimony can, under some reservations, be introduced through the testimony of hearsay witnesses, such as police officers.

Depositions of witnesses made during the preliminary examination can be used at trial under the English variant of common law criminal procedures. To the extent to

cutor is, therefore, capable of "freezing" a great deal of crucial incriminating evidence well in advance of the trial. The extent to which this circumstance explains the difference in attitudes toward actual and potential witnesses in the two systems is too apparent to belabor.[20]

An argument may be anticipated here that no matter what the differences between the two systems on this score, they are irrelevant for our purposes. Exclusionary rules of the type now under discussion make it more difficult to prove factual propositions. These, however, can be favorable as well as detrimental for the defense. Accordingly, the argument continues, if exclusionary rules create special obstacles to the prosecution, they also affect the defense in the same way. The conclusion is that these difficulties cancel each other out and the difficulties in obtaining a conviction remain the same.

Whether the first type of exclusionary rules affect both parties in the same way is not easy to say. The constitutional right of the American defendant to confront witnesses, for instance, could, if stretched to its full potential, prevent the prosecution from using quite a number of hearsay exceptions while still allowing the defense to use all of them. This would then mean that admissibility rules hamper the prosecution more than they do the defense. However, this potential of the confrontation rule, advocated by some, has not been realized.[21] Besides, many *cognoscenti* suspect that hearsay exceptions display a prosecutorial bias to start with. The outcome of these and some other opposing tendencies[22] is unclear, and the argument about the mutually cancelling

which this is permissible, testimony obtained in advance of the trial may be preserved for later use. However, the conditions under which such depositions may be put in evidence are much stricter in England than on the Continent. For example, it must be proved that the defendant was present when witnesses gave evidence and that he had the opportunity to cross-examine them. For elaboration see KENNY'S OUTLINES OF CRIMINAL LAW 511 (18th ed. C. Turner 1962).

20 For example, the motivation to bribe or intimidate potential witnesses will be diminished in that their testimony has in a sense been "canned" for use at trial. The absence of "material witnesses" in the civil law is only one of many other less visible consequences. But, surely, the implications of this "freezing" of testimony at an early stage in the criminal process have a broader range. They affect, for instance, attitudes toward full pre-trial disclosure of evidence. At least some opposition to full disclosure comes from the fear that evidence will be tampered with.

21 The strong exclusionary effect of the confrontation rules has recently been advocated by Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 89 (1971). *But see* Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

22 Perhaps one of them deserves mention here. It revolves around the impact on the law of evidence of the lack of appeals from an acquittal. This is the rule in most common law jurisdictions, while the opposite is the case on the Continent. Some would be prepared to argue that this circumstance must in the long run inject a pro-defense bias into the law of evidence. In an effort to avoid reversals, the common law trial judge might lean in the direction of excluding relevant evidence for the prosecution whenever its admissibility is doubtful, while giving great latitude to the defense. *See* G. WILLIAMS, THE PROOF OF GUILT 327 (1963). Others would make an equally plausible argument that the judges tend to rule in favor of the prosecution in close cases so as to preserve reviewability of their rulings. Note in this connection that Williams considers hearsay to be admissible evidence for the defense, *id.* 209-10.

effect may perhaps be correct. But when we place the issue in the context of trial mechanics, a new dimension appears. The prosecutor at common law is the first to produce evidence and, in order to reach the trier of fact at all, he is the first to be stretched out on the Procrustean bed of the exclusionary rules. Prior to trial, in contemplating whether to bring charges formally against a defendant, he must ask himself whether the logically revelant information he has gathered will successfully undergo the legal metamorphosis into technically competent evidence. This, I submit, is a problem which the continental prosecutor does not face at all, or, if he does, not nearly in equal intensity.[23] But here I am getting ahead of my story. Before considering the problem of the prosecutorial burden to establish a prima facie case, I must return to admissibility rules and discuss their second type.

2. Admissibility Rules Governed by Considerations Extraneous to Truth-finding

The second type of admissibility rules, leading to exclusion of evidentiary material irrespective of its reliability, is not unknown to the civil law systems. However, it would be erroneous to assume that both systems exclude roughly the same amount of evidence by virtue of the operation of these rules. Even if we confined our inquiry solely to comparing statutory proclamations and formal doctrine, it would soon become obvious that exclusionary rules are more numerous and surely much more elaborate in America than they are in any civilian jurisdiction. True, in the field of testimonial privileges the scope of exclusionary rules will not differ significantly.[24] But, as we take a closer look at

23 Imagine how difficult it would be in many cases for the common law prosecutor to establish a prima facie case without taking advantage of the exception to the hearsay rule in favor of admitting out-of-court confessions of the defendant. It is indeed easier for the continental prosecutor to take a case to court without the confession than it is for his common law colleague. *See* Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122 (1966). Note also the empirical data on the use of confessions by West German courts in Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEG. STUDIES 146 (1972).

24 *See* Pieck, *Witness Privilege against Self-Incrimination in the Civil Law*, 5 VILL. L. REV. 375 (1960). It is true that testimonial privileges are quite restricted in a number of European countries (*e.g.*, France and the Soviet Union), but on the other hand some jurisdictions go even beyond what is customary in the common law countries. Consider, as an illustration, YUGOSLAV CODE OF CRIMINAL PROCEDURE, *supra* note 5, art. 213: "A witness is not under duty to answer particular questions if it is probable that, in answering, he may expose himself or his close relatives to serious disgrace, considerable financial loss or criminal prosecution." *Id.*, art. 215 requires the judge to instruct the witness of his privilege.

The actual exercise of the privilege is quite another matter. Pieck, *supra*, at 389, is probably right in his observation that continental witnesses seem to claim the privilege less often than American witnesses. Also, continental lawyers seldom counsel witnesses to use the privilege. In general, their contacts with witnesses outside the courtroom are less frequent than in common law jurisdictions, and are often even frowned upon.

exclusionary rules concerning defective interrogation of the defendant, the impressions begin to change.[25] Many continental provisions regulating the interrogation of defendants are silent as to the admissibility of testimony obtained in violation of proper interrogation procedures. This is a significant silence indeed when compared with express exclusionary rules relative to the defective interrogation of persons other than the defendant. Only a small number of continental countries have adopted express legislative provisions rejecting illegally obtained testimony of the defendant.[26]

But the greatest contrasts by far exist in the law of search and seizure. Exclusionary rules in this area are a rarity in continental law and the "poisonous fruit" doctrine sounds almost fantastic to civil law lawyers.[27] This is all the more remarkable in view of the fact that the continental law of search and seizure is much less restrictive than that of most common law jurisdictions. Thus, for instance, the police can always conduct a warrantless search if there is "danger in delay."[28]

[25] The reader trained in the common law should not hastily assume that views as to what is proper interrogation of the defendant are the same when we leave the Anglo-American legal orbit. The privilege against self-incrimination is not construed in the same way. *See* notes 39-40 *infra* & accompanying text. Let it suffice at this point to offer only one illustration: although most continental procedures accord the defendant the right to remain silent in the face of questioning, not all of them require that the defendant be advised of this right.

[26] *See, e.g.*, WEST GERMAN CODE, *supra* note 5, § 136a; THE FRENCH CODE OF CRIMINAL PROCEDURE arts. 114, 118, 170 (The American Series of Foreign Penal Codes, No. 7, G. Kock transl. 1964) [hereinafter cited as FRENCH CODE]; YUGOSLAV CODE OF CRIMINAL PROCEDURE, *supra* note 5, art. 203. For a comparative discussion of jurisdictions favoring admissibility of evidence obtained from the defendant through illegal questioning if that testimony is otherwise reliable, see Damaška, *Comparative Reflections on Reading the Amended Yugoslav Code: Interrogation of Defendants in Yugoslav Criminal Procedure*, 61 J. CRIM. L.S. & P.S. 168, 179 n.68 (1970). *See also* Pieck, *The Accused's Privilege against Self-incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962).

Two more brief comments seem in order for those in need of background information. First, a survey of much of the continental writing on defective interrogation of the defendant reveals that departures from the prescribed manner of interrogation are typically considered dangerous to truthfinding. Abiding by the rules of proper interrogation thus seems to be mandated solely by the concern for factfinding precision. Second, in those rare jurisdictions where illegally obtained testimony of the defendant must be excluded irrespective of its credibility, few courts would go so far as to exclude all evidence procured as a "fruit" of an illegally obtained confession. Isolated views to the contrary are mostly voiced by academically rather than forensically oriented lawyers. An example of such a radical view is that of the West German K. Peters. *See* Peters, *Beweisverbote in deutschen Strafverfahren*, in VERHANDLUNGEN DES SECHSUNDVIERZIGSTEN DEUTSCHEN JURISTENTAGES 160 (1966).

[27] That is, the doctrine that evidence derived from illegally obtained evidence is also inadmissible. *See* Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939).

[28] *See, e.g.*, WEST GERMAN CODE, *supra* note 5, § 105; THE CODE OF CRIMINAL PROCEDURE OF THE RSFSR art. 168 (H. Berman & J. Spindler transl. 1966) [hereinafter cited as RUSSIAN CODE OF CRIMINAL PROCEDURE]; FRENCH CODE, *supra* note 26, art. 56.

Regarding objects subject to seizure, it must be emphasized that continental law never limited searches and seizures to "instrumentalities" as opposed to items possessing "mere evidentiary value." After the rejection in 1967 of the mere evidence rule by the Supreme Court, Warden v. Hayden, 387 U.S. 294 (1967), the two systems have drawn closer together on this point. But even where, as in West German law, the list of objects not subject to seizure is quite impressive, there still remain differences of practical importance. Thus, for example, private mail can under certain circumstances be seized and opened. *See* WEST GERMAN CODE, *supra* note 5, § 99.

It must also be emphasized, however, that all continental systems provide for various safeguards against police abuse in conducting searches (*e.g.*, two attesting witnesses). Also, certain objects seized by the police (*e.g.*, letters) can be examined only by the investigating judge. Searches for intangibles, such as electronic surveillance, are regulated so differently in individual civil law countries that I can offer no capsule view, except to note that in every civil law jurisdiction electronic eavesdropping without a court warrant is permitted in both internal and external national security cases. On this point, again, West German law seems to be more restrictive of government authority than most continental jurisdictions. *See* E. KERN & C. ROXIN, STRAFVERFAHRENSRECHT 102 (1970).

More important than the black-letter law is, of course, the problem of its practical implementation. Are exclusionary rules more vigorously enforced in common law than in civil law jurisdictions? In the absence of reliable comparative data it is difficult to answer this question. If one were to seek to determine the frequency and vigor with which exclusionary rules are actually implemented on the basis of academic discussions or in the light of the case law emanating from the highest courts, one would be led to believe that the concern over practical implementation, at least in America, greatly exceeds the concern evident in civil law jurisdictions. The volume of American constitutional law on exclusionary rules is clearly without precedent anywhere. Many will argue, however, that academic discussion and Supreme Court decisions are poor indicators of what happens at the trial court level.[29] Let us assume, therefore, that the actual significance of exclusionary rules in America diminishes as we descend from the level of the Supreme Court. Even making allowance for this, there is still ample evidence to the effect that exclusionary rules have, at least in America, a much greater practical significance than in any civil law country.

In America techniques have been developed to insulate the adjudicator of guilt from the impact of evidence adduced in litigating admissibility.[30] There is concern that the adjudicator of guilt, having heard strong evidence of guilt, will be incapable of ruling impartially on the issue of exclusion, or that the adjudicator, having declared evidence inadmissible, will not be able or willing to disregard it. Consequently, for instance, preliminary hearings prior to trial on motions to suppress illegally obtained evidence are quite common in American jurisdictions, and are indicative of the practical impact of exclusionary rules. Even those in America who deplore the frequency of cases in which illegal evidence reaches the adjudicator of guilt will not dispute statistics revealing numerous cases in which incriminating evidence

[29] In addition, one must not forget that where, as in the United States, most defendants plead guilty, the constitutional law on exclusionary rules is of little avail to the defendant. In keeping with limitations indicated at the outset of this essay, I shall, however, not explore the broader perspectives suggested by this point. *See* notes 100-01 *infra* & accompanying text.

[30] *See* Jackson v. Denno, 378 U.S. 368 (1964). Similar devices can be found also in nonjury criminal cases. *See* Levin & Cohen, *supra* note 9, at 918-25.

has been ruled inadmissible with the consequent dismissal of charges.[31] What happens on the Continent? Surely the structure of the continental tribunal, where lay and professional judges sit together, makes it somewhat less natural to separate issues of admissibility from issues pertaining to the merits of the case. Even so, just as in American nonjury cases, procedural devices could be developed.[32] This, however, has not been the general course of development in civil law jurisdictions.

Although there are no comparative statistics on this point, I believe that I can state with a great deal of confidence that motions to exclude illegally obtained evidence are much less frequently made in continental courts than they are in America. Even where such motions are made on the Continent, the preliminary issue of whether illegalities occurred is determined in a somewhat cavalier manner by American standards.[33] Small wonder, then, that cases in which exclusionary rules lead to acquittals are much more rare on the Continent than they are in America. Let us imagine for a moment that it were proposed in a typical continental jurisdiction that a hearing before another judge on the issue of admissibility be ordered whenever the latter issue arose. Serious criticism of this suggestion would probably begin with arguments centering on administrative inconvenience and on the injection into the criminal case of too many "collateral issues" which tend to overshadow the adjudication of the merits. Also, the danger of having the same person decide the question of admissibility and the ultimate issue of guilt would seem less plausible. But I believe that, if pressed far enough, continental lawyers would admit that their opposition to consistent and vigorous enforcement of the second type of exclusionary rules rested in the final analysis largely on their fears that "obviously" guilty defendants may finally have to be acquitted.[34] This to them would appear intolerable. This reaction is, of course, shared by many

[31] *See, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 743-46 (1970).

[32] Such devices might include hearings before another judge, disqualification, etc. *See generally* Levin & Cohen, *supra* note 9.

[33] I submit that even those who are highly critical of American proceedings upon motions to dismiss would have to agree with my observation, which is borne out by the facts that the same trial judge or panel decides admissibility as well as guilt or innocence, and that attempts to develop techniques to insulate the trial judge from exposure to illegally obtained evidence during the pre-trial investigation are very rarely encountered. For two such attempts see FRENCH CODE, *supra* note 26, art. 173; YUGOSLAV CODE OF CRIMINAL PROCEDURE, *supra* note 5, art. 81 (requiring that traces of illegally obtained evidence be expunged from the dossier). Finally, special rules on the burden of proof—for example, placing on the prosecution the burden of proving that a confession has not been coerced—would seem to continentals to involve too much refinement and injection of collateral technical problems into the criminal trial.

[34] By "consistent" and "vigorous" enforcement I mean exclusion which relates not only to the illegally obtained evidence itself, but also to its fruits. Only under these circumstances can an argument be made that the exclusionary rule may serve as a deterrent to illegal practices.

lawyers brought up in the Anglo-American legal orbit.[35] Even so, I believe that a pronounced attitudinal difference remains, and that it reflects a larger contrast regarding views of restraints placed on the pursuit of truth in the criminal process.[36]

3. An Overview

At this point I should attempt to pull the threads together. How does the operation of both types of exclusionary rules affect the prosecutor's chances to obtain a conviction? If my analysis of the two types of these rules is correct, the common law of evidence presents much more formidable obstacles to introducing incriminating evidence than does the civil law governing the identical initial phase of adjudicative factfinding.[37] As with American television, which has fewer lines than the European, the informational sources the common law prosecutor can use are less numerous than those of his continental colleague. But, to continue the metaphor, does the quality of the picture on the screen depend solely on the mass of relevant information? Surely not. But only the rejection of *some* sources of information by the common law can be explained by a desire to improve factfinding reliability. The rejection of others is clearly a conscious sacrifice of factfinding accuracy for the sake of other values.

B. *Presentation of Evidence*

The comparison of evidentiary burdens at the next factfinding phase is complicated by the striking contrast in the way evidence is examined in the two procedural systems. In the common law adversary procedure each party presents *his* case, calls *his* witnesses and examines them. The civil law non-adversary trial is in the nature of an official inquiry presided over by the judge: whatever evidence he decides to examine becomes *his*—or, rather, the *court's*—evidence. Accordingly, there is strictly speaking no "prosecutor's case" and there are no "witnesses for the prosecution." The bulk of questioning comes typically from the bench and it is the presiding judge who begins the examination of witnesses.[38]

[35] For a quite striking recent example of such disenchantment, see the dissenting opinion of Chief Justice Burger in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971), and his appendix setting forth authorities in support of his position, *id.* at 424-27.

[36] These will be traced in Part II of this essay.

[37] As the careful reader must have noticed, I have excluded from the range of my discussion a number of problems with a definite bearing on the difficulties in introducing evidence. Most of these center around the so-called preliminary findings of fact (*e.g.*, laying a foundation for the use of various evidentiary and procedural devices, proof of the chain of custody, proof of *corpus delicti*, etc.).

[38] An exception to this rule will be found in Denmark and Sweden, but even there